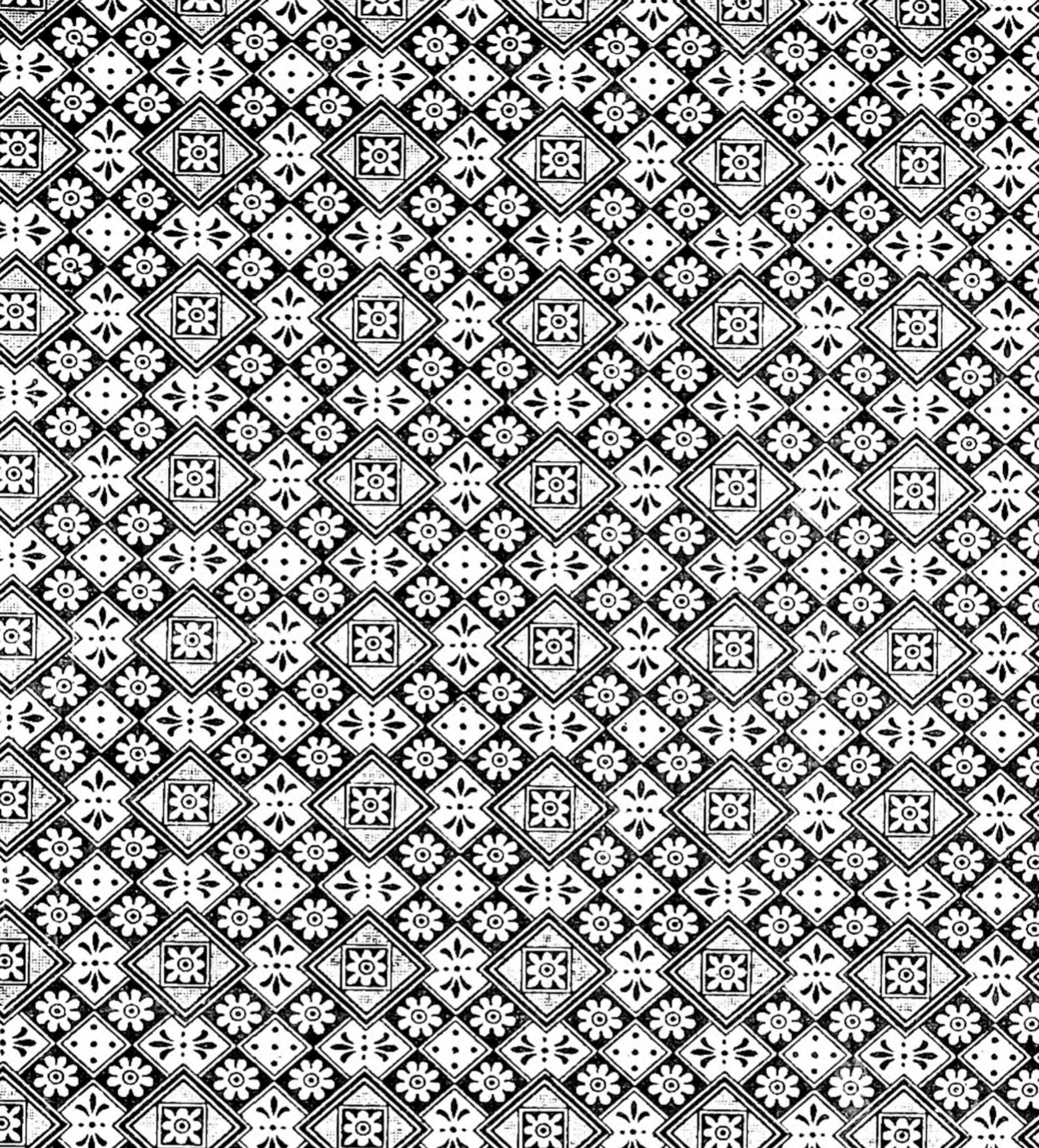
DONATED
BY

*R. N. Jaishwal*
M.A. (PSYCHO.): M.A. (POL. SC.): PUNJAB
L.L.B. ALLAHBAD
Advocate
*Supreme Court of India*
*High Court of J & K State*
9B, R. C. ROAD, PRATAP PARK,
SRINAGAR (KASHMIR.



THE

# ALL INDIA REPORTER

## 1927

## CALCUTTA SECTION

CONTAINING

**FULL REPORTS OF ALL REPORTABLE JUDGMENTS OF THE CALCUTTA HIGH COURT REPORTED IN**

(1) I. L. R. 54 CALCUTTA
(2) 45 & 46 CALCUTTA LAW JOURNAL
(3) 31 CALCUTTA WEEKLY NOTES
(4) 7 & 8 ALL INDIA CRIMINAL REPORTS
(5) 28 CRIMINAL LAW JOURNAL
(6) 99 to 105 INDIAN CASES

WITH

**EXTRA JUDGMENTS**

CITATION : A. I. R. 1927 CALCUTTA

PRINTED AND PUBLISHED BY

**V. V. CHITALEY, B.A., L.L.B.,**

AT THE "ALL INDIA REPORTER" PRESS,

**NAGPUR, C. P.**

1927

*( All Rights Reserved )*

TO

**THE LEGAL PROFESSION**

IN GRATEFUL RECOGNITION OF

**THEIR WARM APPRECIATION AND SUPPORT**

DEPARTMENT OF LAW
NO 23 SPRING ST
1-832-8001

# CALCUTTA HIGH COURT

## 1927

---

**Chief Justice.**

**The Hon'ble** Sir George Claus Rankin, Kt., Barrister-at-Law.

**Puisne Judges :**

**The Hon'ble** Sir William Ewart Greaves, Kt., Barrister-at-Law.
" " Babington Bennett Newbould, Kt., B.A. (*Cantab.*), I.C.S.
" " Charu Chunder Ghose, Kt., Barrister-at-Law.
" " Phillip Lindsay Buckland, Kt., Barrister-at-Law.
" " Zahadur Rahim Zahid Suhrawardy, Kt., Barrister-at-Law.
" Mr. Arthur Herbert Cuming, I.C.S.
" " Herbert Grayhurst Pearson, Barrister-at-Law.
" " Bepin Behary Ghosh, M.A., B.L.
" " Edward Brooks Henderson Panton, B.A. (*Cantab.*), I.C.S.
" " Arthur Page, K. C., Barrister-at-Law.
" " Alfred James Chotzner, I.C.S.
" " Herbert Phillip Duval, M.A., LL.M., C.I.E., I.C.S., Barrister-at-Law.
" " Manmath Nath Mukerji, M[redacted], B.L.
" " John Fuller Graham, I.C.S.
" " Walter Gasper Gre[redacted] Barrister-at-Law (*Addl.*)
" " Paul Eugene Can[redacted]iade, I.C.S. (*Offg.*),
" " Dwarka Nath Mitter, M.A., D.L. (*Addl.*).

---

## EDITORIAL COMMITTEE

DEWAN BAHADUR G. S. RAO, *Ex-Judge, High Court, Bombay.*
DR. SUDISH CHANDRA ROY, M.A., LL.B, Ph. D., *Bar-at-Law, Calcutta.*
SIR M. V. JOSHI, Kt., K.C.I.E., *Ex-Law Member, C. P. Government.*
RAO BAHADUR V. R. PANDIT, *Bar-at-Law, Nagpur.*
MR. E. VINAYAKA RAO, B.A. B.L., *Vakil, High Court, Madras, Editor, Journal*
MR. V. V. CHITALEY, B.A , LL.B., *High Court Vakil, Nagpur.* [*Section.*

## EDITORIAL STAFF

MR. S. G. GADGIL, B.A., LL.B., *High Court Vakil, Bombay.*
MR. G. B. JOSHI, B.A., LL.B., *Pleader, Nagpur.*
MR. D. D. DATAR, B. Sc., LL.B., *Pleader, Nagpur.*

## REPORTERS

### Privy Council

(1) Dr. A. Majid, LL.D., *Bar-at-Law, London.*

### Allahabad

(2) Mr. Saila Nath Mukerji, B.A., B.L., *Vakil, High Court, Allahabad.*

### Bombay

(3) Mr. B. K. Desai, M.A., LL.B., *Advocate, High Court, Bombay.*
(4) Mr. S. C. Joshi, M. A , LL.B., *Advocate, High Court, Bombay.*
(5) Mr. B. D. Mehta, B.A., LL.B., *Vakil, High Court, Bombay.*

### Calcutta

(6) Mr. Pramatha Nath Banerjee, M.A., B.L., *Vakil, High Court, Calcutta.*
(7) Mr. Narain Chandra Kar, B.L., *Vakil, High Court, Calcutta.*

### Lahore

(8) Mr. Amolak Ram Kapur, B.A. (Hons.), LL.B., *Advocate, High Court, Lahore.*
(9) Mr. Anant Ram Khosla, B.A., (Hons.), LL.B., *Advocate, High Court, Lahore.*
(10) Mr. Kedar Nath Chopra, B.Sc., LL.B., *Advocate. High Court, Lahore.*

### Madras

(11) Mr. P. R. Srinivasa Iyengar, M.A., B.L., *Vakil, High Court, Madras.*
(12) Mr. N. Srinivasa Iyengar, M.A., B.L., *Vakil, High Court, Madras.*

### Nagpur

(13) Mr. M. Bhawani Shankar Niyogi, M.A., LL.M., *Advocate, High Court,* [*Nagpur.*
(14) Mr. K. V. Deoskar, B.A., B,L., *High Court Pleader, Nagpur.*

### Oudh

(15) Mr. Surendra Nath Roy, M.A., LL.B., *Vakil, Lucknow.*

### Patna

(16) Mr. Subal Chandra Muzumdar, M.A., B.L., *Vakil, High Court, Patna.*
(17) Mr. Laxmidhar Mahanty, B.A., B.L., M.L.C., *Vakil, Circuit Court, Cuttak.*

### Rangoon

(18) A. J. Robertson, *Bar-at-law, Rangoon.*
(19) K. C. Sanyal, M.A., B.L., *Advocate, Mandalay.*

### Sind

(20) Mr. P. K. Vaswani, LL.B., *Bar-at-law, Karachi.*

THE

# ALL INDIA REPORTER

## 1927

---

# CALCUTTA HIGH COURT

## NOMINAL INDEX

---

**Absence of star denotes Cases of Provincial or Small Importance**
*** Indicates Cases of Great Importance**
*** * Indicate Cases of Very Great Importance**


**A**

Abani Nath v. Secy. of State 322
Abdul v. Emperor 306
*Abdul Alim v. Abdul Hafez 89
Abdul Gafur v. Abdul Jabbar 30
Abdul Gafur v. Mannalal Agarwala 239
Abdul Kader v. Ambika Charan 57
*Adam Ali Taluqdar v. Emperor 324
Adhar Chandra Dey v. Bipin Chandra Dey 373
Ahamuddin v. Banku Behary Dutt 305
Akshoy Kumar Chakraburti v. Emperor 175(2)
Akshya Kumar v. Sasanka Mohan 62
Alfred Laird v. Emperor 224
Alice Maud, Mrs. v. J. C. Galstaun 114
Alijan v. Emperor 679
Ali Mia v. Emperor 296
Ambica Charan Roy v. Har Kishore 825
*Ananta Lal Sinha v. Jahiruddin Biswas 816
Aseruddin v. Emperor 257
Ashutosh Ganguly v. E. L. Waston 149
Ashutosh Lahiri v. Chandi Charan Mitra 179
Ashutosh Roy Chowdhury v. Mono Mohan Roy 65
*Ashutosh Seal v. Gouripore Co. Ltd. 286
Asrafali Saiyal v. Nasu Sarkar 343
Asrufannessa Khatun, Mt. v. Hem Chandra 216
Asutosh Ghosh v. Indu Bhusan 158
Aswini Kumar v. Gobinda Chandra 16
Aswini Kumar Dutta v. Raj Kumar 845
Ayub Mandal v. Emperor 680
*Azimaddy v. Emperor 17
*Azimuddy v. Emperor 398

**B**

Badu Mir v. Emperor 213
Bal Mukunda Bisseswarlal v. B. N. Ry. Co. Ltd. 652
Banerjee, M. v. Emperor 823
Baneshwar Singh v. Abdul Hassan 752
*Banka Behari Deb v. Birendra Nath Dutta 850
Banshidhur Marwari v. Secy. of State 533
Barada Prosad Roy v. Corporation of Calcutta 218
Bechu Lal Kayastha v. Injured Lady 250
Behari Lal v. Gour Chandra 606
Behari Lal Mullick, *In the matter of*
*Behari Lal Sen v. Indra Narayan Bandopadya 553 665
Belvedere Jute Mills, Ltd. v. Hardwarimull & Co. 853
*Bengal National Bank Ltd. v. Janoki Nath Roy 725
Benodini Howladar v. Emperor 480
Benoy Krishna v. Fanindra Nath 100
Bepin Chandra Das v. Menajaddi 865
Berhampur Oil Mills Ltd. v. S. B. Lahiri 830
*Bhaba Sundari v. Ram Kamal 27
Bhaba Sundari Devi v. Aditya Nath Chaudhuri 401
*Bhagaban Chandra v. Tarak Chandra 259
Bhagban Das v. Bisweswar Nath 220
*Bhaniram Rathi v. Ambica Charan 21
Bharat Chandra v. Gouranga Chandra 885
Bhican Chand v. G and M. Fogt 227
*Bhola Nath Hazra v. Emperor 242
Bhuban Chandra Prodhan v. Emperor 628
Bhuban Mohan Basak v. Chairman, Dacca Municipality 704
*Bhupendra Narayan Sinha v. Chandramoni Gupta 277
Bhusan Chandra v. Kanai Lal Addya 73
Bibhuti Bhushan Rai v. Chinibas Makhal 381
Bidhu Bhushan Bakshi v. Kala Chand Roy 775
*Binoy Krishna Mukerjee v. Satish Chandra 481
Birendra Kishore v. Bhola Mia 15
Birendra Kishore v. Durga Sundari 136
Bose, K. M. and Co. v. Allen Brothers 72
*Brajabashi Modak v. Manik Chandra 694
**Brojendra Kishore v. Mohim Chandra 1
*Brojendra Nath v. Lalit Mohan 262
Brojo Gopal Naik v. Lakshmoni Dassi 791

C

Chaitanya Krishna Mandal v. Jagat Chandra Banikya 240
*Chandi Charan Roy v. Siraj Mia 479
Chandra Mohan v. Meherjan Banu 191
Charu Bala Dasi v. Nihar Kumari Dasi 831
*Chuni Lal Dutt v. Gopiram Bhotica 275
*Collector of Howrah v. Santak Das 261
Corporation of Calcutta v. Keamuddin 802
Corporation of the Town of Calcutta v. Ashutosh De 659

D

Dasarathi Ghose v. Kartick Ch. Chose 782
Debendra Lal v. Pitamber Bera 177
*Debendra Lal Khan v. F. M. A. Cohen 908
*Debendra Lal Khan v. Secy. of State 403
Debendra Narain Sarkar v. Satya Charan Mukerji 783
Debendra Nath v. Sefatulla 130
Debendra Nath Bagchi v. Surendra Nath Sur 345
Dhananjoy Das v. Ram Chandra Das 388
Dharanidhar Boral v. Panchanan Saha 559
Dibakar (Bene) v. Saktidhar Kabiraj 520
Durga Charan Chandra v. Ambica Charan Chandra 393
Durga Charan Sarkar v. Bishnupada Sana 833
Durga Mohan Chakravarti v. Ali Buksha Bepari 79
Dwarkanath Mandal v. Sreegobinda Choudhuri 906
*Dwijapada Das v. Kalipada De 421
Dwijendra Krishna v. Surendra Nath 548

E

Emperor v. Chandra Kumar De 78
——— v. Har Mohan Das 848
——— v. Irjan 820
——— v. Monmotha Nath Mitter 199
——— v. Probhat Chandra 793
**——— v. Probhat Chandra Baruah FB 432
——— v. Rajab Ali Fakir 631

F

Fakir Chand v. Daiba Charan 904
Fakir Prasad Ghose v. Kripasindhu Pal Bhuti 303
Fatiar Bap v. Emperor 575
Fazoo Mia v. Sultan Ahmed 817
Fool Kumari Dasi v. Khirod Chandra 474

G

Gallagher v. Emperor 307
*Galstaun, J. C. v. Banku Behary 621
*Galstaun, J. C. v. F. E. Dinshaw 581
Gangadas Seal v. Percival 32
Ganga Dayal Misir v. Chhakina Bhanu 806
*Girija Bala, Mt. v. Manindra Lal Singha 654
*Girindra Nath v. Birendra Nath 496
*Gnanada Sundari v Chandra Kumar De 285
Gobinda Chandra v. Banku Behari 888
*Gobinda Chandra v. Pulin Behari 102
*Goculdas v. Chagan Lal 768
*Gohur Bepari v. Ram Krishna Saha 760
Gopal Chandra v. Abdur Rahim 492
Gopal Krishna v. Mati Lal Singh 196
*Gopal Lal Sanyal v. Emperor 751
Gouranga Sundar Mitra v. Mohendra Narayan Mitra 776
Gour Mohun Gossain v. Emperor 801
*Government of Assam v. Kantila Chutia 505
Guimoni Dasi v. Tarini Charan 887

H

Hachanuddi v. Asimaddi 417
*Hamid Ali v. Madhu Sudan Das 284
Hara Prasad v. Gopal Chandra 315
Harbhanjan Sao v. Emperor 527
Harendra Kumar v. Khemada Kinkar 86
Harendra Kumar Ghosh v. Emperor 409
Hari Bhusan v. Sheikh Abdul 54
Hari Charan Sil v. Bipin Behari Mukhopadhya 374
*Haridas Majumdar v. Golam Mahiuddin FB 256
Har Kumar De v. Jagat Bandhu De 247
*Hashim Ibrahim Saleji v. Secretary of State 352
*Heeralal Agarwalla & Co. v. Joakim Nahapiet & Co. 391
*Heeralal Agarwalla & Co. v. Jokim Nahapiet & Co., Ltd. 647
Hem Chandra Datta v. Uma Sadhan Mukhopadhya 834
Hemendra Prasad Ghose v. Emperor 215
*Holmes Wilson & Co., Ltd. v. Bata Kristo De 668
Hulas Chand v. Emperor 63
Hyat Mahomed v. Shaikh Mannu 290

I

India General Navigation & Ry. Co. v. Girdharilal Gobardhone Das 394
*Indu Bhusan Bose v. Saraju Bala Debi 741
International Continental Caoutchone Compagnie, v. Mehta & Co. 758
International Continental Caoutchone Compagnie v. Mehta & Co. 780
*Ishwari Prasad v. Emperor 747
Ismail Khan v. Emperor 721
*Ismail Munshi v. Niamat Khan 608
Isu Sheikh v. Emperor 200
Iswar Chandra v. Jogendra Lal 126

J

Jadu Nath Mandal v. Amulya Krishna Kundu 794
*Jagathari Saha v. Medini Mohan Burdhan 642
*Jajodia Cotton Mills, Ltd. *In re* 612
Jamiraddin Ahmed v. Mt. Sahera Khatun Bibi 579
Janaki Nath Roy v. Khawaja Habibulla Saheb 359
*Japan Cotton Trading Co. Ltd. v. Jajodia Cotton Mills Ltd. 625
Jatindra Nath v. Manindra Nath 52
*Jatindra Nath Roy v. Indu Bhushan Basu 410
Jiban Naskar v. Muralidhar 48
Jnanendra Chandra v. Royman Sheikh 513
Jnanendra Mohan v. Annapurna Debi 562
Jogendra Nath v. Ram Gopal Das 616
*Jogesh Chandra v. Asaba Khatun 41
*Jogesh Chandra v. Entaz Ali 34
Jagesh Chandra v. Hayder Ali 237
*Jogesh Chandra Ray v. Sharfaddin Ahmad 857
*Johurmull Bhutra v. Kedarnath Bhutra 714
Jonab Biswas v. Siva Kumari Debi 855
Jones J. D. & Co., Ltd. v. Ranjit Roy 682

K

Kailash Chandra v. Meheruddi Sheikh 51
Kailash Chandra Ghosh v. Hamid Ali 243
*Kalimata Debi v. Nagendra Nath Chuckerbutty 244
*Kalipada Basu v. Fort Gloster Jute Manufacturing Co., Ltd. 365
Karuna Chandra Das v. Secretary of State 413

Kashiswar Ray v. Satya Brahma Das 312
Kasim Ali v. K. S. Bonnerjee 493
Ketabuddin v. Nafar Chandra 230
*Khayerunnessa Bibi, Mt. v. Fazar Ali 25
*Khetra Mohan v. Jamini Kanata 472
Khetra Mohan Das v. Bairab Chandra 229
Khetra Mohan Saha v. Akhil Chandra Das 431
Khetra Mohun Ghose v. Lakhi Kanta Lal 46
Khetro Mohan Mitter v. Nalini Bala Dassi 867
Kiran Chandra Roy v. Srinath Chakravarti 210
Kishen Dayal v. Darjeeling Municipality 574
Kissen Gopal Karnani v. Suklal Karnani 76
Krishen Doyal v. Corporation of Calcutta 509
Kshetra Lal Singha v. Prohlad Chandra 603
*Kshetra Nath v. Harasukdas Bal kissen Das 538
Kunjolal Pal v. Idurali Sardar 82

L

*Ladha Singh v. Munshiram Agarwalla 605
Lakhi Nath Bera v. Nabadwip Chandra Nandi 268
Lalit Mohan Banerjee v. Norodamoyi Dasi 494
Lal Mohan Poddar v. Emperor 724
Latifa Khatun, Mt. v. Tofer Ali 902
Levy Brothers & Knowles Ltd. v. Subodh Kumar Day 689
Lionel Ashby Dunkley, *in the matter of* 389
*Loke Nath Roy v. Bazlal Gani Patari 313

M

*Mabia Khatun v. Sheikh Satkari 309
Madari Sikdar v. Emperor 514
*Mafizaddi v. Emperor 644
Maharaj Bahadur Singh v. Karani Mai 633
Mahim Chandra v. Naba Chandra 43
Mahomed Ebrahim Molla v. Commissioners for the Port of Chittagong 465
Mahomed Maliha v. Mahomed Ismail 766
Mahomed Maliha v. Mahomed Ismail Khan 203
Mahomed Yakub v. Hamid Ali 884
Makram Ali v. Abdul Hamid 880
Manindra Chandra Nundi v. Velji Mulji 773
Manindra Nath Roy v. Rasik Lal 69
Manohar Ali v. Emperor 515
Mawazzam Ali Khan v. Shebash Chandra 598
Mayeuddi v. Mahomed Razzab Ali 457
Meghraj Kanyalal v. Durga Sahai Buldeo das 291
Midnapore Zamindari Co. Ltd. v. Sadhumoni Dasi 846
Midnapore Zemindary Co. v. Naresh Narain Roy 844
*Mitchell v. Mc Neill & Co. 518
*Mohan Singh v. Panchanan Sadhu Khan 106
Mohendra Nath v. Nabadwip Chandra 97
Mohini Mohan Banerjee v. Secy. of State 298
Moslem Sirkar v. Emperor 516
Moss, E. St. C. v. Emperor 460
Muktakeshi Pal v. Ramani Mohan 195
*Muktamala Dasi v. Ram Chandra De 84
Municipal Corporation, Faridpore v. Gour Gopal 592
Munni Lal Kshetry v. Sasi Bhusan Adhikari 339

N

Nabadwip Chandra v. Bagaban Chandra 462
Nakul Chandra Das v. Rajendra Chandra Gangopadhya 873
*Nalinakha Sinha v. Ram Taran Pal 733
Nanda Kumar v. Emdad Ali 49
Narayan Chandra v. Dulal Chandra 477
**Narendra Lal Das v. Gopendra Lal Das 543
*Nasaruddin Khan v. Emperor 98
Nasib Ali v. Wajed Ali 197
*National Coal Co. v. Gyan Ranjan Bhattacharya 299
*National Insurance Co. v. Haridas Basu 691
Nazir Ahmed v. Emperor 478
**Nepra v. Sajer Pramanik 763
New Beerbhoom Coal Co. Ltd. v. Jotiprosad Singh 686
Nirmala Sundari Dassi v. Deva Narayan Das 868
*Nirmal Chandra v. Emperor 265
Nitai Pada Das v. Sarat Kumari Dasi 96
*Nobin Chandra v. Debendra Sen 522
Noni Krishna Bosak v. Nabamonjuri Dassi 464
Nripendra Bhusan Roy v. Pramatha Bhusan Deb 907

O

Official Assignee of Calcutta v. Ramratan Das 529

P

Panna Lal v. Adjai Coal Co. 117
Paresh Chandra Sen v. Jogendra Nath Roy 93
Pramatha Nath Mallia v. Radha Kishore Mukherjee 344
Pramatha Nath Roy v. Bejoy Singh 234
Pran Kumar Pal v. Darpahari Pal 281
Pravat Chandra v. Amulya Chandra 340
Promatha Nath Mukherji v. Bhabataran Ganguly 829
Promode Nath Roy v. Secy. of state 182
Purna Chandra v. Manobini Devi 156

R

Radhanath Mandal v. Emperor 289
Radhika Mohan Das v. Hamid Ali 405
*Rahamat Sheikh v. Emperor 593
Rahela Khatun, Mt. v. Amburennessa Chowdhurani 881
Rahimaddhi Matabar v. Naimaddi Howladar 565
Rajani Kanta Ghose v. Nagendra Narain Roy 232
Rajani Kanta Kayal v. Bistoo Moni Dassi 718
Rajani Kanto Pal v. Mohim Chandra Roy 847
Rajaram Singh v. Pancha Deogi 862
Raj Kumar Dutta v. Ramani Mohan Kunda 878
Rajtilak Narayan v. Mufizuddi Topadar 193
*Rakhal Dolui v. Makham Lal Ghose 701
Rakhalraj Banerjee v. Ranjan Bagtani 87
*Ram Das Singh v. Emperor 28
Ramesh Pada Mandal v. Kadambini Dasi 702
Rameshwar Khemka v. Siddeshwar Ghosh 418
**Ramgopal Ghose v. Dhirendra Nath Sen 376
Ram Sundar Saha v. Kali Narain Sen 889
Ranmaya Gaorangini v. Betty Mahbert 207
Rasul Khan v. Emperor 61
*Rebati Mohan Das v. Alauddin Ahammed 29
**Rosonali v. Emperor 787
Rustomji Dorabji v. K. D. Brothers 163

S

Sabjan Bibi v. Asanulla Sheikh 411
Safar Ali Master v. Abdul Majid 279

*Sahebzada Faridun Seko v. Sahebzadi Jehanara Begum 382
Sajjad Mirza v. Emperor 372
Sali Bewa v. Ajijuddin Shaikh 911
Samir v. Sajidar Rahman 95
Samiulla v. Nil Mamud 13
Samsannessa Bibi v. Rahim Pramanik 900
*Santosh Kumar v. Ganesh Chandra 160
Santosh Kumar Roy v. Rakhal Chandra Hazra 174
Sarada Kanta v. Nabin Chandra 39
Saradindu Mohan v. Girish Chandra 511
Saraj Basini Debi v. Mohendra Nath Bahaduri 636
Sarat Chandra v. Mon Mohan 711
*Sarat Chandra v. Upendra Nath 623
Sarat Chandra Haldar v. Mitra Mukerjee & Co. 420
**Sarat Krishna Bose v. Bisweswar Mitra 534
**Sarifuddin Mahomed v. Mohiuddin Mahomed 808
Saroda Prosad Pakrasi v. Umashankar Sanyal 168
Saroj Bala Bose v. Jatindra Nath Bose 619
Saroj Ranjan v. Joy Durga Dassi 56
*Sasson , M. A. and Sons Ltd. v. Gosto Behari De 629
Satindra Narain Sinha v. Chunilal Jamadar 818
*Satindra Nath v. Jatindra Nath 425
Sati Prasad v. Mahesh Bhunia 561
Sati Prasad Garga v. Broja Gopal Dalapati 458
Satis Chandra Singha, *In the matter of* 536
Satish Chandra v. Hasem Ali 109
Satish Chandra v. Hashem Ali 488
Satish Chandra v. Secy. of State 311
Satish Chandra Joardar v. Birendra Nath Roy 225
Sattar Ali v. Afzal Mahomed 532
*Satyaranjan Bakshi v. Emperor 698
*Satyendra Nath v. Charu Chandra 657
Secy., Cantonment Committee, Barrackpore v. Satish Chandra 786
Secy. of State v. Altaf Hossein 827
———— v. Amulya Charan Banerjee 874
———— v. Fakir Mahomed Mandal 415
*———— v. K. S. Bannerji 45
Sefatullah Bepari v. Sadhu Molla 495
Shahabuddin Ahmed v. Abdul Kader 70
*Shambo Chandra De v. Kartik Chunder Dey 11
Shashi Mukhi Choudhurani v. Sarat Chandra Chakravarty 327
Shiba Kali Kumar v. Chuni Lal 748
Shyama Charan v. Fakir Chandra 546
*Shyam Lal Singh v. Madhu Sudan Singh 253
Siddik Ahmed v. Azizar Rahaman 238
Solema Bibi v. Hafez Mahomed Hossein 836
*Samokanta Mohanta v. Sarveswar Das 578
*Sourendra Nath Mitra v. Tarubala Dasi 354
Srinath Roy v. Taraprasanna Roy 375
Srish Chandra v. Gaharali Talukdar 148
Subal Chandra Kar v. Jatindra Mohan Ghose 175 (1)
Subhash Chandra Bose v. R. Knight & Sons 297
Surajmull Askaran v. Chandmull Moolchand 601
Surendra Nath Rath v. Sambhu Nath Dobey 870
Suresh Chandra Banerji v. Secy. of State 357
Suresh Chandra Saha v. Gobind Nath Saha 796
Surja Kumar Roy v. Kamakhya Charan 323
Surja Kumar Tewari v. Ratan Choura 406
*Surjya Kumar Singh v. Secy. of State 604
*Surya Kanta v. Tarak Nath 37
Sushila Sundari, Mt. v. Tarak Chandra Roy 81
Sushil Kumar v. Annada Prasanna 692
*Susil Kumar Biswas v. Rajani Kanta Chakrabutty 737
Sutu Howladar v. Alep 576
Syamnessa Bibi, Mt. v. Abdul Gani 882

T

Tamezkhan v. Rajjabali Mir 330
Tamijannessa Khatun v. Purna Chandra 321
*Tilokechand Surana v. J. B. Beattie & Co. 270
Tirthamayi Dassi v. Atikulla 140

U

Uma Charan Bose v. Rakhal Das Ray 756
Uma Charan Panda v. Lakshmi Narayan 214
Umamoyee Dasya v. Jatan Bewa 781
*Umapati Mukerjee v. Sheikh Soleman 614
Umesh Chandra Das v. Bipin Behary 75
Upendra Nath Chattopadhya v. Radha Govinda 189

W

Willam Henry Turner v. Kilburn & Co. 332

THE

# ALL INDIA REPORTER

## 1927

---

# CALCUTTA HIGH COURT

## SUBJECT INDEX

---

**Absence of star denotes Cases of Provincial or Small Importance.**
*** Indicates Cases of Great Importance.**
*** * Indicate Cases of Very Great Importance.**


### A

**Acknowledgment**
——*See* LIMITATION ACT, S. 19.

***Adverse Possession**
——Public navigable river—Right of fishery can be acquired by adverse possession 403*b*
——Asserting possession in a written statement is not sufficient to show possession 117*a*
——Public exercise of easement does not destroy title 97*b*
——Waste land is to be considered in possession of person having title thereto 49*a*

**Amendment of Plaint**
——*See* CIVIL P. C., O. 6, R. 17.

**Appeal**
——Competency—Lower appellate Court having no jurisdiction—Possibly second appeal lies (*Mukerji, J.*) 633*b*
——Forum—Mesne profits—Valuation of suit—*Obiter*: When the value of the mesne profits decreed, taken along with the value of the land exceeds Rs. 5,000, the value of the suit must be taken to exceed Rs. 5,000, though the suit was valued at less than Rs. 5,000 by the plaintiff, and an appeal from a decree therein lies to the High Court 616*a*

**Arbitration**
——*See* ALSO (1) CIVIL P. C., SCH. 2.

**Arbitration**
——*See* ALSO (2) ARBITRATION ACT
——Award appealed to Committee of Calcutta Baled Jute Association—Parties not satisfied on question of fact—Committee not precluded by rules to take fresh evidence—Failure to take fresh evidence amounts to misconduct—Instead of referring back the matter to same Committee, Court can set aside award and deal with the matter itself 601
—— Bengal Chamber of Commerce, Rs. 13 and 14—Arbitrators must allow opportunity to adduce oral evidence in certain cases—Oral evidence as to market rate on a particular date need not necessarily be heard 227

**Arbitration Act (9 of 1899)**
——Award under, upheld by Court becomes enforceable as a decree—Court is not to pass a decree as under Civil P. C., Sch. 2., para. 20 562*a*
——Powers of arbitrator—No arbitrator can give to anybody any right to apply to the Court for any direction 562*b*
——Motion is not available under the Act for administration of an estate 562*c*
*——Ss. 6 and 10 to 15—Award by a private appellate tribunal

**Arbitration Act**
hearing appeal from award of umpire by agreement between parties cannot be filed 391
*——S. 11—Award of Committee of appeal, on appeal from umpire according to contract by parties, can be filed—Committee are arbitrators 647
——S. 15—Award filed in High Court under S. 15—Execution applications are governed by Lim. Act, Art. 183 853

**Arm's Act (11 of 1878)**
——S. 19 (f)—Agreement of parties makes offence complete—Conspiracy to possess firearms—Conspiracy in respect of particular firearms need not be proved 265c
——S. 22—Scope—S. 22 deals with persons without licenses dealing with licensed vendors or purchasers or with persons with licenses dealing with unlicensed vendors or purchasers 265b
——S. 29—Entering case in a case book and making out a charge is not institution of proceeding 721

**Assignment**
*——Rent paid in advance to landlord who had assigned—The assignee is not bound by such payment 270a
*——Property in possession of tenant—Assignee is bound to enquire from tenant as to extent of his rights in the premises 270b
*——Mortgage — Mortgagee privy to collateral agreement between mortgagor and tenant—Assignee of mortgagee's interest is bound 270c

**B**

**Benami**
——Slight evidence is sufficient to prove 140d

**Bengal Alluvion and Diluvion Regulation (11 of 1825)**
——S. 4—Portion not settled—Right to accretion is not affected 902b
——S. 4—"Gain"—Land washed away and re-formed on old site is not gained — Tenure-holder cannot claim such land as an accretion on payment of rent 565a

**Bengal Cess Act (9 of 1880)**
——S. 40—S. 40 applies only where cess is levied in the district as a whole—S. 40 is imperative wherever it applies 322a
——S. 182 (1)—R. 30 is not ultra vires 322b

**Bengal Civil Courts Act (12 of 1887)**
——S. 13 (1) and (2)—Under S. 13 (2) District Judge cannot divest a Subordinate Judge of the jurisdiction conferred on him by S. 13 (1) 312

**Bengal Criminal Law Amendment Act (1925)**
——Act is not ultra vires 496c
——S. 11—Whether a person is legally detained has to be dealt with under Criminal Procedure Code 496d

**Bengal Decennial Settlement Regulation (8 of 1793)**
——S. 4—Dowls after confiscation — The fact that dowls were taken from the holders of the taluks after the confiscation does not make the taluks independent, if in point of fact at the Decennial Settlement or in pursuance of the regulation relating thereto separate engagements had not been made in respect of them 136b

**Bengal Estates Partition Act (5 of 1897)**
——Ss. 99, 76, 77 and 78—One coowner holding specific piece of land as a joint owner—Rights of other cosharers are not affected—He cannot create a tenure on such lands to the prejudice of other cosharers — Position is different when he holds such lands in severalty under an agreement from other cosharers 65d
——S. 99—Lands held by proprietors in different parcels — S. 99 does not apply 62
——S. 119—Lessees from cosharer claiming relief that their tenure should not be reduced by the act of partition authorities and they should be declared to be tenants under the cosharers holding their tenancy under the partition is cognizable by civil Court 65b

**Bengal Excise Act (5 of 1909)**
——Search under—Criminal P. C., Ss. 102 and 103, do not apply 527*a*
——S. 74 (4)—Report of an excise Sub-Inspector is not a police report for purposes of S. 250, Criminal P. C. 405*a*
**Bengal General Clauses Act (1 of 1899)**
——S. 22 — Power to fix date includes power to postpone the same 704*b*
**Bengal Landlord and Tenant Procedure Act (8 of 1869)**
——Sales under—Civil Procedure Code does not apply 752*a*
——S. 52 — Transferee of non-transferable occupancy holding cannot make deposit 752*b*
**Bengal Land Revenue Settlement Regulation (7 of 1822)**
——Diara Deputy Collector cannot assess rent 148
**Bengal Municipal Act (3 of 1884)**
——Meeting Rules, R. 32 — Election postponed and new polling officers appointed in place of old ones—R. 32 does not apply 704*d*
——S. 6 (3) — Expression "surrounded by one set of boundaries" explained 592*a*
——S. 6 (3) — Occupation is the basis 592*a*
——S. 45—Rules under the Act—Chairman has power to delegate his power even under the rules 704*e*
——S. 363—Claim for damages for wrongful act of municipal officers—S. 363 applies 592*b*
**Bengal Municipal Election Rules**
——Rr. 4 to 11 — Election postponed to allow 15 days time under R. 5 — Fresh compliance with Rr. 4 to 11 is not necessary 704*c*
——Rr. 6, 7 and 10 — Eight days time not allowed to apply under R. 10 — No application rejected wrongly and no prejudice caused—Election cannot be set aside 704*f*
**Bengal, North-Western Provinces and Assam Civil Courts Act (12 of 1887)**
——S. 10—District Judge absent from place of his office—He has no jurisdiction to hear appeals—Another Judge acting for him should hear them 598*a*
**Bengal Patni Regulation (8 of 1819)**
——S. 14 — Sale held under regulation can be set aside only as provided by S. 14 733*e*
——S. 14 — Nature of suit illustrated 733*f*
**Bengal Permanent Settlement Regulation (1 of 1793)**
——Estates are not relieved from aiding subsequent necessities of the Government nor are they exempt from general tax like income-tax F. B. 432*a*
——Income-tax Act, 1922 — The two Acts deal with different subjects (*C. C. Ghosh, J., Buckland and Panton, JJ.*) concurring F. B. 432*d*
** ——Income from land even in permanently settled estate is assessable to income-tax subject to exemptions in Income-tax Act: **53 Cal 524=A. I. R. 1926 Cal. 819=95 I. C. 539, Overruled** F. B. 432*e*
——Effect is that Government has limited its demand upon zamindar in respect of income derived from land. (*Mukerji, J. Suhrawardy, J., concurring*) F. B. 432*f*
——S. 1 — Independent taluks—The mere fact that in various reports made and proceedings taken under the then existing regulations the taluks are mentioned as decennial taluks does not make them independent taluks 136*a*
**Bengal Public Demands Recovery Act (3 of 1913)**
——Rules by Local Government, R. 46 (2) — Omission to serve notice does not vitiate sale 315*c*
——Rules under R. 46 (4)—Omission of statement under — Only purchaser can raise an objection, if any 315*d*
——Rules under R. 47 (3)—Omission to publish proclamation at Thana is not fatal 315*e*
——Ss. 4 and 6—Columns in the tabular form properly filled in—Omission to mention names and figures in the blanks in the

**Beng. Public Demands Recovery Act**
certificate portion does not invalidate the certificate 315a
——S. 7 and Appx. form 3—Lithographic signature of certificate officer is sufficient 315b
——Ss. 37 and 23—Sale cannot be set aside by suit unless substantial injury is caused 315f
——S. 37—Scope — A suit in the civil Court to set aside sale will only lie on the ground of fraud and not on the ground of irregularities in the conduct of the sale 315h
——S. 37—Representative—Mortgagee from certificate debtors is their representative 315i

**Beng. Regulation (44 of 1793)**
——S. 5—Talukdar made to pay enhanced rent under S. 5—Original term as to fixity of rent is not affected 168b

**Bengal Sanitary Drainage Act (3 of 1895)**
——S. 16—S. 16 applies to lands within and outside the municipality 415c

**Bengal Tenancy Act (8 of 1885)**
——Tenancies of homestead land and of the nature of village service tenure are not governed by the Act 373
——Lease of homestead within municipal area—Bengal Tenancy Act does not apply 279b
——S. 5 — Flower garden—Land taken for the purpose of a flower garden is taken for an agricultural purpose 748a
——S. 5—Presumption—Rebuttal—Test is the purpose of tenancy and the attendant circumstances 413a
——S. 15—No notice of succession by heirs—Decree in rent suit against some heirs—Decree is not rent decree 825a
——Ss. 15 and 16—Omission to notify succession to a permanent tenure makes the successor unable to recover through Court rent payable by sub-tenants, but his interest is not affected in any other way—Landlord must either proceed against the recorded tenants or real tenants in occupation. 81a

**Beng. Tenancy Act**
——S. 18—Transfer—The word "transfer" includes "lease": (*Per Cuming, J.; Cammiade, J., dissenting.*) 878a
——Ss. 18 and 48—S. 48 is controlled by S. 18 (*Per Cuming, J.; Cammiade, J., dissenting*) 878b
——S. 19—Occupancy rights acquired prior to 1885 are protected by the provisions of S. 19 46a
——Ss. 23 and 178 (3)(b)—Cutting trees is using land within S. 23—Occupancy raiyat stipulatiug not to cut trees—Stipulation is not binding—Tenant covenanting not to appropriate trees is bound by the covenant irrespective of any custom 268b
——S. 26 — Death of occupancy raiyat leaving heir—Suit for khas possession under S. 26 fails—Court need not decide who is the preferential heir 86a
——S, 29—Where a new contract entered into between the parties for the original consideration and additional consideration and the parties are free to enter into it on any terms they please, there is no violation 911
——S. 30—Potta containing stipulation that additional rent would be payable for additional area is not conclusive on the point of perpetuity of rent 406
——S. 40—Proceedings are miscellaneous proceedings—No procedure is laid down in the Act—Civil P. C., O. 32, R. 3, does not apply—Civil Court cannot interfere with revenue officer except for illegality 374
——S. 48—S. 48 is controlled by Bengal Tenancy Act, S. 18: (*Per Cuming, J.: Cammiade, J. dissenting*) 878b
——S. 50—"Kaimi" added to "settled raiyats" in the entry—Entry is not bad 546a
——S. 50—S. 50 inapplicable—Court can draw inference of fixity of rent from evidence—Uniform rate for twenty years is not itself sufficient to establish fixity of rent 546b
——S. 50—Uniform rate shown for twenty years — Old wasil baki papers in which these

**Beng. Tenancy Act**
tenancies are not found does not rebut the presumption 493*a*
——S. 50—Suit by ryots for correcting wrong entries as to their status—No proceeding in revenue Court or under Bengal Tenancy Act taken—Suit is only ordinary civil suit 458*b*
——S. 50—One or series of tenancies or the land held under one or different landlords is immaterial 75*a*
——S. 50—Kabuliyat, stating that if excess area is found to be in possession of tenant, he would pay higher rent, does not alter rate of rent 75*b*
——S. 50—Non-payment of rent previous to suit does not affect presumption—Rate of rent remaining unchanged for 20 years is sufficient 48
——S. 50 (2)—S. 50 (2) does not apply to suit not under the Act—But presumption may arise in case of uniform rate of rent for more than 20 years 174
——S. 50 (3)—Addition or subtraction of land affects the presumption 493*b*
——S. 66 (2)—Transferee of non-transferable occupancy holding cannot make deposit 752*b*
——S. 74—Illegal cesses—In all cases about illegal cesses, the question will primarily turn about the meaning of the words "actual rent" used in S. 74 (*Mukerji, J.*) 857*a*
——(Ch. 10), Ss. 101 — 115A—Situation of land in municipal area is not sufficient to make Ch. 10 inapplicable 126*b*
——Ss. 102 (b) and 50—"Kaimi" added to "settled raiyats" in the entry—Entry is not bad 546*a*
——S. 103-B (5)—Rent not paid—Period of tenants' possession indefinite—Evidence is not sufficient to prove that the entry in Record-of-Rights that rent is assessable, is incorrect 1*j*
——S. 104—Tenant's holding over—Settlement Officer can determine fair rent on basis of tenant's status 413*d*
——Ss. 104J and 103B—Entry in Record-of-Rights as to area is not conclusive under S. 104J—It is only conclusive under S. 103B—Suit for ejectment — Tenant can give evidence as to area 214
——S. 105—Proceedings based on assumption that lands are rent paying—Question of liability to pay rent not decided—Question is not barred 603
——S, 109—Proceedings based on assumption that lands are rent paying—Question of liability to pay rent not decided—Question is not barred 603
——S. 109—Application by landlord for settling fair rent under S. 105 pending — Subsequent rent suit by landlord in respect of that holding not barred 711*a*
——S. 109—Jurisdiction—Nature of proceedings should be decided with reference to the plaint or application 711*b*
——S. 109 — Proceedings under S. 105—Revenue Court applying presumption under S. 50—Appellate Court holding that presumption was rebutted and remanding the case for settling fair rent—Appellate Court's order is decision under S. 109 and second appeal lies—Order of appellate Court is final and not interlocutory 686
——S. 149 (3)—Decision under, does not decide finally substantial rights of parties—Incidental decision on question of res judicata 431
——S. 153—Fraud not established but only alleged—No second appeal lies 845
——S. 153 — Munsif holding wrongly that a suit was barred under Bengal Tenancy Act, S. 109 — District Judge can interfere 711*c*
——S. 153, Explanation—Irregularity in publishing or conducting sale also includes fraud 633*a*
——S. 153A—Intention is that the Court should regulate the amount of deposit—In all cases reasons for the order passed should be recorded 821*b*
——S. 158—Application under—Court can determine relationship of landlord and tenant 51

**Beng. Tenancy Act**
——S. 158-B—Notice not served on cosharers—Rent-sale is altered to execution sale in money-decree 873*a*
——Ss. 158-B to 177, Chap. 14—Judgment-debtor not raising objection to execution proceeding under the chapter that the decree is not a rent decree—He cannot subsequently raise the plea 825*b*
——S. 160—Occupancy raiyat subsequently obtaining fixed rate grant—His right is stfll " protected interest " 846
——S. 170, Cl. (3)—Under-raiyati interest in contravention of S. 85 (2) is not an incumbrance and holder of such interest is not entitled to make deposit 513
——S. 173—Application for setting aside sale under Civil P. C., O. 21, R, 90, and also under S. 173—Sale set aside under both—Order setting aside sale is not appealable 833
——S. 178 (1) (a) and (c)—Proprietor creating putni lease with condition that putnidar should recover any lands that the proprietor required — Proprietor leasing out lands on the same condition—S. 178 (1) (a) and (c) is not infringed 41*a*
——Ss. 178 (3) (b) and 23—Cutting trees is using land within S. 23—Occupancy raiyat stipulating not to cut trees—Stipulation is not binding—Tenant covenanting not to appropriate trees is bound by the covenant irrespective of any custom 268*b*
——S. 181—S. 181 does not affect rights acquired under (the repealed) Act (10 of 1859), S. 6 46*b*
——Ss. 182 and 49—Under-raiyats holding homestead along with other lands as part of their tenancy—Landlord can eject from whole of demised premises by service of notice 191*a*
——S. 182—Provisions regarding homestead of under-raiyat are same as raiyat 96
——S. 184—Landlord and tenant —Where the dispossession is not made by landlord the special rule of limitation has no application 831*b*

**Beng. Tenancy. Act**
——Sch. 3, Art. 3—Dispossession need not necessarily be by landlord as such 488*a*
——Sch. 3, Art. 3—Landlord purchasing the holding at sale in execution of rent decree inoperative against the tenant—Dispossesson by landlord—(*Cuming J.*; contra *Page, J.*)—Art. 3 does not apply 109
——**(amendment) Act (1 of 1907)**
——Act is not declaratory. 748*f*
——S. 19—Non-occupancy tenant is not affected 748*b*

**C**

**Calcutta High Court Insolvency Rules**
——R. 178—Sale by Assignee of charged property—Assignee is not entitled for commission on sale proceeds 529

**Calcutta High Court Rules**
——Registrar can admit appeal out of time even though full Court-fees are not paid within time 238*a*
——Ch. 7, R. 12—Suit by Corporation — Person signing must prove by affidavit that he is so authorized 780
——Ch. 7, R. 12—Plaint verified by a person other than the plaintiff or his agent— His authority to verify must be proved by affidavit 773

**Calcutta Municipal Act (3 of 1899)**
——Ss. 127 to 140—Functions of executive officer under those sections are administrative 802*b*
——S. 637—Section could not by itself include any area in Calcutta town 748*g*
——**(3 of 1923)**
——Proceedings by Municipal Magistrate are not criminal 509*b*
——S. 127—Annual value—Method of determination indicated —" Reasonably expected to let" —Meaning explained 659*b*
——S. 131 (1)—Assessment cannot be increased above the standard rent under Calcutta Rent Act (1920), S. 26 659*a*
——S. 141 — Appeal to Small Causes Court—Onus is on asses-

**Calcutta Municipal Act**
see to prove executive officer's valuation to be either excessive or wrong 802c
——Ss. 141 and 142—Appeal to Small Cause Court—Evidence should be recorded in full 659c
——S. 142—Appeal to High Court under S. 142 is not a second appeal within Civil P. C., S. 100 802a
——Ss. 346 and 359—Corporation cannot refuse notice under S. 359—Bustee owner prosecuted and fined under S. 346 is immaterial—Prosecution within six months of notice is not valid 218
——S. 363—Party to proceeding under, is not exempted from administration of oath under Criminal P. C., S. 342 509a
——S. 363—The demolition of unlawfully erected work is not a punishment within the meaning of S. 363 509c
——S. 488—So long as there is no disobedience by a party to the order of demolition of an unauthorized structure passed by the Magistrate, he commits no offence 509d

**Calcutta Police Act (4 of 1866)**
——Ss. 46 and 47—Warrant under S. 46 defective — Presumption under S. 47 should not be raised 801a
——S. 68—Conviction under, bars a trial on same facts under Merchant Shipping Act S. 103 (4) 224b

**Calcutta Rent Act (3 of 1920)**
——Order fixing standard rent is judgment in rem and cannot be altered on application by subsequent tenant 305a
——S. 15—S. 15 applies only where rent has been fixed 305b
——S. 26—Assessment cannot be increased above the standard rent 659a

**Cantonment Lands**
——Mere declaration of lands to be within cantonment area does not vest their ownership in Government. 786

**Cantonments Act (2 of 1924)**
——S. 5—Mere declaration of lands to be within cantonment area does not vest their ownership in the Government 786

**Carriers**
——Goods to be carried by several carriers—Contract is an indivisible one—With which carrier the contract was made is a question of fact 394b

**Carriers Act (3 of 1865)**
——S. 10—Notice to local agent is sufficient 394a

**Charge to Jury**
——*See* CRIMINAL P. C., S. 297.

**Chaukidari Chakran Lands**
——Rights acquired under, are not distinct from those under chakran lands 46c

**Chittagong Port Act (5 of 1914)**
——S. 29—Non-compliance with the provisions of S. 29 renders the agreement not binding upon the commissioners 465b
——S. 38 (g)—Scope—The words used in S. 38 (g) are wide and it is not ultra vires of the commissioners to let out a steam tug for operations outside the Chittagong river 465a

**Civil Procedure Code (5 of 1908)**
*——S. 2—Appellate Court framing additional issue and remanding the case reversing the decree instead of calling for a finding retaining the case on its file—Order of remand is not a decree 850a
——S. 2 (4)—'District Court' will not in every instance mean and include a High Court on the original side 290a
——S. 2 (12) — Mesne profits should be calculated on the basis of the profits the trespasser might have made and not what the rightful owner was receiving before eviction—Joint trespassers are severally and jointly liable for whole of the profits 182c
——S. 9—Suit for a right to religious office is of a civil nature though no emoluments are attached 783
——S. 11—Heard and finally decided—Prior suit dismissed on the ground of nonjoinder of parties—Subsequent suit on the same cause of action is not barred 794a
——S. 11 — Order made at an earlier stage is binding at a sub-

**Civil P. C.**

sequent stage in the same proceedings 616*b*

——S. 11 — Prior proceedings against shebait in person but idol effectively represented by shebait—Decision is against idol 606

——S. 11—Decision under B. T. Act, S. 149 (3) does not decide finally substantial rights of parties — Incidental decision on question of title does not operate as res judicata 431

——S. 11—Decision in probate proceedings can operate as res judicata 421*a*

——S. 11—False case set up—Evidence in support not called—Decision is binding 421*b*

——S. 11—Plaintiff recorded as owner of certain share—Defendant suing for correction of the record under S. 106, B. T. Act—Plaintiff's suit for declaration of title and recovery of possession is not barred 216

——S. 11 — Parties — Plaintiffs sued for a declaration that the defendants had no right of easement. The defendants were the representative tenants of the village, the villagers of which claimed the right of easement. The proprietors of the village were not parties to the suit. The defence which was based upon a grant alleged to have been made by the proprietors of the village was upheld—*Held* that plaintiffs' suit against proprietors was not barred 97*a*

——S. 23—Original side Judge is a High Court — Application under S. 23 to a Division Bench for transfer of case pending before him is incompetent 290*b*

——S. 35—Reversal of decree in part does not entitle the defendant to recover costs unless the Court directs 906

——S. 46—Decree transferred for execution — Parent Court can issue precept 581*e*

——S. 46—Validity of precept cannot be challenged by the Court to which it is sent 581*f*

——S. 47—Order setting aside or refusing to set aside sale under O. 21, R. 90—No second appeal lies even though the matter is between decree-holder purchaser and judgment-debtor 657*a*

——S. 47—Question whether certain land is included in a decree is one under S. 47 614*a*

——S. 47—Applications under—Art. 181 applies 614*b*

——S. 47 and O. 21—"All questions arising between the parties" in S. 47 means questions relating to or affecting parties—Question whether the sale passed any interest in the property should be decided in execution—Questions that ought to have been raised in execution cannot be raised even in defence in other proceeding 106

——S. 47—Question really relating to execution and arising between decree-holder and judgment-debtor is not taken out of S. 47 by the decree-dolder becoming the auction-purchaser 57*a*

——S. 47 — Application under S. 47 must be governed by the residuary Art. 181, Lim. Act 57*b*

——S. 65—Purchaser in execution of his own money decree between date of decree nisi and decree absolute in a mortgage-suit is entitled, if he takes without notice of mortgage, to have the mortgage decree satisfied out of properties not sold to him 522*a*

——S. 65—Person having only charge on property mortgaging it as owner—Purchaser in execution of mortgage decree against him was disallowed to recover possession — Purchaser can claim a right to the charge in favour of the mortgagor 359*b*

——S. 89—Award made on private reference during suit objected to by one party— Court cannot record it as adjustment of suit under O. 23, R. 3—S. 89 is a bar to enforcement of such award 887

——S. 92—Public wakf—Any person whose personal rights are infringed can sue in his individual capacity in respect of the wakf 130*a*

——S. 95—Temporary injunction wrongfully obtained — Suit is maintainable 247

**Civil P. C.**

——S. 97—Final decree passed—Appeal from preliminary decree already filed and dismissed—Right to second appeal is not barred by the passing of the final decree 559*a*

——S. 97—Decree—Appeal against preliminary decree after passing of final decree—No steps taken to set aside final decree—Appeal is infructuous 492

——S. 100—Appeal to High Court under Calcutta Muncipal Act S. 142 is not a second appeal within S. 100 802*a*

——S. 100—Creditor, instead of being actually paid, taking renewed pro-note—Whether new note is in substitution of old one is a question of fact 538*b*

——S. 100—Record-of-rights—Permanent Settlement of 1793—Question if lands are included in permanent settlement is one of fact 457*c*

——S. 100—Whether tenants are raiyats is a question of fact 413*b*

*——S. 100—Rent suit dismissed on the ground that plaint lands were not comprised in the tenancy—Appeal lies 410

——S. 100—New point—Question of law not requiring fresh investigation of facts can be allowed 393*a*

——S. 100—Question of fact—The question whether there has been a representation amounting to acquiescence or not is a question of fact 220*d*

——S. 100—Crown—Escheat—On confiscation zemindari does not merge in the permanent right of Government—Whether there was a merger is a mixed question of law and fact 136*c*

——S. 100—Whether certain persons are representatives is a question of fact 81*b*

——S. 100—Limitation—Limitation is a mixed question of law and fact 30*b*

——S. 103—Second appeal—Lower appellate Court improperly admitting additional evidence—High Court can dispose of the case only when lower Court has based its decision on other than such evidence 140*b*

**Civil P. C.**

**——S. 103 (as amended by Act. 6 of 1926, S. 2)—According to the amendment of S. 103, the High Court can decide, if there is sufficient evidence, a question of fact wrongly decided by the lower appellate Court 1*f*

*——S. 105—Interlocutory order made and costs allowed to the unsuccessful party—Party taking costs—He is not barred from challenging the order in appeal 733*b*

*——S. 109 (c)—Interlocutory orders—Power to grant leave should be exercised in exceptional cases of great public or private importance 481*a*

——S. 109 (c)—Interlocutory orders—The extreme undesirability of protracting interlocutory proceedings is based partly on the fact that in point of expense it may well be the plainest oppression and partly on the fact that it tends to postpone a real elucidation of the facts by a trial of the suit, (*Rankin, C. J.*) 481*b*

**——S. 110—Partition suit—Lower Court granting certain share—High Court on appeal increasing it—No further grievance left in that matter—Substantial question of law must be shown 543

——S. 110—Plaintiff under-valuing his suit—Defendant acquiescing in the valuation—Case cannot be referred for a report under O. 45, R. 5 at defendant's instance 418

——S. 110—Low valuation put on plaint does not estop plaintiffs for the purpose of Privy Council appeal—High Court can go into question of real value if trial in a different Court is not necessary 225

——S. 115—Scope—Where no appeal lies from an order the memorandum of appeal can be treated as an application for revision 850*c*

——S. 115—Order for adding parties under O. 22, R. 10—Proper remedy is to appeal under O. 43 and not revision 844

——S. 115—Revision may be converted into appeal 581*b*

**Civil P. C.**

*——S. 115—Decree passed without jurisdiction—Decree appealable but not appealed against—Revision was allowed 578b

——S. 115 and O. 33, Rr. 6 and 7—Court disposing of pauper application without notice to opposite party and Government Pleader and without taking evidence adduced in disproof of pauperism—Court acts without jurisdiction and revision lies 464

——S. 115—Objection as to jurisdiction cannot be raised for first time in revision 388b

——S. 115—Question of jurisdiction cannot for the first time be raised in revision 381

——S. 115—Decree amended—Order amending the decree is not revisable 114a

——S. 115—Other more appropriate remedy open—No revision lies 114b

——S. 115—Power to make order of reference attacked — High Court can revise the order 52b

**——S 141—S. 141 does not make O. 9 applicable to proceedings under O. 9 534a

*——S. 144—Order under S. 151 Civil P.C., in exercise by analogy of jurisdiction under S. 144 is appealable 285

——S. 145—Surety undertaking to be liable in case a decree was passed against the debtor and the debtor failed to pay—Compromise decree passed granting certain period to debtor for payment—Surety is not liable 239

——S. 151—No appeal lies from an order under S. 151, as it is not one of the orders appealable under O. 43, Civil P. C. 867

——S. 151—Specific provisions existing—Inherent powers should not be invoked 850b

——S. 151—Section should be resorted to only when Code provides no other remedy 657c

*——S. 151—Executing Court—Inherent power thereof is not limited to Rr. 11, 21, 26 and 37 of O. 21—It can delay issuing processes, but not so as to ignore just rights of the decree-holder 581c

**Civil P. C.**

**——S. 151—R. 9, O. 9 does not apply to set aside the dismissal of an application under R. 9—If second application is in time it may be treated as application to restore suit itself—If not in time S. 151 may be invoked 534a

*——S. 151—No proper remedy provided, but no prohibition provided—S. 151 is to be invoked 534b

——S. 151—Exercise of inherent power is discretionary—Lower Court's exercise of such discretion should not ordinarily be interfered with 420b

*——S. 151—Court may interfere in fit cases apart from Rr. 9 or 13, of O. 9 and O. 41, R. 16 225

——Ss. 151 and 152—Amending of decree—Evidence is not admissible to show that there is any arithmetical or clerical error in judgment 203a

——Ss. 151 and 152—Decree in accordance with judgment cannot be amended without the judgment being amended—Mistake in judgment can be corrected only by review or appeal 203b

——S. 151—Inherent power can be exercised only where there is no remedy provided by the Code for doing justice 158a

——S. 151—Dismissal of suit under O. 11, R. 21—Court cannot review its order under S. 151 158b

——S. 151—Plaintiff adjudicated insolvent before hearing—Plaintiff absent at the hearing—Official Assignee not served—Dismissal of suit under O. 9, R. 8, is improper—Dismissal can be set aside in appoal—Provisions of O. 22, R. 8, should be applied 76

——S. 151—Court cannot treat its previous order as nullity under S. 151 57c

*——High Court can add or transpose a party from one category to another 37

*——O. 1, R. 8—Permission validily granted for suit—Fresh permission for appeal therefrom is not necessary 608a

**Civil P. C.**
——O. 1, R. 8—Defendant permitted to represent public--Written statement not specifically mentioning that he was appearing in representative capacity —Public cannot be said as not represented 608*b*
——O. 1, R. 8—Order can be made against the will of the person asked to represent 608*c*
——O. 1, R. 8—Notice must show names of persons permitted to represent other persons interested 608*d*
——O. 1, R. 8—Leave need not be express 608*e*
——O. 1, R. 9—Suit for khas possession—Division of land not possible—Some respondents dead —Heirs not brought on record —Appeal should not be entertained despite R. 9 238*b*
——O. 1, R. 10—Plaintiff wrongly described as minor and represented by next friend—Suit is maintainable 477*b*
——O. 1, R. 10—Subject of land acquisition wakf property—Reference under S. 18, Land Acquisition Act, for determining valuation—Trustees can be added as parties 352
——O. 1, R. 10—High Court can add or transpose a party from one category to another 37
——O. 1, R. 10 (1)—To apply sub-R. (1) it must be shown that there was mistake and that addition or substitution of new plaintiff is necessary—Addition or substitution of plaintiff should not be made without consent of existing plaintiffs 340*a*
——O. 1, R. 10, sub-Cl. (2)—Suit in the name of dead person as a sole plaintiff cannot be amended —Suit brought in the name of two plaintiffs, one of whom is dead, can be amended 880
——O. 1, R. 10 (2)—Rent suit—Addition should not be made so as to convert the suit into one of title 340*b*
——O. 2, R. 2—Suits for declaration of title by purchaser of the rights of auction-purchaser at revenue sale—Separate suits are maintainable where plaintiff alleged individual resistance by cosharers 237
——O. 2, R. 2—Cause of action arising after determination of suit by trial Court and being different—Plaintiff is not entitled to a decree on that cause of action in this suit 56*b*
——O. 2, R. 3—Separate cause of action against each defendant—Joint decree cannot be passed 93*c*
——O. 3, R. 1—Partition suit—Suit involving only a point as to whether a property was joint or debuttar—Counsel compromising suit—Appointing attorneys for parties as receivers of one property and commissioner at partition—Receiver's appointment was a collateral matter and client's consent should be obtained—Appointment of attorney as a receiver interrupts the relationship of client and attorney and decree based on the compromise should be set aside 714*a*
——O. 3, R. 5—Notice of filing award under Sch. 2, para. 10, not given to a party, but filing made known to his pleader and admitted by the pleader—Para. 10 is complied with 619*b*
——O. 6, R. 15—Suit by corporation— Person signing must prove by affidavit that he is so authorized 780
——O. 6, R. 15--Plaint verified by a person other than the plaintiff or his agent—His authority to verify must be proved by affidavit 773
——O. 6, Rr. 15 and 17--Verification of plaint amended being defective—Plaint will be deemed to be filed on the day of first presentation and not when verification was amended 376*a*
——O. 6, R. 17 — Suit by two plaintiffs —- Whether one can apply for amendment is doubtful 733*c*
——O. 6, R. 17—Defendant losing valuable right if amendment allowed — Amendment should not be allowed 733*d*
——O. 6, R. 17— Amendment is allowed if it does not alter character of suit 477*a*

**Civil P. C.**

——O. 7, R. 1 — All necessary facts mentioned—Form may be disregarded 806*a*

——O. 7, R. 1—Plaintiff wrongly described as minor and represented by next friend— Suit is maintainable 477*b*

——O. 7, R. 1—A Court is bound to see whether a plaintiff has brought his suit within the statutory period of limitation 30*d*

——O. 7, R. 10 — Nature of proceedings should be decided with reference to the plaint or application 711*b*

—— O. 7, R. 10—Return of plaint cannot be made on the ground that it would be more advantageous to one of the parties to do so 87

——O. 7, R. 18 — Court refusing to admit document — Appellate Court will interfere only when discretion is wrongly exercised 168*a*

——O. 9— Order is inapplicable to execution proceedings dismissed for default 420*a*

——O. 9, R. 8 — Plaintiff adjudicated insolvent before hearing — Plaintiff absent at the hearing —Official Assignee not served —Dismissal of suit under O. 9, R. 8 is improper — Dismissal can be set aside in appeal — Provision of O. 22, R. 8, should be applied 76

** ——O. 9, R. 9—R 9 does not apply to set aside dismissal of application under R. 9—S. 141, Civil P. C., does not authorize such procedure— If second application is in time, it may be treated as application to restore suit itself—If not in time, S. 151 may be invoked 534*a*

*——O. 9, R. 13—Suit to set aside ex-parte decree is not maintainable on the ground of false claim and perjured evidence 84

——O 9, R. 14 — "Opposite party"—Meaning explained 692

——O 11, R. 21 —Dismissal of suit under — Court cannot review its order under S. 151 158*b*

——O. 16, R. 10 — Mere issuing of summons and warrants is not sufficient to comply with provisions of S. 68, Evidence Act— All processes under R. 10, must be exhausted 102*a*

——O. 20, R. 10—Decree in terms of R. 10—Procedure in O. 21, R. 31, must be followed 652

* ——O. 21, R. 2— Agreement between judgment-debtor and proposed assignee of decree before assignment can be pleaded in bar of execution without 'certification 694*b*

——O. 21, R. 6 — Small Cause Court decree passed by Munsif exercising Small Cause Court powers—Application for execution to the Munsif with affidavit addressed to Small Cause Court —R. 6 is in effect complied with —Execution by the Court is in capacity of Munsif and appeal from his order lies to Subordinate Judge 782

* ——O. 21, Rr. 11, 21, 26 and 37 —Executing Court — Inherent power thereof is not limited to Rr. 11, 21, 26 and 37. It can delay issuing processes but not so as to ignore just rights of the decree-holder 581*c*

——O. 21, Rr. 16 and 22 — No notice served on the assignor— Fact of assignment mentioned in the notice under R. 22 — Omission under R. 16 is fatal 781*a*

——O. 21, R. 16 — Rule applies to first occasion only 694*a*

——O. 21, R. 31 —Decree in terms of O. 20, R. 10— Procedure in R. 31 must be followed 652

——O. 21, R. 54—No prohibitory order is passed—Only notice to give security served — There is no legal attachment 885

——O. 21, Rr. 58, 63 and 100 — Claim under R. 58 dismissed — Suit under R. 63 not filed—Application by transferee of claimant under R. 100 was held competent 339

*——O. 21, R. 64 — Purchaser in execution of his own money decree between date of decree nisi and decree absolute, in a mortgage suit, is entitled, if he takes without notice of the mortgage, to have the mortgage decree first satisfied out of the property not sold to him 522

**Civil P. C.**
——O. 21, R. 89—Purchaser of a portion of non-transferable occupancy holding can apply 817
——O. 21, R. 89 — Sales under Bengal Landlord and Tenant Act (1869)—Civil P. C. does not apply 752a
——O. 21, R. 90—Substantial loss must be proved 873c
——O, 21, R. 90—Application for setting aside sale under R. 90 and also on the ground under S. 173, Bengal Tenancy Act — Sale set aside under both provisions—Order setting aside sale is not appealable 833
——O. 21, R. 90 — Immovable property sold in execution without attachment — Absence of attachment by itself does not vitiate the sale 847
*——O. 21, R. 90 — Order setting aside or refusing to set aside sale—No second appeal lies even though the matter is between decree-holder - purchaser and judgment-debtor 657a
——O. 21, R. 90—Sale set aside —Before dismissing execution, reasonable opportunity should be given to decree-holder for taking further steps 511
——O. 21, R. 90—'Execution sale —Stranger cannot challenge on the ground of irregularity 82a
——O. 21, R. 92—Sale confirmed by Court—Absence of formal order or of sale certificate does not affect purchaser's title 881
——O. 21, R. 92—Certificates cure irregularities 82b
——O. 21, Rr. 100, 58 and 63—Claim under R. 58 dismissed—Suit under R. 63 not filed—Application by transferee of claimant under R. 100 was held competent 339
——O. 21, R. 100—Purchaser of the whole of non-transferable occupancy holding can apply under R. 100 156
——O. 22, R. 8—Plaintiff adjudicated insolvent befo e hearing—Plaintiff absent at the hearing—Official assignee not se ved—Dismissal of suit under O. 9, R. 8 is improper—Dismissal can be set aside in appeal—Provisions of O. 22, R. 8 should be applied 76
——O. 22, R. 10—Order for adding parties—Proper remedy of party dissatisfied is to appeal under O. 43, R. 1 (1) and not under S. 115. 844
——O. 23, R. 3—Award made on private reference during suit objected to by one party—Court cannot record it as adjustment of suit under R. 3—S. 89 is a bar to enforcement of such award—Nor can it be enforced under general law of contract 887
——O. 23, R. 3—Partition suit—Suit involving only a point as to whether a property was joint or debuttar—Counsel compromising suit appointing attorneys for parties as receivers of one property and commissioners at partition—Receiver's appointment was a collateral matter and client's consent should be obtained—Appointment of attorney as receiver interrupts the relationship of client and attorney and decree based on the compromise should be set aside 714a
——O. 24—Unconditional deposit is contemplated 72b
——O. 24, Rr. 1, 2 and 3—Rules do not apply to execution proceedings 72a
——O. 26, R. 8—One party examined on commission — No consent of the other party against whom that evidence was offered - Party giving evidence must show that he was beyond jurisdiction when evidence was being read 43a
——O. 26, R. 8 (b)—Exercise of discretion by Court must appear from record 43b
——O. 26, R. 15—The rule does not prevent the Court from making any terms that it chooses as a condition precedent to the granting of the prayer for local investigation 907
——O. 29, R. 1—Suit by corporation—Person signing must prove by affidavit that he is authorized to do so 780

**Civil P. C.**

——O. 30, R. 3—Service effected as per directions of Court is good 758*a*

——O. 30, R. 6—Persons should file written statements on behalf of firm 758*b*

——O. 30, R. 8—Person appearing under protest—Service on him on firm's behalf is nullity 758*c*

——O. 32, R. 1—Plaintiff wrongly described as minor and represented by next friend—Suit is maintainable 477*b*

——O. 32, R. 3—R. 3 does not apply to proceedings under B. T. Act, S. 40 374

——O. 32, R. 3 (4)—Non-service of notice on the minor, or guardian not taking steps to defend is not sufficient to set aside decree on the ground of fraud—Minor must prove fraud in such suit 865

——O. 32, R. 4—Guardian appointed without his consent—Proceedings are void 488*b*

——O. 32, R. 7—Compromise effected between parties to a suit who are major—Court need not consider its effects on minors not on the record—(*Obiter*) 870*b*

——O. 32, R. 7—Compromise by guardian — Order must show that leave was obtained and compromise was for minor's benefit 796*a*

——O. 32, R. 7 (2)—Setting aside compromise — Fact of benefit cannot be considered 796*d*

*——O. 33, R. 1—Plaintiff suing in representative capacity — His personal property should not be taken into account 309*a*

*——O. 33, R. 1—Debt due to applicant from third person cannot be taken into account 309*b*

——O. 33, R. 1—Ornaments which a woman ordinarily wears should be excluded in determining her means 309*c*

——O. 33, Rr. 6 and 7—Court disposing of pauper application without notice to opposite party and Government Pleader and without taking evidence adduced in disproof of pauperism—Court acts without jurisdiction and revision lies 461

**Civil P. C.**

——O. 34, R. 1—Appeal—Redemtion suit dismissed—One only of the mortgagors appealing—Others are not necessary parties 479*b*

*——O. 34, R. 4—Purchaser, in execution of his own money decree between date of decree nisi and decree absolute in a mortgage suit, is entitled, if he takes without notice of mortgage, to have the mortgage decree first satisfied out of property not sold to him 522*c*

——O. 34, R. 14—Mortgage with possession — Property let to mortgagor under kabuliyat—Mortgagee obtaining decree for arrears of rent—He cannot bring the mortgaged property to sale in execution of the decree 884

——O. 38, Rr. 5 and 7—No prohibitory order passed — Only notice to give security served—There is no legal attachment 885

*——O. 38, R. 5—Attempt to secure debts already incurred—Defendants running into debt—Value of properties far exceeding amount of debts including amount of claim in suit—Facts do not necessarily indicate intention to delay execution 354*c*

*——O. 38, R. 6—Order for furnishing security or showing cause against it passed—Failure to furnish security—Before ordering attachment, Court must determine that there had been failure 354*a*

——O. 38, R. 6—Order for security and order for attachment combined—Combined order is not always proper—If combined order leads to doubt as to competency of appeal, benefit of doubt goes to appellant 354*b*

——O. 38, R. 11—Attachment before judgment—Another person attaching and selling same property in execution of his decree Sale not confirmed—Attachment before judgment revives and reattachment is not necessary 240

——O. 39, R. 2—Abettors of contempt of Court cannot be punished 598*b*

**Civil P. C.**

——O. 39, R. 2 (3)—Attachment —Attachment of property is not a suitable form of remedy except where a person is ordered to do something and he does not do it 598c

*——O. 40, R. 1—Order appointing receiver subject to his furnishing security is not appealable before security is furnished 253

——O. 40, R. 3—Application for accounts against receiver should be by a suit 175 (1)

*——O. 41. — Complaint under S. 476, Criminal P. C.—Appeal from, is regulated by O. 41, Civil P. C. (*Duval, J*) 284a

——O. 41, Rr. 17 and 19—Appeal dismissed for default — Opportunity must be given to appellant as required under R. 19 888

——O. 41, R. 20—One of two plaintiffs not appealing against dismissal of suit—Suit decreed in appeal—Defendant appealing but joining only the appealing plaintiff—Appeal is not infructuous 733a

——O. 41, R. 23—Evidence Act, S. 32—In the absence of proof of some fact within S. 32, the appellate Court should find whether there was any contention that the writer was still alive and if so, grant a remand 855b

*——O. 41, R. 23 — Appellate Court framing additional issue and remanding the case reversing the decree, instead of calling for a finding retaining the case on its file—Order of remand is not appealable either under O. 43, R. 1 (u) or under S. 100, as it is not a decree within Civil P. C, S. 2 850a

*——O. 41, R. 23—Order of remand without jurisdiction, but if it purports to be one under R. 23 it is appealable 642

——O. 41, Rr. 23 and 25—Anomalous order of remand—Whole case sent down—Remand should be deemed under R. 23 401

——O. 41, R 27—Additional evidence can be admitted in appeal under general principles of law or O. 41, R. 27—Whether such evidence should be admitted should be decided when appeal is actually heard—Evidence can be admitted by appellate Court in its discretion—High Court will interfere in exceptional cases (*Page, J.*) 140a

——O. 41, R. 27—One party adducing additional evidence—Other party should be allowed to rebut it 140c

——O. 41, R. 27—Mere non-recording of reasons for receiving additional evidence is nothing but a mere irregularity 126a

——O. 41, R. 31—Appellate Court independently considering material points—Adopting reasons of trial Court is not objectionable 323

——O. 41, R. 33—Alternative prayers—One relief denied—Alternative relief should be given if findings by appellate Court justify it—Suit for declaration and recovery of possession or compensation—Decree for recovery of possession passed—Mesne profits also should be given 831a

——O. 43, R. 1 — Order under S. 151, Civil P. C.—No appeal lies 867

——O. 43, R. 1 (l)—Order for adding parties under O. 22, R. 10 —Proper remedy is appeal and not revision 844

*——O. 43, R. 1 (u)—Appellate Court framing additional issue and remanding case reversing the the decree instead of calling for a finding retaining the case on its file—Order of remand is not appealable 850a

——O. 43, R. 1 (u)—Order of remand, without jurisdiction, but if purports to be one under R. 23 it is appealable 642

——O. 45, R. 5—Plaintiff undervaluing his suit — Defendant acquiescing in the valuation—Case cannot be referred for a report at defendant's instance 418

——O. 47, R. 1—Review granted —Whole case need not necessarily be re-opened 21a

*——O. 47, R. 8 — Re-hearing—Party is confined to additional evidence which formed subject-matter of review application and the Court ought not to

**Civil P. C.**
allow evidence which should and could have been brought at the trial 21*b*
——Sch. 2, R. 1—Award made on private reference during suit objected to by one party—It cannot be enforced 887
——Sch. 2, para. 1—Reference by all parties except one whose rights are not in dispute is valid 619*a*
——Sch. 2, para. 1—Application for order of reference to arbitration—Same day other reference by parties as to matters not in dispute—Order of reference as to only matters in dispute by Court is not illegal 52*a*
——Sch. 2, para. 1—Power to make order of reference attacked—High Court can revise the order 52*b*
——Sch. 2, para. 10—Notice of filing not given to a party but filing made known to his pleader and admitted by such pleader—Para. 10 is complied with 619*b*
——Sch. 2, para. 20—Award under Arbitration Act upheld by Court becomes enforceable as a decree—Court is not to pass a decree as under para. 20 562*a*

**Companies Act (7 of 1913)**
——S. 9—Charge created on all machinery, implements, utensils furniture, stock in-trade, raw materials, etc.—All such property to be in possession and control of lender company—Borrower company not to alienate such property, or, in case of necessity, to alienate undertaking to replace the same by another property of equal value—No floating charge is created 682
*——S. 163—Notice by creditor's solicitors is not enough 625*a*
——S. 163 (1)—Company must be in default at the time of service 625*b*
——Ss. 215 and 202—Order under S. 215 depriving creditor of all the rights to take advantage of winding-up proceedings is appealable 689

**Company**
——Execution of pro-note by directors—Liability of company discussed 612

**Company**
——Borrowing powers—Articles of Association providing for the powers to be exercised in a certain way—Directors cannot borrow on basis of general delegation of the powers 299*a*
*——Articles of Association—Person dealing with company must take the articles only as filed in the registrar's office 299*b*

**Compromise**
——Unenforceable against minor—Hardship on the other party or impossibility to put parties in original position cannot make it binding 796*c*

**Contempt of Court**
——Receiver appointed by High Court in its appellate jurisdiction—Obstructing receiver in his duty is contempt—High Court has power to punish—Wilful disobedience of an order, to be punishable, order must be personally served 548

**Contract**
——Construction—Mercantile contract—Evidence of usage in particular locality is admissible only if necessary to explain ambiguous terms—If such usage is repugnant to the terms of written contract it is inadmissible 668*a*
——Construction—Sale and purchase on printed form in English—One of the clauses providing that anything written in Hindi would be null and void—Description of shipment and quality entered in Hindi by buyer while signing—Such description is void 291*a*
——Construction—Sale and purchase—A contract whereby defendants agreed to purchase a certain number of cases of cloth, shipment July-August and September provied: "If in any one month one package be shipped in excess of that month's instalments the buyers agree to accept such one package so shipped in excess as aforesaid along with the instalments of that month—If in any one month one package less than that month's instalments be

**Contract**
shipped, the buyers agree to take that instalment less the one package so short shipped as aforesaid"—*Held*: the clause could not be intended to make the buyer take more than the total amount for which he had contracted — The clause must have been intended to arrange for a month's instalment containing a package in excess of the quantity provided by the contract for that particular instalment, the delivery being within the total amount of the contract quantity 291*b*

**Contract Act (9 of 1872)**
——S. 12—Unsoundness of mind —The question whether a contract is invalidated by unsoundness of mind does not depend merely on belief or disbelief of the witnesses before the Court, but depends largely upon the inference to be drawn from the evidence 889*a*
——Ss. 12 and 16—Undue influence and incapacity are totally different 889*f*
——S. 12—Loss of vigour owing to old age is not alone sufficient to invalidate a contract—Disablement to understand the transaction owing to old age must be proved 889*j*
——S. 12—Party weak, but having ample protection and independent advice — Other party not shown to have taken undue advantage of this weakness—Court will not extend protection in favour of the weak party 889*h*
——S. 12—Unsoundness, to render a contract invalid, must exist at the time of contract 889*i*
——Ss. 16 and 12—Equitable jurisdiction—Where a party to a contract is weak, but has ample protection and independent advice, and the other party is not shown to have taken any undue advantage of his weakness, the Court will not extend its protection in favour of such weak party 889*h*
——S. 29—Contract to execute a kobala "containing necessary

**Contract**
stipulations" is not void for vagueness or indefiniteness 889*c*
——Ss. 59 and 60—Costs—Reversal of decree in part does not entitle the defendant to recover costs unless the Court directs to that effect—Defendant appropriating amount as such costs—Amount is not lawful debt 906
——S. 62—Creditor instead of actually being paid, taking renewed pro-note receiving some consideration as increased interest for giving time to debtor —Old debt not paid off—Whether new is substituted in place of old is a question of fact 538*b*
*——S. 69—Co-mortgagors — The fact that mortgage suit against defendant was barred is no defence to a suit for contribution 665*c*
*——S. 69 — Firm dissolved by death of partner — Surviving members paying super-tax in respect of profits of the deceased partner—Payment is voluntary and cannot be recovered from estate of the deceased 518*d*
——S. 69—Second mortgagee paying off decree of first mortgagee to save mortgaged property can sue under S. 69—S. 74, T. P. Act, does not take away this right 393*b*
——Ss. 70 and 69—Cosharer paying arrears of rent in fraud of other cosharers—Payment is not lawfully made—If it is made voluntarily and gratuitously plaintiff cannot get contribution 56*a*
——S. 196—Agent to collect rent cannot ratify the lease unless he is authorized to ratify the contracts 796*b*
——S. 253 (10)—Partnership of two Mahomedan brothers is governed by contract — Ordinarily it terminates on death of one of them 836*d*

**Co-operative Societies Act (2 of 1912)**
——S. 42 (b)—One member of Executive Committee cannot sue others to recover sums which he is made to pay to the liquidator 578*a*

**Cosharer**

——Permanent lease by one without other's consent—In partition the property allotted to the other—He takes it not subject to the lease 882

——Cosharer tenure-holder's claiming land re-formed in situ as accretion on payment of rent amounts to denial of proprietary title—Other cosharers can claim joint possession without partition 565*b*

——Whether exclusive possession amounts to ouster depends upon the facts of each case—Where it does not amount to ouster, other cosharers are not entitled to joint possession 462

——Property possessed through a cosharer—Dispossession of such cosharer is also dispossession of the other 457*a*

——Suit for entire rent—Other cosharers joined as pro forma defendants—Tenant cannot object to plaintiff's getting decree 79

——Private partition—One cosharer creating tenure of his lands—Subsequent partition by Collector will not affect the interests of tenure-holder if he is a party to such partition—If tenure-holder being a co-owner was a party to partition he cannot plead previous partition 65*c*

——Partition—Where a cosharer finds that a lessee under another cosharer is erecting buildings over the whole property, in spite of his objecting to do so, his only remedy is to sue for partition 54*b*

**Court-fees Act (7 of 1870)**

——S. 7 (iv) (c)—Relief apparently declaratory, but really consequential—Ad valorem fee must be paid 775*a*

*——S. 8—There is no discrimination between Court-fees payable by Secretary of State and the claimant from an appeal against award of the Judge 45

——S. 12 (ii)—Formal decision of lower Court is not necessary 775*b*

——S. 12 (ii)—Appellate Court can order additional Court-fees only on registration of appeal 775*c*

**Criminal Breach of Trust**

——*See* PENAL CODE, S. 409.

**Criminal Procedure Code (5 of 1898)**

——S. 35 (as amended 1923)—Charge under S. 147, I. P. C., including acts constituting offences under Ss. 323, 324 and 325, I. P. C.—Separate conviction and sentence on charges for such offences is not bad 575*b*

——Ss. 102 and 103—Ss. 102 and 103, do not apply to the search made under the Bengal Excise Act 527*a*

——Ss. 107, 117 (1) and 119—Magistrate proceeding under S. 117 (1)—Complainant and witnesses absent—Discharge under S. 119 is proper 343*b*

——S. 110—Person registered as member of criminal tribe may be proceeded against under S. 110—Each case will depend on its own facts 213

——Ss. 117 (2) and 247—S. 247 is not applicable to proceedings under S. 117 (2) 343*a*

——S. 119—Magistrate proceeding under S. 117 (1)—Complainant and witnesses absent—Discharge under S. 119 is proper 343*b*

——S. 133—It is unjust to recover costs from a party who is not served with notice 70*b*

——Ss. 133 and 140 (2)—Order of removal of obstruction cannot be cancelled because of non-service of notice—Act not done—Procedure to be followed is as under S. 140 (2) 70*a*

*——S. 145—Order under, passed in favour of one party—Other party can show in a subsequent proceeding that he was ,actually in possession after the order (*Graham, J., doubting*) 701

——S. 145—Report of police and sketch submitted with it showing lands in possession of parties cannot be used to found possession 327

*——S. 145—Party taking possession by ousting without physical force another in possession without title, himself dispossessed by force within two months—He is entitled to be restored to possession 261*a*

**Criminal P. C.**
——S. 145—Reference asking to quash a part of the order is not proper 261*b*
*——S. 145 (1)—Possession—On failure of non-landlord parties to prove possession, possession should be presumed to be with landlord—Continuous possession does not mean possession exercised every day of the year 313
*——S. 154—Neither statement by the accused nor first information report is covered by S. 162—Statements by third persons are admissible under certain limitations 17*a*
——S. 161—Witness stating to police that he knew nothing—Application of S. 161 is doubtful 257*c*
*——(amended 1923), S. 162—Object of amendment is that police should not claim any privilege 644*c*
*——S. 162—Actual words of the witness need not be recorded—Memo of statement is enough 644*d*
——(amended 1923), S. 162—Amendment makes it obligatory on Court to give copies to accused 514*a*
——(amended 1923), S. 162—Accused is entitled to request for copies only after witness is called and cross-examined 514*b*
——S. 162—Breach of section not prejudicing accused is not illegality 372
——S. 162—"I did not make any statement to the police" is not a statement contemplated by S. 162 257*a*
*——S. 162—Neither statement by accused nor first information report is covered by S. 162—Statements by third persons are admissible under certain limitations 17*a*
——S. 162,( proviso)—Trial Court refusing copy of witness' statement—Accused prejudiced by refusal—Trial is bad 644*e*
——S. 165—General search of stolen property is not authorized —" General search "—Meaning explained 93*a*

**Criminal P. C.**
——S. 165—Police officers searching for articles for which a list is given to him—Search is not illegal 93*b*
——Ss. 165 and 94—Search for specific articles in the house of a person accused of crime can be made 93*d*
*——S. 172—No statement is recorded under S. 172 644*b*
——S. 190—Report of Excise Sub-Inspector is not police report for purposes of Criminal P. C., S. 250 405*a*
*——S. 195—S. 195 contemplates only civil, criminal and revenue Courts—Land acquisition officer is not a Court 621
——S. 195—Complaint to police by *A* against *B*, dropped—B laying complaint under S. 211, Penal Code, against *A*—*B* again charged by *A* and tried but acquitted—*A* cannot be proceeded against under S. 211, Penal Code, without Magistrate's complaint 95
——S. 196-A (2)—Consenting order by Local Government—Only existence of such order is necessary for giving Court jurisdiction 296
——S 233—Joinder of two offences in one charge is merely an irregularity 330*a*
——S. 233 - Three murders committed in one transaction—Three separate heads of charge should be employed 17*b*
——S. 234—Criminal breach of trust in respect of four items of money realized at the same time under one receipt—One charge is not bad 409*b*
——S. 235 — Same transaction—Proximity of time, community of intention and continuity of action is the test 330*b*
——Ss. 235 and 238 (2 A)—Accused charged for substantive offence—He cannot be convicted of abetment without a separate charge 63
——Ss. 236 and 237—Scope—If on the facts proved of which the accused may be taken to have notice, another offence appears to have been committed by him and if on those facts it seems

doubtful as to which offence the accused has committed, he may be convicted under Ss. 236 and 237 of the other offence 520*a*

——Ss. 236 and 237 — Trial on charge under S. 366, I, P. C. for kidnapping—Conviction for abduction under same section is bad 200*a*

*——S. 242—Omission to comply with provisions of S. 242 is not an irregularity curable under S. 537 196

——Ss. 247 and 117 (2)—S. 247 is not applicable to proceedings und S. 117 (2) 343*a*

——S. 250—Report of an Excise Sub-Inspector is not police report for purposes of S. 250 405*a*

——S. 250—Report of an Excise Sub-Inspector is complaint or information for S. 250 and the Sub-Inspector is the person giving the same 405*b*

——S. 276—One of the jurymen not entitled to sit on the jury—Verdict is nullity 820*a*

**——Ss. 276-279—"Required" in S. 276, Prov. 2, refers to "persons summoned" — "Chosen" means "chosen by lot" 787

*——S. 276—Choosing of jurors—Where of the juorors that were summoned to act, only five were present on the day on which the case against the accused was taken up and they were all chosen as jurors — *Held*: that the procedure was not illegal 593*a*

——Ss. 276 and 326 — Provisions are imperative 593*b*

——S. 276 — Choosing is to be done when more than necessary number are present 593*c*

——S. 276—"Deficiency" means "deficiency in the number required" 593*d*

*——S. 276—Jurors summoned—Only the number forming quorum present—All of them cannot be empanelled—Some other persons present should be added and jurors selected by lot — Omission to do so vitiates trial 242

——S. 282—S. 282 gives discretion either to postpone trial or discharge jury 199*a*



——S. 297—Sessions Judge should present jury points in favour of accused and not merely read out evidence — Jury told that there was no difficulty in coming to the conclusion that accused was guilty—There is grave misdirection 631*a*

——S. 297 — Charge should contain not only the heads but also the law as explained to the jury 460*a*

——S. 297—Person suspected to be an accomplice—Charge must direct jury to consider and find on the point C. 460*b*

——S. 297—Questions of law not arising from facts or pleadings need not be explained 324*b*

——S. 297—Right of private defence set up—Omission to state to jury the law as to private defence amounts to serious misdirection 257*b*

——S. 297—Putting before jury matters not on record and those prejudicial to accused is misdirection 200*b*

——S. 297—Summing-up — Putting contested matters to jury is inappropriate 200*c*

——S. 307—Verdict of jury should not be interfered with, where evidence shows that reasonable men would have taken the same view as the jury 848

——Ss. 326 and 276—Provisions are imperative. 593*b*

——S. 337—One of the accused tendered pardon — By mistake his name included among accused and his plea taken in Sessions Court—His subsequent removal from the dock and examination as prosecution witness is not illegal 680*a*

——S. 342—Party to proceedings under Cal. Municipal Act S. 363 is not exempted from administration of oath under S. 342 508*a*

——Ss. 342 and 537—Omission to comply with S. 342 is curable irregularity (*obiter*) 330*c*

——S. 342—S. 342 applies to summons cases 250

——S. 342 (4)—Applicability — Sub-Section (4) of S. 342 was intended to relate to the pro-

**Criminal P. C.**
ceedings which are specified in S. 342 307*a*
——S. 360 — Non-compliance not resulting in failure of justice is not fatal 575*a*
*——S. 360—Accused sent on trial for offences under Ss. 457 and 354—Evidence disbelieved and commission of offence under S. 354 not suspected—Trial of accused only under S. 457 summarily is not illegal 505*b*
——S. 374—Entire case is open to High Court only if trial has been according to law in Court below—If there is no such trial retrial should be ordered 631*c*
——S. 403 (1)—Conviction under Calcutta Police Act, S. 68—Trial under Merchants Shipping Act, S. 103 (4) on the same facts is barred 224*b*
——S. 423 (2) — Verdict of jury will not be set aside unless failure of justice has been caused 680*b*
——S. 423 (2) — Practice—Jury trial—High Court will not interfere unless miscarriage of justice is caused 398*b*
——S. 423 (b) (2) — Appellate Court may alter conviction if accused is not prejudiced—Charge and conviction under S. 379, I. P. C.—Alteration to conviction under S. 143, I. P. C. by appellate Court—Accused is prejudiced 520*b*
*——S. 424 — Complaint under S. 476, Criminal P. C.—Appeal from, is regulated by S. 424, Criminal P. C. (*Chotzner, J.*) 284*a*
*——S. 438—Reference asking to quash a part of the order under S 145 is not proper 261*b*
——S. 439—Case heard without notice to accused—Order passed thereon was vacated and case was retried after issue of notice 702
——S. 439—Practice of Calcutta High Court—Limitation is 60 days 574*b*
——S. 449 (1) (c)—Application for leave to appeal—Affidavit as to nationality is admissible 307*c*
——S. 449 (1) (c)—Application for leave to appeal comes within Lim. Act, Art. 155 307*d*

**Criminal P. C.**
——S. 465—The moment the question of insanity is raised Judge must put it to the jury as a preliminary issue 289
——S. 476 — Court must itself record a finding that enquiry should be made and should itself make complaint 718*c*
——S. 476—Application to take action made to successor of Judge—Notice to opposite parties should be given 718*d*
*——S. 476— Appeal from main case pending—Proceeding under S. 476 should await disposal of appeal 718*e*
——S. 476—Court before whom offence is committed is to take initiative (*Cammiade, J.*) 718*f*
——S. 476—Conduct of jury called in question — Court enquiring into it—Enquiry is judicial 628*a*
——S. 476—Enquiry need not be exhaustive 628*c*
*——S. 476— Witness's false evidence in no way affecting the case—Complaint should not be lodged 515
——S. 476—False charge of theft made to police—Sessions Court complaining under S. 476—Institution of false case to police being basis of proceedings in Sessions Court the offence is committed "in relation to" proceedings in Sessions Court within the meaning of S. 476 478
*——S. 476 — Complaint under—Appeal from, is regulated by Criminal P C., S. 424 (*Chotzner, J.*)—Civil P. C., O. 41 applies (*Duval, J.*) 284*a*
——S. 476 — Sanction under—Appeal—Sanctioning Court cannot be asked to correct defects in complaint—Summary disposal of appeal is bad 284*b*
*——S. 476—Civil Court making complaint—Appeal lies to civil appellate Court and is governed by provisions of Civil P. C., and not of Criminal P. C. 98
*——S. 476B — Appeal to High Court—Lim. Act, Art. 155, applies 718*a*
——S. 491—Whether a person is legally detained under the Bengal Criminal Law Amendment

**Criminal P. C.**
Act has to be dealt with under Criminal P. C. S. 491 496*d*
*——S. 491—For purposes mentioned in S. 491 writ of habeas corpus cannot be issued on civil side of High Court 496*e*
*——S. 494—Accused convicted by first Court—Appeal by accused—Petition for withdrawal of prosecution cannot be put in in appellate stage 816
——S. 517—Elephant seized by police from accused's custody—Accused tried for and acquitted of abetment of theft of the elephant—Elephant should be made over to him 532

**Criminal Trial**
——Identifications — Identifications made at night during the occurrence, such as dacoity when blows are struck and the people are terrorized, are generally of very little value 820*b*
——Trial by jury — Appeal—Verdict of jury will not be set aside unless failure of justice has been caused 680*b*
——Trial for murder—Every procedure must be strictly followed 631*b*
——Jury cannot talk to persons connected with accused 628*b*
——Sessions case—Withdrawal of charges triable by Sessions—Commitment should not be set aside in respect of charges not triable by Sessions 199*b*
——Jury trial—Jury discharged before a long time should not be re-summoned except for strong reasons 199*c*

**Crown**
——Escheat — On confiscation zemindari does not merge in permanent right of Government—Whether there was merger is a mixed question of law and fact 136*c*

**Custom**
——Landlord and tenant—Kabuliyats by tenants covenanting not to cut trees—Kabuliyats do not prove custom that tenants are not entitled to cut trees 268*c*
——Proof of—Family custom—Particular line of succession followed for a series of years is not necessarily binding on

**Custom**
family—Immemorial existence must be shown 177

**D**

**Damages**
——Suit for—Temporary injunction wrongfully obtained—Suit is maintainable 247
——Suit for damages for trespass and wrongful removal of underground coal—Coal removed negligently—Market value of coal at pit's mouth less cost of carriage to the bank should be allowed—Value on the day when coal was reduced to possession should be considered 117*f*
——Suit for—Interest—In an action for damages for trespass interest can be allowed as damages 117*g*

**Decree**
——Construction—A Court construing the decree may look at the plaint itself 182*a*
——Construction — Mesne profits allowed but period not mentioned—Plaint not expressly restricting prayer for profits must be deemed to be allowed up to date of delivery of possession 182*b*
——Separate cause of action against each defendant—Joint decree cannot be passed 93*c*

**Deed**
——Construction — Document coustrued by Privy Council in a certain way—It is not open to further consideration by High Court 359*a*

**Defamation**
——*See* (1) PENAL CODE, S. 499
——(2) Tort—Defamation

**E**

**Easements Act (5 of 1882)**
——S. 15—Interference with ancient lights—Interference with convenience and comfort of dominant premises must be proved 345*b*
——S. 64 — License — Licensee with interest cannot be evicted 16

**Ejectment**
——Suit for—Damages for use and occupation may be claimed alternatively 13*a*

**Estoppel**
——*See* EVIDENCE ACT, S. 115

**Evidence**
——Objection to, is not justified in second appeal (*contra Ouming* and *Mukerji, JJ.*) 1c

**Evidence Act (1 of 1872)**
——Ss. 11 and 13—Executant of document containing recitals of boundaries of land in dispute alive but not giving evidence—Document is not admissible 230b
——S. 13 — Dispute concerning land — Landlord's papers prepared in course of business concerning lands are admissible 576
——Ss. 13 and 83—Chittas made by Govt., for private use in connexion with resumption proceedings are not admissible either under S. 83 or S 13 189a
——S. 13—Benami transaction is not admissible under S. 13 1b
*——S. 13—Transaction by which right is asserted is admissible 1d
——S. 13 (a)—" Claim " must be asserted in presence of the party to be affected thereby 1a
——S. 25—Police officer—An excise officer is not a police officer within S. 25 527b
——S. 30—Admission of guilt by an accused implicating a co-accused can be used against the latter 265d
——S. 32—In the absence of proof of some fact within S. 32, the appellate Court should find whether there was any real contention that the writer was still alive and if so grant a remand 855b
——S. 32—Documents not inter partes—Statements as to boundary description — Executant dead—Documents are admissible 234c
——S. 32—Executant of a document containing recital of boundaries of land in dispute dead—Document is admissible 230c
——S. 33—Examining the doctor is not an essential condition when a witness is ill 679
*——S. 33—Witness examined in committal proceedings but not cross-examined immediately—Witness dying before Sessions trial—His deposition in committing Court can be admitted in Sessions trial—Refusal to allow cross-examination of Police

**Evidence Act**
Inspector recording witness' statement under S. 161, Criminal P. C., is not an irregularity 598a
——Ss. 34 and 32—Jama wasil baki papers are only corroborative evidence in the absence of proof of facts under S. 32 855a
——Ss. 35 and 36—Thak map is no evidence of title 403a
——S. 36—Thak maps are not conclusive and may be shown to be wrong 457b
——S. 36—Survey maps prepared under Calcutta Survey Act are admissible as evidence of possession (*C. C. Ghose, J.*)—Survey map is admissible evidence of state of things at the time it was made 345a
——S. 68—Section is mandatory—Examination of the only surviving attesting witness cannot be dispensed with on the ground of his becoming hostile—Mere issuing of summons and warrants is not sufficient—All processes under O 16, R. 10, Civil P. C., must be exhausted 102a
——Ss. 83 and 13—Chittas made by Government for private use in connexion with resumption proceedings are not admissible either under S. 83 or S. 13 189a
——S. 90—Presumption is discretionary so that Court may require document to be proved without making any presumption 870a
——S. 90—Court is not bound to presume the correctness of every statement in a document thirty years old 229
*——S. 90 - Presumption must be cautiously applied—In proper cases presumption may be relied on, and whether the document forms foundation of party's title or it is sought to be used as evidence is immaterial 102b
——S. 91—Mercantile contract—Evidence of usage in particular locality is admissible only if necessary to explain ambiguous terms—If such usage is repugnant to the terms of the written contract it is inadmissible 668a
*——S. 92— Proviso — Misstatement in pro-note as to rate of

**Evidence Act**
interest owing to mutual mistake can be rectified 605
*——S. 92—Contract reduced to writing—Rule excluding any other evidence does not apply when there is complete oral contract before writing 538a
*——S. 92—Mortgage suit—Mortgagor can prove satisfaction by part-payment and remission of balance 27
——S. 101—Onus—Value of—The question of onus is not very material after the whole of the evidence has been adduced by the parties and gone into in the case 126c
——S. 114—Determination of title to waste land—No one proving possession—Court can hold that the land is in possession of rightful owner 49c
——S. 115—Owner standing by and allowing improvement on his land is estopped, but where he objects by a notice, he is not 54a
*——S. 114—Estoppel—Only such person can take advantage of a representation for whom it was meant—Declaration in sale proclamation that property is not subject to any encumbrance—Only purchaser at auction sale can plead estoppel and not a private purchaser from judgment-debtor 34
——S. 145—Object is to give witness a chance of explaining his statement 514c
——S. 157—Executant of document producing it in support of his evidence—Document is admissible 230a
*——S. 167—Evidence improperly admitted—High Court cannot examine whether other evidence is sufficient and should therefore remand the case for rehearing. (But see Civil P. C., S. 103, as amended in 1926.—ED.) 1e
**Execution**
——Sale—Death of judgment-debtor after attachment but before sale—Sale is not invalidated 315g
**Execution Sale**
——Setting aside—Minor not represented by guardian—It is not sufficient to avoid sale 873b

**F**

**Fishery**
*——River shifting—Grantee can follow so long as waters form part of river system—But he cannot claim right over another's land also because the river flowed there for a short time 741
**Forest Act (7 of 1878)**
——Ss. 29 (a) and 32—Notification under S. 29 (a) fixing no date is bad—Conviction under S. 32 for cutting trees reserved by such notification is illegal 516a
——Ss. 63 and 29—Offence under S. 29—Forest officer cannot arrest without warrant—His custody is not lawful within Penal Code, S. 225 516b

**G**

**General Clauses Act (10 of 1897)**
——S. 6—Rule applies to Act of Provincial Council 748e
**Government of India Act, (1915)**
*——S. 80-A, Cl. (1)—"Peace and good Government"—Court of law is not competent to consider the merits of a particular enactment 496a
*——S. 80-A, Cl. (4)—"Affect"—What is preserved from interference of Indian legislature is the effect of an Act of Parliament by its own force as a determination of the will of Parliament with reference to a particular subject-matter 496b
*——S. 80-A, Cl. (4)—Bengal Criminal Law Amendment Act of 1925 is not ultra vires 496c
*——S. 107—Single Judge of High Court exercising insolvency jurisdiction cannot exercise powers under S. 107 629b
——(1919), S. 96-B—Rules under, regarding Civil Services—R. 14—Before a police officer may be dismissed, R. 14 must be followed 311
**Grant**
——Lost grant—Long possession without paying rent—Lost rent-free grant will be presumed—But possession must be as of right with notice to persons likely to be adversely affected 210a

**Guardians and Wards Act (8 of 1890)**

——S. 7 (3)—Guardian appointed by will—Other person should not be appointed unless such guardian is unfit 389

——S. 30—Managing partner also appointed guardian of minor partners under the Act—Mortgage by such partner without District Judge's sanction can be invalidated by minors 836*f*

**H**

**Habeas Corpus**

——*See* CRIMINAL P. C., S. 491

**Hindu Law**

——Alienation—Mitakshara father—His powers as karta to bind infant sons by admissions or dealings with family property rest on implied consent of all members and on presumption of benefit resulting to them (*obiter*) 870*c*

*——Alienation by widow—Powers are same as manager—Her maintenance, expenses of religious ceremonies for salvation of her husband's soul are, but anticipation of her wants is not, legal necessity 160*a*

——Alienation by widow—Necessity—Alienee must prove necessity or his belief as to there being necessity—Due enquiry and his bona fides are necessary 160*b*

——Dayabhaga—No joint family of father and sons can exist—Sons if joint in food, worship and estate after their father, can form joint family 776*a*

——Dayabhaga—A person in more affluent circumstances supporting his brothers—Poor brothers do not form joint family with him 776*b*

——Joint family—It is only when property is claimed as self-acquisition that it is necessary for the other members of the joint family to prove that they had also contributed to the acquisition of the property 776*c*

*——Joint family — Mortgage by some members agreeing to be liable jointly and severally — Suit against all except one barred—His share is liable for whole debt 665*a*

**Hindu Law**

**——Joint family — Promissory note executed by karta unconditionally in his own name—Other members or their interest in the joint property is not bound unless their names appear in the pro-note—Plaintiff may elect to sue on the original consideration of the note and the members are entitled to plead want of necessity or benefit 376*b*

——Marriage—First marriage performed with consent of legal guardian — Marriage is valid, making subsequent marriage a bigamy 480

——Religious endowment — Suit involving question of deb sheba—Idol is not necessary party in all cases 262*a*

*—— Religious endowment — Family idol—Additional endowment—Donor can appoint shebait in respect of additional endowment but such shebait has no power to interfere with management of original endowment 262*b*

*——Religious endowment—Suit in respect of properties belonging to idol can be maintained only by shebait and as long as he does not refuse to do so, none else can sue on behalf of the idol 244*a*

——Religious endowment—Dedication to idol to save property from creditors—Dedication can be impeached—To test reality of dedication settlor's dealing with the property should be looked to 244*b*

——Succession—Samanodaka and Sakulyas — Kinsmen ex parte materna are not Sakulyas 11*a*

——Succession — Dayabhaga and Mitakshara are radically distinct 11*b*

*——Succession — Dayabhaga — Maternal great-great-grandfather's daughter's son's son is no heir under Dayabagha 11*c*

——Widow—Property purchased by widow benami from surplus income—Reversioner must prove that widow intended to make it an accretion 868

——Widow—Property purchased by the widow in execution of

**Hindu Law**
rent-decree obtained by her against tenants holding under her husband is an accretion 806*b*

**I**

**Income-tax**
——Assessment for a year is valid though the source of income, which existed in the previous year is non-existent in that year 553*a*
——The income-tax is one tax and not an aggregate of different taxes 553*b*

**Income-tax Act (11 of 1922)**
——Bengal Permanent Settlement Regulation (1 of 1793)—The two Acts deal with different subjects (*C. C. Ghose, J., Buckland, and Panton, JJ., concurring*) **F. B.** 432*d*
——The Income-tax Act like other statutes must be read according to the ordinary and natural construction of the words with only such aid as is afforded from within the four corners of the statute itself read as a whole (*Mukerji, J.*) **F. B.** 432*g*
——S. 2—Agricultural produce—Meaning illustrated 793
*——S. 2 (2) — Estate of deceased person is not liable 518*b*
——S. 9—House property income—Interest due on a mortgage though not actually paid is allowable 553*c*
——S. 9 — Permanently settled estates in Bengal are not exempt from general tax like income tax **F. B.** 432*a*
*——S. 9—Income from profits of land is assessable (*Ghose, J.*) **F. B.** 432*b*
**——S. 9—Income from land even in permanently settled estates, is assessable subject to exemptions in Income-tax Act: **53 Cal. 524=A. I. R. 1926 Cal. 819=95 I. C. 539, Overruled F. B.** 432*e*
*——S. 30 (2)—Appeal may be entertained after 30 days 518*c*
——S. 37 — Account books produced in pursuance of notice under S. 23 (2) found to be false — Prosecution under S. 196, I. P. C., cannot be sustained 724
*——S. 56 — Proviso — Firm dissolved by death of partner—Surviving members paying super tax in respect of profits of the deceased partner — Payment is voluntary and cannot be recovered from the estate of the deceased 518*d*

**Inherent Power**
——*See* CIVIL P. C., S. 151

**Interest**
——In an action for damages for trespass interest can be allowed as damages 117*g*

**Interpretation of Statutes**
——Construction—To construe the provisions of a section it is hardly permissible to refer to the report of the Select Committee 821*a*
——Retrospective operation—Clear intention must be manifested 763*a*
——Preamble will not control the enactment 763*b*
——Substantive law—The law requiring how a document is to be completed is not a mere rule of procedure but a substantive provision 763*d*
*——Pending Bill cannot be referred to 763*e*
——Amending Act—An Act is not to be considered to take away the rights and privileges conferred by a former Act unless it is quite clear from the provision that it does so 748*c*
——Retrospective effect—Intention must be clearly expressed 748*d*
**——General and special — Subsequent general statute may not repeal a prior special Act—Subsequent Act making no reference to earlier—Two should be construed together—Each should be construed according to its own terms (*Ghose, J.*) **F. B.** 432*c*
——Absurdity should be avoided 415*b*
——Liability created by a statute—Specific remedy provided by the same statute excludes all other remedies 149*c*
——Proceedings of legislature are not relevant 149*d*

**J**

**Joinder of Charges**
——*See* CIMINAL P. C., S. 233

**Jurisdiction**
——Nature of proceeding should be decided with reference to the plaint or application 711*b*

**Jurisdiction**
——High Court—Lunacy jurisdiction—High Court has power to interfere with improper order on its own account 636*d*

**K**

**Kabuliyat**
——*See* Lease

**L**

**Land Acquisition**
——Evidence considered — Evidence relied not indicated—All round increase made being reasonable — Increase held not arbitrary 827*a*

**Land Acquisition Act (1 of 1894)**
——S. 3 (f)—Land acquired for one purpose can be used by municipality for other authorized purposes 874*d*
——S. 18—Objection not specifically taken in application for reference cannot be allowed in Court 415*a*
*——Ss. 18 and 54—Subject of acquisition—Wakf property—Reference under S. 18 for determining valuation of property—Trustees can be added as parties 352
——S. 23—Capitalizing upon rack rental—Number of years is 20 874*a*
——S. 23—Valuation is based on inference—There is no exact rule 874*b*
——S. 23—Prices given by Collector—Owners accepting them—It is valuable evidence of market value 874*c*
——S. 23—Valuation — Rent of basti land is often no criterion for ascertaining the actual value of the land 827*b*
——S. 23—Money paid by lessee to sub-lessee as compensation for using land as brick-field need not be considered 415*d*
——S. 23—Market value assessed—Damages for prospective profits cannot be asked in addition 357
——S. 23—Capability of land to be used as brick-field should be considered 298
——S. 26 — Land Acquisition (Amendment Act 1), S. 2 (2)—There is no discrimination between Court-fees payable by Secretary of State and the claimant from an appeal against award of the Judge 45
——(amended 1921), S. 54—"in any proceeding"—Order dismissing application for restoration of application dismissed for default is not appealable 533

**Landlord and Tenant**
——Whether one of the several tenants can be regarded as a representative of the rest is a question of fact 900*a*
——At the time of sale of tenancy, interests of non-registered tenants must also be considered 900*b*
*——Abwab—Each case depends upon the contract in question 857*b*
——Rent— Enhancement—Prima facie there is right to enhance unless there is contract to contrary—Patta — Construction—Tenants to hold from generation to generation—No remission of rent—Cesses to be paid in addition to rent—Landlord is not precluded from enhancing the rent 855*d*
——Rent—Suspension — English common law rule of, is to be applied in exceptional cases, as a rule of equity—Court should apportion wherever possible—Lump rent—Tenant not put in possession of part of leased property—Rent per acre of bigha—Rule of suspension does not apply 737
——Service tenant refusing to serve or denying title — No notice to eject is necessary 561*b*
——Service tenant—A grant coming into existence long before the Transfer of Property Act—Notice to eject is necessary 561*c*
——Raiyat — Whether tenants are raiyats is a question of fact—Mere form of kabuliyat or use of word "raiyat" is not the test 413*b*
——Tenant's status as regards parent tenure determines his status regarding accretions 413*c*
——Tenancies of homestead land and of the nature of village service tenure are not governed by Bengal Tenancy or Transfer of Property Act and are not transferable — Surrender by

**Landlord and Tenant**
tenant—Former tenant absconding—Landlord can take direct possession 373
——Nature of tenancy—Original unknown — Uniform rate for more than 50 years—Lease for dwelling house—Suit not for rent—Inference that tenancy is permanent and heritable might be drawn 234*b*
——Transferability of holding by tenant— Proof — Few instances where landlord recognized transferees as tenants are not sufficient 232*a*
——Ejectment— Partial ejectment can be allowed only under special circumstances 191*b*
——Rent—The grant of a putni connotes that the rent is fixed 168*c*
——Putni taluq—Fixity of rent —Where a tenure has not been held from the time of the Permanent Settlement the landlord is prima facie entitled to enhancement of rent, unless there is anything to prevent him from doing so 168*d*
——Waste land is to be considered in possession of person having title thereto— Cutting hogla, (wild grass) is not an act of possession or dispossession 49*a*
——Homestead or agricultural lands — Tenancy is not transferable in the absence of custom or express contract to the contrary 39
*——Landlord is not entitled to recognize only such tenants as are recorded in his sherista and ignore others recorded in the record-of-rights — Rent-decree against former only—Sale does not pass latter's interest 25
——Rent — Enhancement of— Standard of measurement at the time of letting out must be presumed to continue 15
——Suit for ejectment—Damages for use and occupation claimed in the alternative—Contract to pay rent by trespasser need not be proved. 13*b*

**Land tenure**
——Chakran lands — Wages paid in addition — Lands are still Chakran 561*a*

**Land Tenure**
Service tenant refusing to serve or denying title—Notice to eject is not necessary 561*b*

**Lease**
——Kabuliyat — Construction — Whether rent fixed is in kind or cash depends upon the terms of a particular kabuliat 243
——Kabuliat — Construction — Kabuliat creating tenancy in respect of certain lands, containing clauses consistent with creation of raiyati interest such as payment of falkar, and compensation for land acquired for public purposes—There is presumption in favour of creation of tenure 220*a*
——Construction—Grant for indefinite period enures at least for lifetime of grantee unless otherwise intended 179
——Construction — Lease for a term providing clause for renewal — Mortgage by lessee— Clause for renewal not assigned to mortgagee — Mortgagee cannot claim renewal 100

**Legal Practitioner**
——Rights and responsibilities—He should use discretion before asking any question 823*c*
——A compromise arrived at between the counsel of either party and consented to by the Court is not vitiated merely because the counsel considered the matter in the corridor of the Court or in the Bar library 714*b*

**Legal Practitioners Act (28 of 1879)**
——S. 14—Allegations amounting to aiding or conspiring to commit criminal offence—Proceeding under S. 14 should not be taken but a criminal prosecution may be started 536*a*
——S. 14—Recording evidence in contravention of S. 14—Procedure is defective 536*b*

***Letters Patent (Calcutta),**
——Cl. 12—"Suit for land" means a suit in which having regard to issues the decree will affect directly title to immovable property—Suit claiming share in sale-proceeds of ancestral dwell-

**Letters Patent (Calcutta)**
ing house is not a suit for land 768a
——Cl. 12—Suit for administration of trust if for enforcement of the trust relating to property outside Court's jurisdiction is not, but, for declaration of the applicant's right to possession of trust-properties is, a suit for land 768b
*——Cl. 12—High Court has jurisdiction to pass a decree in personam regarding property outside its jurisdiction—But Court will not pass a decree unless it is enforceable effectively by personal obedience 768c
*——Cl. 12—'Defendant' means all defendants to the suit 768d
——Cl. 13 — Balance of convenience must be considered 791
——Cl. 13 — "Suit" includes contested probate proceedings 281a
——Cl. 13 — Order transferring probate proceedings to High Court—No appeal lies 281b
——Cl. 15—Order under S. 215, Companies Act, depriving creditor of all rights to take advantage of winding up proceedings is appealable 689

**License**
——*See* EASEMENTS ACT, S. 64

**Limitation**
——Party against whom no relief claimed brought on record out of time—No question of limitation arises 794b
——Duty of Court —A Court is bound to see whether a plaintiff has brought his suit within the statutory period of limitation 30d

**Limatation Act (9 of 1908)**
——Act leaves no scope for equity in the matter of limitation 117b
——S. 5—Appeal filed beyond time — Pleader under a wrong impression as to its due date—Party accelerating filing—Time should be extended delay being due to pleader's wrong advice 829
*——S. 5—Decision of High Court giving differing opinions of two Judges about limitations—Appellant probably misled—Time should be extended 718b

**Limitation Act**
——S. 5 — Period between judgment and signing of decree should be excluded 65a
*——S. 12—Appellant required to do certain things before delivery of copies to him — Default in doing these things will disentitle appellant from claiming exclusion of whole time 623
— S. 12 — Period between judgment and signing of decree should be excluded 65a
——S. 19 — Partnership accounts adjusted and balance due from one of the partners carried over —Adjustment made and balance found due from the same partner—Cause of action for suit for balance arises from the next adjustment 495
——S. 19—The word "only" in S. 21 does not interfere with the operation of Ss. 19 and 20 but would restrict their application 193b
*——S. 20—Mortgagor selling equity of redemption but remaining liable for the debt—Payment by him saves limitation — Decree passed on mortgage before payment does not make any difference as against purchaser 193a
——S. 20—The word "only" does not interfere with the operation of Ss. 19 and 20, but would restrict their application 193b
——S.21 (2)—The word "only" in S. 21 does not interfere with the operation of Ss. 19 and 20 but would restrict their application 193b
——S. 22—Party against whom no relief is claimed brought on record out of time—No question of limitation arises 794b
——S. 22 — Party already on record when filing plaint — Amendment describing him properly allowed at later stage does not amount to adding new party under S. 22 477c
——S. 26—Interference with ancient lights—Interference with convenience and comfort of dominant premises must be proved 345b
——Art. 12 — Applicability — Where the sale is a nullity, no question of limitation arises 781b
——Art. 12—Time runs from date of final confirmation of sale 315f

**Limitation Act**
——Arts. 39 and 49 — Claim for damages for underground trespass and removal of coal — Art. 49 or Art. 39 applies—Time runs from inadvertent taking or discovery of fraudulent taking 117*e*
——Art. 45 — No contest or decision on investigation—Suit for confirmation of possession—Art. 45 does not apply 902*a*
——Art. 48—"Conversion" means dishonest conversion ejusdem generis with preceding words—Claim for damages for trespass is not covered 117*d*
——Arts. 49 and 39 — Claim for damages for underground trespass and removal of coal—Art. 49 or Art. 39 applies—Time runs from inadvertent taking or discovery of fraudulent taking 117*e*
——Art. 96—Article applies only to cases of mistake committed in contractual transactions 117*c*
——Art. 120—Wakf — Mutwalliship not hereditary — Person holding office if not ousted within six years gets indefeasible title 130*c*
——Art. 120—Entry in—Suit for declaration that entry is wrong—Limitation runs from date of final publication 30*a*
——Arts. 120 and 144 — Suit for declaration of title and confirmation of possession — No allegation as to disturbance of possession by defendants—Cause of action being erroneous entry in Record-of-Rights — Suit is governed by Art. 120 and not Art. 144 30*c*
——Art. 144 — Limitation runs from the date of hostile claim 417
——Art. 144—Suit for declaration of title and confirmation of possession — No allegation as to disturbance of possession by defendants—Cause of action being erroneous entry in Record-of-rights—Suit is governed by Art. 120 and not Art. 144 30*c*
*——Art. 155—Limitation for appeal to the High Court under S. 476 (b), Criminal P. C., is governed by Art. 155 718*a*
——Art. 155 — Application for leave to appeal under Criminal P. C., S. 449 (1) (c) comes within the article 307*d*
——Art. 166—Sale by registrar on original side—Art. 166, does not apply 818
*——Art. 181—Applications under Civil P. C., S. 47—Art. 181 applies 614*b*
——Art. 181 — Property wrongly sold—Right to apply to recover it arises on date of sale 614*c*
*——Art. 181—Application under S. 47 must be governed by the residuary article 57*b*
*——Art. 182—Uncertified payment does not give fresh start for limitation 29*a*
*——Art. 182—Certification is not a step-in-aid (*obiter*) 29*b*
——Art. 182 (2)—Appellate decree is decree on appeal from decree sought to be executed 904
*——Art. 182 (2)—*R* obtaining decree against *G* on 29th March 1922— *G* appealing— *R* dying during pendency of appeal—No substitution in his place—Appeal declared to have abated on 21st May 1925 — Time will begin to run from 21st May 1925 and not from 29th March 1922 760
*——Art. 182 (2)—Time for applying for execution runs from date of appellate decree when there is appeal even against a portion of the trial Court's decree 89
——Art. 183 — Award filed in High Court under Arbitration Act (9 of 1899), S. 15—Execution applications are governed by Art. 183 853

**Lunacy Act (4 of 1912)**
——S. 40—Notice must be issued after an order for inquisition is made—No general notice is to be issued 636*b*
——Ss. 62, 40, 41, 42 and 64—Application under S. 62—Procedure to be followed indicated—There can be no inquisition without an order directing it 636*z*
——S. 83—A person adjudged lunatic upon irregular proceedings—Any relative having in-

**Lunancy Act**
terest in that person's affairs can appeal 636c

**M**

**Mahomedan Law**
——There is no such thing as family trading partnership — Partnership of two Mahomedan brothers is governed by contract—Ordinarily it terminates on death of one of them 836d
*——Succession—Rule of propinquity does not apply as between classes 808a
**——Gift—Heba, heba-bil-ewaz—Incidents fully discussed 808b
——Restitution of conjugal rights —Wife living in adultery — Husband describing her as such is not legal cruelty 579
*——Wakf—Court has no power to order a mutwalli appointed during the minority of one entitled to towliat to render accounts on the application of the latter on attaining majority 382
——Gift—Essentials are declaration, acceptance and delivery of possession—A written instrument is not one creating gift, but a mere evidence not requiring registration 197
——Wakf—Professing to act as mutwalli gives no right to sue in respect of the wakf properties 130b
——Wakf — Mutwallishiip not hereditary — Person holding office if not ousted within six years gets indefeasible title 130c
——Wakf—Mutwalli has a right to hold wakf properties 130d

**Merchant Shipping Act (21 of 1923)**
——S. 103 (4) — Essence — The essence of S. 103 (4) is assault 224a
——S. 103 (4)—Trial under the Act on the same facts after conviction under Calcutta Police Act S. 68 is barred. 224b

**Mesne Profits**
——Mesne profits must be moulded according to facts of each case—Purchaser of holding in execution is entitled to mesne profits on the basis of what he might have grown on land—Defendant's indolence is no ground for depriving the plaintiff of his dues 616c

**Minor**
——Debts incurred by guardian for minor's business—Creditor can proceed against the assets provided guardian has not acted improperly 862
——Plaintiff wrongly described as minor and represented by next friend—Suit is maintainable 477b
——Decree against — Mother as guardian taking part in proceedings and doing nothing injurious—No formal order appointiug her—Minors are properly represented 207a

**Mortgage**
*——Suit on—Purchaser of part of mortgaged property subsequent to mortgage not made party and ousted in execution of mortgage decree— His remedy is not suit for ejectment—He can only redeem the execution purchaser 259
——Splitting up—Mortgagee relinquishing his claim on a portion cannot throw whole burden on remainder 195

**N**

**Negotiable Instruments Act (26 of 1881)**
*——S. 13, Expl. (i), as amended by Act (8 of 1919)—Explanation (i) does not apply to S. 2 (5) (b), Stamp Act 472a

**Notice**
*——*See* T. P. ACT, S. 3.

**O**

**Oaths Act (10 of 1873)**
——S. 5—S. 5 was intended to apply to an accused person while he is under trial 307b

**Originating Summons**
——Claim by creditor of estate—Decision as to—Proper course is suit and not summons 518a

**P**

**Partition**
——Suit for—Plaintiff must be in actual or constructive possession of the subject-matter—Execution of decree for khas possession barred—Second suit for khas possession is barred 411

**Partnership**

——Assets — Money or property given away does not continue to be the assets of the firm when it is given over to a third party 836e

**Part Performance**

*——Contract to transfer immovable property partly performed —Party delivering possession is estopped from setting up his own title—Doctrine will not apply where remedy for specific performance of contract is barred —Plaintiff trying to recover possession on strength of title cannot succeed when the transfer was not by a registered deed 365

**Penal Code (45 of 1860)**

*——S. 34—S. 34 can apply to a case under S. 304, Part 2 324a

——S. 97—Plea of private defence —Accused must prove justifying circumstances 324c

——S. 120B—In cases of conspiracy evidence generally available is that of police officers and therefore it should be dealt with caution 265a

*——S. 120B—Arms Act, S. 19 (f) —Agreement of parties makes offence complete—Conspiracy to possess firearms—Conspiracy in respect of particular firearms need not be proved 265c

*——S. 124A—Section should be narrowly construed — Article should be read as a whole—Some latitude to public press should be allowed 751

*——S. 124A—Indian law is more compressed — Intentional attempt to rouse against Government feeling of disaffection must exist—Meaning of language used as understood by the readers, is the meaning of the writer—Words used should be constructed liberally 698a

*——S. 124A — Sentence—Object is not to take vindictive action 698b

——S. 143—Going to particular place armed with lathis with more than five persons is not offence 520c

*——S. 153A—Article should be read as a whole 747

——S. 153A—Publishing matter in public interest honestly—Publisher is not liable 215a

——S. 153A—Essence is malicious intention — In the absence of that, honesty may be inferred 215b

——Ss. 182 and 420—Rash act in identifying another before treasury officer is not punishable under S. 182 or S. 420 78

——S. 188—Order under S. 144, Criminal P. C.—Simply promulgation of order is not sufficient—Knowledge of order must be proved 306

*——S. 188—Promulgation of order is not sufficient—Accused must be proved to have knowledge of the order 28

——S. 196—Account books produced in pursuance of notice under S. 23 (2), Income-tax Act, found to be false—Prosecution under S. 196, I. P. C. cannot be sustained 724

——S. 211—Report by police as to complaint being false — Trial under S. 211 without giving accused opportunity to prove truth of complaint is bad 175 (2)

——S. 225—Offence under Forest Act, S. 29—Forest officer cannot arrest without warrant — His custody is not lawful within S. 225 516b

——S. 302—Trial for murder—Every procedure must be strictly followed 631b

——S. 304 (part 2)—S. 34 can apply to a case under S. 304 (part 2) 324a

*——Ss. 304 and 323 — Death caused by kicking — Ultimate consequence should be considered 73

——S. 354—Catching a woman while sleeping by neck—Offence under S. 354 is not committed (*Cuming, J., Graham, J., contra*). 505a

——S. 366—Kidnapping is quite different from abduction 644a

——S. 366—Charge of kidnapping or abduction in one head is bad 644f

——S. 379—Accused acquitted because of incomplete evidence—Subject of theft should not be made over to him—Complainant retaining possession of the pro-

**Penal Code**
perty cannot be required to execute bond till disposal of question of title 61
——S. 409—Prosecution proving receipt of money by accused—Burden is on accused to prove non-conversion of money to his own use 409*a*
——S. 420 and 182—Rash act in identifying another before Treasury officer is not punishable under Ss. 420 or 182 78
——S. 494—First marriage performed with consent of legal guardian — Marriage is valid, making subsequent marriage a bigamy 480
*——S. 499—Privilege—Advocates in India have not absolute privilege to ask questions in cross-examination as in England 823*a*
——S. 499, Excep. 9—Imputation on character of witness made for protection of client—Presumption that question is asked on instructions should be drawn—Opportunity should be given to explain 823*b*
——S. 500 — Pleader must use common-sense and caution in asking defamatory questions of a witness 303

**Possession**
——Suit for—Title found with plaintiff — Possession follows title 344
——Title—Where land is covered with water, possession is determined by title 97*c*

**Power-of-attorney**
——Must be strictly construed—No express power to mortgage in ammukhtearnama—It cannot be construed to give such power 836*j*

**Practice**
——Appeal—In the absence of some fact within Evidence Act S. 32, what the appellate Court has to do is to find whether or not there was any real contention that the writer was still alive and if so grant a remand 855*b*
——New plea should be discouraged at a later stage 855*c*
——Appeal—New plea cannot be raised 836*h*
——Appeal Court can consider matters before it, de novo both as regards law and fact — It should not interfere unless lower Court's decision is wrong 830
——Precedents—A case is authority for what it actually decides 657*b*
*——Discretion—Motive of a party in seeking to enforce a legal right is not altogether irrelevant 581*a*
——Calcutta High Court — One Division Bench issuing rule—Bench hearing it on merits can question the lower Court's order on merits 574*a*
——Precedents—A case is authority for what it actually decides 565*c*
——Appeal — Order for security and order for attachment combined—If combined order leads to doubt as to competency of appeal, benefit of doubt goes to appellant 354*b*
*——High Court — Reference to Full Bench in second appeal—Full Bench holding that point referred does not arise — Case should be sent to referring Bench for decision **FB** 256
——Second appeal—Record—Evidence—To put a translated copy of the evidence is not a satisfactory method of placing evidence before the High Court 232*b*
——Second appeal—Lower appellate Court improperly admitting additional evidence—High Court can dispose of the case only when lower appellate Court has based its conclusion on other than such evidence 140*b*
——Judgment must be based on legal evidence and not on surmise 140*e*
——Appellate Court cannot make out a new case 86*b*
——Relief—Cause of action arising after determination of suit by trial Court and being different—Plaintiff is not entitled to a decree 56*b*
——Court is entitled to draw inference inconsistent with the case of either party 49*b*

**Presidency Towns Insolvency Act (3 of 1909)**
——S. 8—A person whose right to recover his debt or part of his

**Presy. Towns Insolvency Act**
debt from the insolvents may seriously be affected, is a "person aggrieved" within the meaning of S. 8 163*b*
——S. 18—S. 18 applies where adjudication order has been made 529*a*
——S. 45 (2) — Adjudication by two Courts — Conditional order postponing discharge by one without stay in the other is bad 163*a*
——S. 90 — Insolvency Judge of High Court cannot exercise extraordinary power of calling up a case from mofussil Court 629*c*
——S. 102—S. 102 applies only to an insolvent adjudicated under that Act 149*a*

**Principal and Agent**
——Agent employed to effect purchase on behalf of principal from third person—Principal is not bound if agent sells his own goods to him unless principal has assented to that mode—If principal assents, relationship of vendor and purchaser is created 668*b*

**Probate and Administration Act (5 of 1881)**
——S. 3—Provision to appoint a trustee after death of executant does not make the document a will 756*b*
——Ss. 41 and 85—Case under Hindu Wills Act governed by S. 85—Grant of letters cannot be refused, but if applicants are not next-of-kin or legatees proper case under S. 41 must be made out 654*b*
*——S. 42 and 44—Grant of letters in respect of a portion of the estate—There cannot be another grant except in respect of the whole balance 654*a*
——S. 89—Doctrine of *actio personalis moritur cum persona* does not apply in India—Right to sue for damages for negligence survives against the representatives of the wrong doer 277

**Promissory Note**
*——Execution by directors of a company — Liability of the company discussed 612

**Provincial Insolvency Act (5 of 1920)**
——Ss. 4 and 5—Title of insolvent to property which is sold in question—Purchaser is entitled to have the sale set aside and purchase money refunded to him 834*b*
——S. 4 — Insolvency Court can decide questions of title between Official Assignee and stranger 474*a*
——S. 24—Court need not go into an elaborate enquiry as to validity of the debts 69
——S. 24 (2)—Sub-S. (2) is mandatory — Failure to examine vitiates order of adjudication 32
——S. 53—T. P. Act S. 53—Difference indicated 766*a*
——S. 53—Surrender by insolvent —Landlord aware of a previous contract to sell—Transfer is not for valuable consideration 766*b*
——S. 68—Application for challenging act or decision of receiver—Grounds may be supplemented or amplified later on 834*a*
——S. 72 (1) and (2)—Sub-S. (2) lays down the only procedure by which offence under sub-S. (1) can be proceeded with (*Per Suhrawardy* and *Ghose, JJ.*—) Sub-S. (2) does not take away right of private party to prosecute on his own motion (*Duval, J.*) 149*b*
——S. 75—Decision of Sub-Judge under S. 4—Appeal lies to District Judge and second appeal to High Court 474*b*

**Provincial Small Cause Courts Act (9 of 1887)**
——S. 32 (2)—Sub-S. (2) applies where officer entertaining suit is invested with Small Cause Court powers 388*a*
——Art. 31—Suit not for accounts but for price of fruits wrongfully retained by defendant— Article does not apply 375
——Sch. 2, Art. 35 (k)— Temporary injunction wrongfully obtained—Suit is maintainable 247

**R**

**Record-of-rights**
—— Civil suit for wrong entry in, is maintainable but the decree in such suit will only be declaratory and will not force the

**Record-of-rights**
revenue authorities to alter the entry 458a
——Suit by raiyats for correcting wrong entry as to their status — No proceedings in revenue Court or under Bengal Tenancy Act taken—Suit is only ordinary civil suit 458b
——No proceedings to correct entry in record-of-rights taken either in revenue Court or under Bengal Tenancy Act — Record-of-rights are final 458c
——Thak maps are not conclusive 457b
——Party challenging correctness must show that it is incorrect —Proceedings of revenue authorities before final publication are not admissible 268a
——Entry in, will be presumed to be correct unless proved to the contrary 210b
——Presumption — Record that lands are rent-paying lands— Presumption is rebutted if there is no evidence that rent was ever paid 189b

**Redemption**
——*See* T. P. ACT, S. 60

**Registration Act (16 of 1903)**
——S. 17— Mortgage by deposit of title-deeds— Part consideration paid to mortgagor for discharging previous mortgage by deposit of deeds — Mortgagor depositing the deeds — Letter confirming the deposit and acknowledging receipt of some more money paid to him on the date of the letter does not require registration 538e
——S. 17 — Mahomedan law — Gift—Essentials are declaration acceptance and delivery of possession, a written instrument is not one creating gift but a mere evidence not requiring registration 197

**Religious Endowment**
——*See* HINDU LAW—RELIGIOUS ENDOWMENT

**Remand**
——*See* CIVIL P. C., O. 41, RR. 23 AND 25

**Restitution of Conjugal rights**
——*See* MAHOMEDAN LAW

**Review**
——*See* CIVIL P. C., O. 47

**Revision (Civil)**
——*See* CIVIL P. C., S. 115

**Right of Suit**
——Witness refused travelling expenses— Suit to recover does not lie 601

**S**

**Shipping**
——Charter Party—Delay in loading— It is the duty of charterer to provide cargo and keep it ready for loading— Time will not begin to run until shipowner has brought the ship to the place named in the charter— Ordinarily procuring allotment of berth is charterer's duty —Source of supply of cargo is not the concern of shipowner unless speeially provided for 322

**Specific Performance**
Contract concluded — Another person offering higher price— Specific performance cannot be refused 889d

**Specific Relief Act (1 of 1877)**
——S. 22—Mere hardship of the results of a contract will not affect Court's discretion togrant specific performance 889
——S. 31—Misstatement in pronote as to rate of interest owing to mutual mistake can be rectified 605
——S. 42—Municipal election— A rate-payer, as such, is not entitled to challenge 704a

***Stamp Act (2 of 1899)**
——S. 2, (v) b — Neg. Instr. Act S. 13 Expl. (i)—Expl. (i) does not apply to S. 2 (v) b 472a
——S. 35—Suit disposed of and decree signed— S. 35 is not applicable to documents produced in the case 472b
——Art. 55—Release though not stamped as such is not ineffective 806c

**Step-in-aid**
——*See* LIM. ACT, ART, 182

**Succession Act (10 of 1865)**
——S. 199—There is broad distinction between cases of wills

**Succession Act**
and of intestacy in matter of citation 207*b*
——S. 199 — Citation should always issue to persons interested —Such persons not complaining for omission to cite them— Omission does not call for revocation 207*c*
—— Ss. 234 and 199 — Citation should always issue to persons interested — Such persons not complaining for omission to cite them — Omission does not call for revocation 207*e*
——(39 of 1925), S. 2— Provision to appoint trustee after the death of executant does not make the document a will 756*b*
——S. 187— Knowledge of right to elect is necesaary to bind one by the principle of election 494

**T**

**Tort**
——Defamation—Libel—Plea of fair comment—Facts other than those contained in the libel cannot be introduced 297
——Negligence—Doctrine of *actio personalis moritor cum persona* does not apply in India—Right to sue for damages for negligence survives against the representatives of the wrongdoer 277

**Transfer of Property Act (4 of 1882)**
——Tenancies of homestead land and of the nature of village service tenure are not governed by the Act and are not transferable 373
*——S. 2 (d) and S. 135—Claim under life insurance policy purchased in execution by a pleader —Purchase is not prohibited 691
——S. 3—Equitable mortgage—Subsequent sale—Purchaser asking for title-deed—Vendor replying that he had not got it—Abstention from enquiry by purchaser amounts to notice 538*d*
——S. 6—Tenancy created after Transfer of Property Act but before operation of Bengal Tenancy Act is transferable 220*b*
——S. 14—Reservation of right of reconveyance is not creation of interest 41*b*
* ——S. 40—Covenant running with the land is one restricting the user and not a positive covenant 41*c*
——S. 41 — Principle applies where one stands by and acquiesces in the act of another and by such acquiescence injury is caused to a third person 220*c*
——S. 43—A member of Hindu joint family mortgaging joint property representing to be his —His share, as at the date of decree, will be liable 665*b*
——S. 48 -- Mortgagee claiming priority will not lose his right unless estopped by his conduct 538*c*
——S. 53—Taking security from other persons jointly with debtor does not render the transaction a fraudulent one 836*a*
——S. 53—Scope—What S. 53 invalidates is a transfer which removes the whole or a part of the debtor's property from the creditors as a body to the benefit of the debtor 836*b*
——S. 53—Provincial Insolvency Act, S. 53—Difference indicated 766*a*
——S. 54—Price may not be ascertained in the first instance 889*b*
——S. 59—Mortgage by deposit of title-deeds—Part consideration paid to mortgagor for discharging the previous mortgage by deposit of deeds—Mortgagor depositing the deed—Letter confirming the deposit and acknowledging the receipt of some more money paid to him on the date of the letter does not require registration 538*e*
*——S. 60—Hindu law—Mortgage by some members agreeing to be liable jointly and severally—Suit against all except one barred—His share is liable for whole debt 665*a*
——S. 60—Person having fractional interest in equity of redemption is entitled to redeem whole mortgage 479*a*
*——S. 60—Usufructuary mortgage—Mortgagor partially interested in mortgage—Tender of mortgage money refused—Decree giving credit for usufruct must give only for so much as actually fell to redeeming mortgagor's share. 479*c*

**T. P. Act**

**T. P. Act**
——S. 60—One of the mortgagees cannot ordinarily enforce the mortgage for his share only except in a case of severance of his interest with mortgagor's consent 425a
——S. 60—Splitting up—Mortgagee relinquishing his claim on a portion cannot throw whole burden on remainder 195
*——S. 68—Several joint mortgagees—Payment to one is not valid as against other mortgagees and does not operate as discharge as to all, but operates as a discharge as to the share of the payee only 425b
——S. 74—Second mortgagee paying off decree of first mortgagee to save mortgaged property can sue under S. 69, Contract Act—S 74 does not take away the right 393b
——S. 91—Purchaser of equity not impleaded in mortgage suit can sue for redemption without setting aside the mortgage decree and sale thereunder 559b
——S. 98—Mortgage anomalous—Construction 836c
*——S. 107—Terms of lease for three years settled by oral agreement—Parties intending to execute a lease—Lessee allowed to take possession—Oral agreement can be enforced 275
*——S. 108 (j)—Lessee holding over under renewal clause—Mortgagee from such lessee is liable to lessor for rent 725b
*——S. 114—Forfeiture on non-payment of rent—Court should exercise discretion in tenant's favour, where interest of third party has not intervened and where tenant's conduct justifies his continuance 908
*——S. 116—Tenant holding over and paying enhanced rate as contained in a renewal clause—Landlord accepting the rent—Tenant is not monthly tenant but is deemed to have taken a renewal 725a
——S. 116—Holding over—Possession for eleven years after expiry of lease—Holder holding under kobala from tenant is not a trespasser 279a
*——S. 136—Claim under life insurance policy purchased in execution by a pleader—Purchase is not prohibited 691

**Transfer of Property Act (Amendment) Act (27 of 1926)**
**——Act is not retrospective 763c

**W**

**Wakf**
——*See* MAHOMEDAN LAW—WAKF

**Will**
——What amounts to—The mere fact that a trust-deed is mentioned as part of the grant does not make the document a testamentary document or a will 756a
——Bequest—A bequest cannot be placed in the same category as a transfer inter vivos 234a

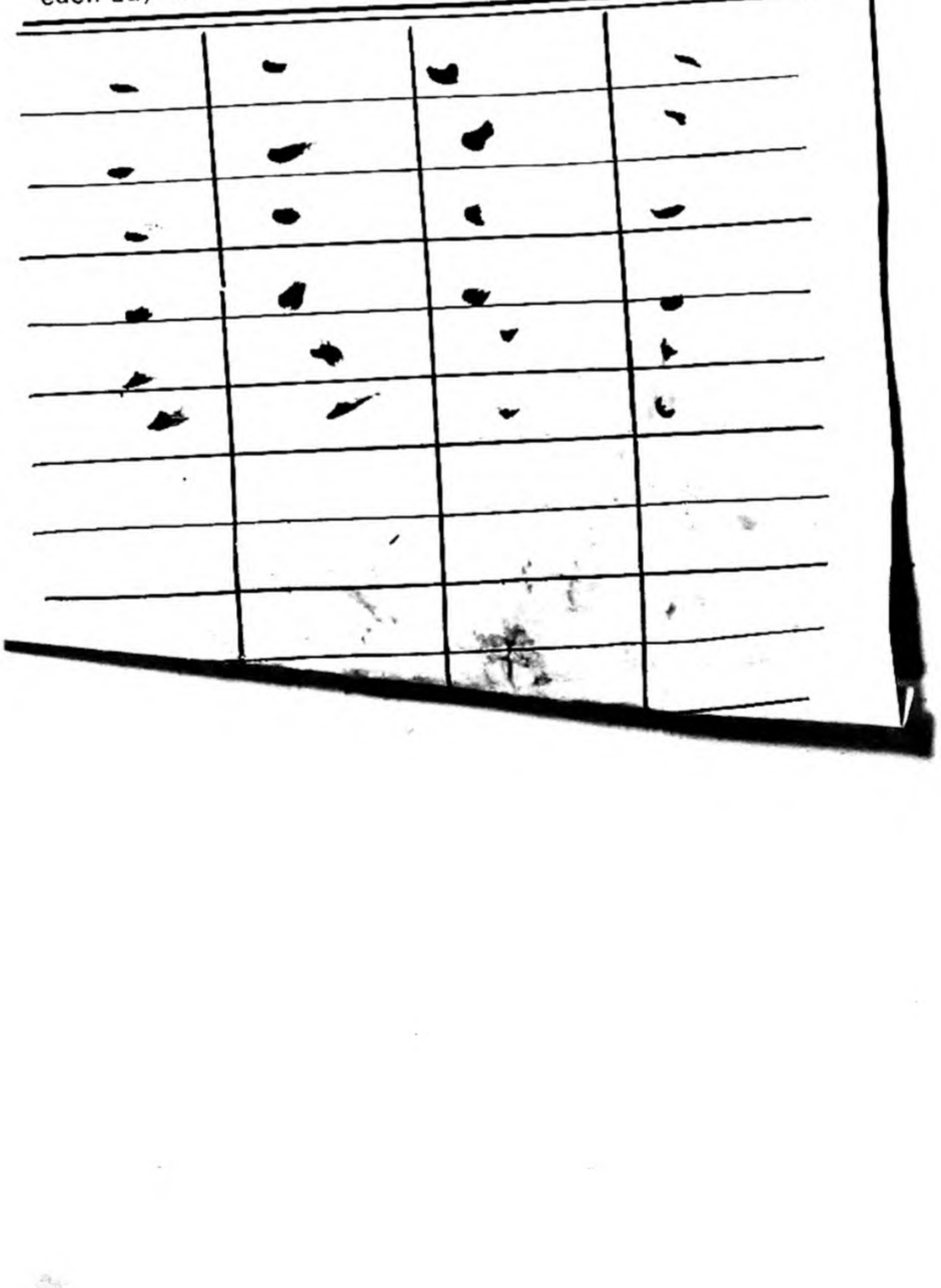
**Words**
——"Kaimi" does not connote fixity of rent 546c

**Workmen's Compensation Act (8 of 1973)**
*——S. 4—Words "result from" are wider than "directly attributable to"—Even if injury is unnatural result of the accident, law is satisfied 286

*Acc. No.*_____ *Call No.*_____

## DATE SLIP

"This book was issued from the Library on the date last stamped. A fine of **10 Paise** will be charged for each day the book is kept over - due".



# A. I. R. 1927 CALCUTTA

## Supplement to Nominal Index


A

Abdul Bari v. Amirjan 940
Azimuddin v. Ali Hosan 921(1)

B

Basiruddin v. Emperor 931(1)
Basiruddin Sarkar v. Sahebulla 966
Bepin Behari v. Trailakya Nath 933

D

Dasarathy Chakravarty v. Khounish Chandra 938
Deven Mandal v. Dhurba Kumar 916
Dhirenda Nath v. Rejendra Nath 945
Dintarini Debi v. Ambicaprosad 970
Dulichand Samsukh v. Dunbar Mills Co. 947

E

Ebad Ali v. Fatema Bibi 951

G

Gnana Dayini v. Gunamoni 914
Gouribala Devi v. Probhas Chandra 931(2)

J

Jotindra Nath v. Sourindra Nath 928
Jugal Kishore Debi v. Baidya Nath 952

K

Kasem Ali v. Emperor 949
Kessoram Poddar v. Banamali 941
Krishna Lal v. Emperor 946
Kumarish Ch. Mukhopadhya v. Ram Taran 939
Kumuda Kumari Dasi v. Dilsook Roy 914

M

Mahim Chandra v. Esahak Sikdar 958
Matangini Devi v. Behari Lal 989
Mohanta Ramnibash v. Jyoti Prosad 921(2)
Monoranjan Mitra v. Fazlar Rahman 925

N

Nadiar Chand v. Satish Chandra 964
Nawab Bahadur of Murshidabad v. Bhupendra Narayan 965
Nikunja Behari v. Usalati Devi 944

R

Radha Bincde v. Surendra Nath 968
Rajani Kanta v. Raj Kumari 913
Rajam Kanta v. Ramani Mohan 934
Rajendra Nath v. Nagendra Kumar 917
Rajeswar Prosad v. Bhupendra Narayan 956
Rakhal Chandra v. Kunidini Debya 930

S

Sheikh Kachu v. Mahammad Ali 926
Srish Chandra Dutta v. Mathura Nath 936(2)
Sudananda Moral v. Rakhal Sana 920
Sukumari Mitra v. Kinu Mandal 924

T

Taka Mia v. Emperor 936(1)

# A. I. R 1927 CALCUTTA

## Supplement to Subject Index


**Adverse Possession**
——Tenant holding land under a permanent lease—Possession not disturbed for over 12 years—Right to permanent tenancy is not prescribed 913*b*

**Attestation**
——Mere attestation does not prove knowledge of contents by attestator 933*b*

**Bengal Patni Regulation (8 of 1819)**
——S. 3 (1)—Difference between mokarari and patni explained 956*b*

**Bengal Tenancy Act**
——S. 49—Suit for ejectment—Plaintiff alleging that defendant is under-ryot must prove that 966
——S. 61—Deposit by tenant less than the amount due is valid if due to bona fide dispute as to amount 914
——S. 148-A—Cosharers should sue for rent due to all—Dues to other cosharers not known—Plaintiff would be entitled to proceed with the suit for his share only 945*a*
——S. 148-A—Terms should be strictly complied with — Substantial compliance is not enough 945*b*
——S. 153—Decision that jama set up as separate forms part of bigger jama does not come within exception to S. 153 939

**Civil Procedure Code**
——S. 115—Error of law is no ground for revision 928*a*
——S. 115—"Jurisdiction" means power to decide—Entertaining a petition and deciding wrongly that it is not maintainable is not refusing to exercise jurisdiction 928*b*
——S. 115—Wrong application of law is no point for revision 965
——S. 151—S. 151 cannot be used to review when review has been forbidden by other provisions 920*c*

**Civil P. C.**
——O. 9, R. 9—Applicability—Rule 9 does not apply to proceedings in execution 938*b*
——O. 21, R. 90—Order refusing to set aside the dismissal of an application under O. 21, R. 90, for default is nonappealable 938*a*
——O. 32—Minor properly represented till passing of decree but not so represented in execution proceedings — Execution sale need not be set aside—O. 32 is not strictly applied to the stage of execution 930
——O. 47, R. 1—Ground or review must be one existent at the time of decree 920*a*
——O. 47, R. 1—"Sufficient reason" must be analogous to those stated in the rule 920*b*

**Company**
——Articles of Association—Article providing for issue of duplicate share certificates — Provisions construed 947

**Contract Act**
——S. 73—Sale of goods—Defaulting purchaser is not entitled to recover earnest money 964
——S. 218—Zamindar employing a naib and an under-naib has a cause of action against the latter for collections received by him and not paid to naib 917

**Cosharer**
——One cosharer can have joint possession over land abandoned by a tenant and occupied by his cosharer landlord 936(2)

**Criminal P. C.**
——S. 145—Likelihood of breach of peace is necessary 944*a*
——S. 145 (4) — Person legally taking possession cannot be ousted 944*b*
——S. 234—Misjoinder — Charge in respect of falsifications of six different documents is bad 946

**Criminal P. C.**
——S. 297 — Scrappy and insufficient charge amounts to misdirection 936(1)a
**Criminal trial**
——Presiding officers should insist upon compliance with procedural law as embodied in statutes and decisions 936(1)b
**Decree**
——Setting aside—Fraud—Decree obtained by practising gross fraud on Court — Suit to set aside such decree is maintainable 940
**Evidence Act**
——Ss. 32, 9, 11 and 13—Recitals of boundaries of land not in suit in documents between third parties are inadmissible 918
——S. 70 — Document appearing from evidence to be invalid—S. 70 does not validate—Mortgage not properly executed — Mortgagor admitting execution — Document cannot be enforced as mortgage 926
——S. 101—Party claiming land as revenue free must prove his case by positive evidence of grant 921(2)
——S. 115 — Pre-emption — Sale after notice that cosharers have a right of pre-emption — Before commencement of sale cosharer claiming his right without protest by purchaser — Purchaser cannot subsequently resist the claim of the cosharer 925
——S. 116—Landlord and tenant —Person attorning to lessors as tenant cannot question title of lessors 941a
**Execution**
——Objection by judgment-debtor —Decree-holder absent—No adjudication on merits of objection petition—Order allowing objection is set aside 935
**Execution sale**
——Setting aside—Minor properly represented till passing of decree but not so represented in execution proceedings — Execution sale need not be set aside—O. 32 is not strictly applied to the stage of execution 930
**Hindu Law**
——Succession—Dayabhaga school
1927 Indexes (Cal.)—7
**Hindu Law**
—Daughter's daughter's son is not an heir 970
**Land Acquisition Act**
——S. 21—Landlord is entitled to compensation given for the land acquired according to terms of the lease 968
**Landlord and tenant**
——Reduction of rent obtained after diluvion—Tenant does not relinquish his rights in his lands 921(1)
——Rent paid according to Bengalee months — Tenancy is regulated by Bengalee months 911b
——Suspension of rent — Tenant put in possession of only a part of land leased—Doctrine of suspension applies only where rent is a lump sum 951
**Lease**
——Kabuliyat—Construction 924
**Limitation Act**
——S. 7 — Joint decree in favour of one adult and two minors—Persons not proved to be members of joint Hindu family — Adult not acting as karta — He cannot give discharge on minor's behalf 952
——Art. 11-A — Execution of decree — Decree-holder obtaining symbolical possession — Application for khas possession—Objection by defendants on the ground of lease rejected — Suit is barred by Art. 11-A 916
——Arts. 144 and 120—Where defendants worked quarries without objection, the period of adverse possession is not to be counted from the time when different sorts of earth were found 956a
**Penal Code**
——Ss. 71, 147, 325 and 149—Sentence—Separate sentences under Ss. 148 and 326 read with S. 149 are illegal in view of provisions of S. 71 931(1)
——S. 120-B — Charge of conspiracy between two persons only —One acquitted — Other must also be acquitted 949
**Possession**
——Possession lawfully and peaceably obtained shall be main-

**Possession**
tained except against preferential title-hoider 931(2)
**Record-of-rights**
——Presumption arising from, is conclusive until rebutted 933*a*
**Registration Act**
——S. 17 (2) (iv) — Compromise granting permanent lease — Decree is not exempt from registration 913*a*
**Specific Relief Act**
——S. 42, Proviso — Suit for a mere declaration — Property leased to insolvent-defendant, sold as belonging to latter—Suit barred under S. 42 if it omits to ask for consequential relief 934
**Transfer**
——Mere agreement does not create a conveyance 956*d*
**Transfer of Property Act**
——S. 54 — Part performance — Right of defendant to claim specific performance barred — Doctrine of part performance is not applicable 954
**Words**
——" Durbust hakuk " means all zamindari rights 956*a*
——Sayer — " Sayer " means all sorts of imports in addition to land revenue and does not include minerals 956*c*

THE

# ALL INDIA REPORTER

## 1927 CALCUTTA

## COMPARATIVE TABLES

(PARALLEL REFERENCES)

### Hints for the use of the following Tables

**Table No. I.**—This Table shows serially the pages of INDIAN LAW REPORTS for the year 1927 with corresponding references of the ALL INDIA REPORTER.

**Table No. II.**—This Table shows serially the pages of other REPORTS and JOURNALS for the year 1927 with corresponding references of the ALL INDIA REPORTER.

**Table No. III.**—This Table is the converse of the **First** and **Second Tables**. It shows serially the pages of the ALL INDIA REPORTER for 1927 with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

---

## TABLE No. I

Showing seriatim the pages of INDIAN LAW REPORTS, CALCUTTA SERIES, for the year 1927, with corresponding references of the ALL INDIA REPORTER.

*N. B.*—Column No. 1 denotes pages of I. L. R. 54 CALCUTTA.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

### I. L. R. 54 Calcutta=All India Reporter

| ILR | A. I. R | | | ILR | A. I. R. | | | ILR | A. I. R. | | | ILR | A. I. R. | | | ILR | A. I. R. | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | 1926 | *C* | 889 | 179 | 1926 | *C* | 1218 | 363 | 1927 | *C* | 579 | 532 | 1927 | *C* | 509 | 754 | 1927 | *C* | 808 |
| 15 | " | " | 934 | 186 | " | " | 1056 | 371 | " | " | 405 | 539 | " | " | 680 | 770 | " | *PC* | 128 |
| 30 | " | " | 1083 | 189 | 1927 | " | 465 | 374 | " | " | 312 | 549 | " | " | 668 | 782 | 1928 | *C* | 62 |
| 44 | 1927 | " | 811 | 218 | 1926 | " | 1121 | 380 | " | " | 376 | 582 | " | *PC* | 172 | 788 | " | " | 52 |
| 52 | " | " | 307 | 237 | 1927 | " | 17 | 394 | " | " | 574 | 586 | " | " | 117 | 799 | 1927 | " | 857 |
| 59 | 1926 | " | 1183 | 251 | 1926 | " | 597 | 405 | " | " | 534 | 595 | " | " | 108 | 813 | " | " | 725 |
| 78 | 1927 | " | 297 | 266 | " | " | 1153 | 414 | " | *PC* | 60 | 601 | " | *C* | 527 | 836 | " | " | 636 |
| 80 | 1926 | " | 1014 | 279 | 1927 | " | 213 | 419 | " | *C* | 614 | 607 | " | " | 791 | 858 | 1928 | " | 50 |
| 84 | " | *PC* | 121 | 283 | " | " | 532 | 424 | " | " | 393 | 614 | " | " | 783 | 863 | 1927 | " | 432 |
| 97 | 1927 | *C* | 291 | 286 | " | " | 250 | 430 | " | " | 394 | 624 | " | " | 781 | 948 | 1928 | " | 99 |
| 114 | " | " | 216 | 296 | " | " | 516 | 445 | " | " | 472 | 630 | " | " | 553 | 955 | 1927 | *PC* | 159 |
| 119 | " | " | 322 | 303 | 1928 | " | 24 | 450 | " | " | 488 | 650 | 1928 | " | 21 | 969 | 1928 | *C* | 74 |
| 126 | " | " | 281 | 307 | 1927 | " | 514 | 476 | " | " | 520 | 655 | 1927 | " | 768 | 1026 | 1927 | " | 593 |
| 184 | 1926 | " | 1224 | 312 | " | " | 583 | 481 | " | " | 623 | 669 | " | *PC* | 135 | 1038 | 1928 | " | 114 |
| 187 | 1927 | " | 803 | 317 | " | " | 529 | 485 | " | " | 908 | 681 | " | *C* | 846 | 1041 | " | " | 97 |
| 148 | 1925 | " | 1012 | 328 | " | " | 492 | 493 | " | " | 818 | 687 | " | " | 836 | 1050 | 1927 | " | 845 |
| 152 | 1927 | " | 28 | 333 | " | " | 39 | 500 | " | *PC* | 73 | 708 | " | " | 848 | 1052 | " | " | 904 |
| 155 | " | " | 296 | 338 | 1926 | *PC* | 142 | 508 | " | " | 97 | 716 | " | " | 844 | 1057 | " | " | 758 |
| 161 | " | *PC* | 1 | 345 | 1927 | *C* | 625 | 513 | " | *C* | 682 | 721 | " | " | 536 | 1064 | 1928 | " | 94 |
| 168 | " | " | 29 | 355 | " | " | 284 | 524 | " | " | 411 | 727 | " | " | 496 | 1075 | " | " | 177 |
| 171 | " | *C* | 11 | 359 | " | " | 196 | | | | | | | | | | | | |

# TABLE No. II

Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1927 with corresponding references of the ALL INDIA REPORTER.

*N. B.*—Column No. 1 denotes pages of other JOURNALS.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

## 45 Calcutta Law Journal=All India Reporter

| CLJ | A. I. R. | | | CLJ | A. I. R. | | | CLJ | A. I. R. | | | CLJ | A. I. R. | | | CLJ | A. I. R. | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | 1927 | *C* | 946 | 129 | *Too old* | | | 229 | 1927 | *C* | 381 | 395 | 1927 | *PC* | 32 | 544 | 1927 | *PC* | 108 |
| 4 | " | " | 259 | 131 | 1927 | *C* | 324 | 230 | " | " | 375 | 404 | " | " | 41 | 548 | " | " | 121 |
| 8 | " | " | 250 | 138 | " | " | 918 | 233 | " | " | 538 | 408 | " | " | 2 | 553 | " | *C* | 628 |
| 15 | 1926 | " | 586 | 142 | " | " | 312 | 244 | " | " | 286 | 418 | " | " | 26 | 557 | " | " | 657 |
| 20 | " | " | 1107 | 146 | " | " | 340 | 249 | " | " | 941 | 420 | " | " | 57 | 561 | " | " | 644 |
| 21 | " | " | 1101 | 151 | " | " | 359 | 255 | " | " | 522 | 426 | " | *C* | 543 | 566 | " | " | 638 |
| 32 | 1927 | " | 275 | 161 | " | " | 832 | 263 | " | *PC* | 15 | 432 | " | " | 215 | 571 | " | " | 665 |
| 41 | " | " | 262 | 185 | " | " | 415 | 268 | " | " | 22 | 435 | " | *PC* | 42 | 577 | " | " | 926 |
| 55 | 1926 | " | 948 | 191 | " | " | 393 | 274 | 1926 | " | 142 | 441 | " | " | 44 | 581 | 1926 | *J* | 149 |
| 60 | 1927 | " | 938 | 194 | " | " | 401 | 279 | 1927 | " | 1 | 454 | " | " | 60 | 584 | 1927 | *C* | 200 |
| 63 | " | " | 253 | 199 | " | " | 372 | 282 | " | " | 8 | 458 | " | *C* | 619 | 588 | " | " | 916 |
| 68 | " | " | 309 | 202 | " | " | 305 | 297 | " | " | 25 | 462 | " | " | 616 | 589 | " | *PC* | 172 |
| 71 | " | " | 290 | 204 | " | " | 949 | 300 | " | " | 17 | 469 | " | " | 509 | 591 | " | *C* | 330 |
| 73 | " | " | 315 | 207 | " | " | 409 | 305 | " | " | 20 | 474 | " | " | 345 | 597 | " | " | 562 |
| 86 | 1926 | " | 1077 | 211 | " | " | 343 | 308 | " | " | 27 | 504 | " | *PC* | 56 | 605 | " | *PC* | 128 |
| 96 | 1927 | " | 299 | 213 | " | " | 114 | 313 | " | " | 18 | 507 | " | " | 73 | 613 | " | " | 131 |
| 117 | 1926 | " | 1232 | 218 | " | " | 388 | 318 | " | " | 50 | 512 | " | " | 80 | 620 | " | " | 139 |
| 119 | " | " | 1042 | 222 | 1926 | *J* | 91 | 323 | " | *C* | 432 | 520 | " | " | 89 | 633 | " | " | 156 |
| 126 | 1927 | " | 931 | 225 | 1927 | *C* | 418 | 386 | " | *PC* | 87 | 537 | " | *C* | 927 | 638 | " | *C* | 698 |

## 46 Calcutta Law Journal=All India Reporter

| CLJ | A. I. R. | | | CLJ | A. I. R. | | | CLJ | A. I. R. | | | CLJ | A. I. R. | | | CLJ | A. I. R. | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | 1927 | *PC* | 135 | 136 | 1927 | *PC* | 159 | 231 | 1927 | *PC* | 206 | 322 | 1927 | *C* | 403 | 527 | 1927 | *C* | 965 |
| 9 | " | " | 164 | 145 | " | *C* | 756 | 237 | " | " | 208 | 341 | " | *PC* | 97 | 530 | 1928 | " | 143 |
| 12 | " | " | 165 | 149 | " | " | 806 | 241 | " | *C* | 820 | 344 | " | " | 99 | 535 | 1927 | " | 659 |
| 31 | " | *C* | 631 | 154 | " | " | 747 | 247 | " | " | 831 | 349 | " | " | 237 | 550 | " | " | 724 |
| 35 | " | " | 721 | 156 | " | " | 751 | 250 | " | " | 924 | 353 | 1928 | *C* | 108 | 552 | 1928 | " | 153 |
| 40 | " | " | 718 | 160 | " | " | 787 | 253 | " | " | 855 | 362 | " | " | 57 | 555 | " | " | 146 |
| 46 | " | " | 711 | 168 | " | " | 766 | 257 | " | " | 829 | 368 | " | " | 27 | 558 | " | " | 130 |
| 51 | " | " | 733 | 172 | " | " | 833 | 260 | " | " | 802 | 393 | 1927 | *PC* | 217 | 561 | " | " | 127 |
| 57 | " | *PC* | 162 | 175 | " | " | 776 | 267 | " | *PC* | 227 | 406 | " | " | 234 | 566 | " | " | 123 |
| 61 | " | " | 195 | 182 | " | " | 928 | 272 | " | " | 230 | 413 | " | " | 224 | 570 | " | " | 116 |
| 76 | " | " | 176 | 186 | " | " | 801 | 280 | " | " | 229 | 420 | " | " | 286 | 573 | " | " | 107 |
| 93 | " | *C* | 741 | 188 | " | *PC* | 191 | 282 | " | *C* | 862 | 428 | 1928 | *C* | 65 | 575 | " | " | 104 |
| 111 | " | " | 760 | 197 | " | *C* | 636 | 287 | " | " | 865 | 433 | " | " | 136 | 579 | " | " | 60 |
| 116 | " | " | 935 | 209 | " | *PC* | 204 | 291 | " | *PC* | 244 | 441 | 1927 | " | 796 | 584 | " | " | 115 |
| 118 | " | " | 794 | 214 | " | " | 210 | 292 | " | " | 261 | 452 | 1928 | " | 46 | 592 | 1927 | " | 579 |
| 1 | " | " | 816 | 225 | " | *C* | 691 | 297 | " | *C* | 857 | 455 | " | " | 1 | 596 | " | " | 421 |
| 123 | " | *PC* | 146 | 227 | " | " | 823 | 307 | " | " | 956 | 515 | " | " | 158 | 607 | 1928 | " | 89 |
| 126 | " | " | 151 | | | | | | | | | | | | | | | | |

## 31 Calcutta Weekly Notes=All India Reporter

| CWN | A. I. R. | | | CWN | A. I. R. | | | CWN | A. I. R. | | | CWN | A. I. R. | | | CWN | A. I. R. | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | 1926 | *C* | 34 | 58 | 1926 | *PC* | 93 | 112 | 1927 | *C* | 182 | 148 | 1926 | *C* | 1208 | 167 | 1927 | *C* | 196 |
| 14 | " | *C* | 1153 | 60 | " | *J* | 176 | 124 | " | " | 175 | 150 | " | *PC* | 96 | 168 | " | " | 215 |
| 22 | 1927 | " | 76 | 65 | 1927 | *C* | 160 | 125 | 1926 | *PC* | 91 | 152 | " | *J* | 194 | 171 | " | " | 200 |
| 25 | 1926 | *PC* | 56 | 74 | 1926 | *PC* | 79 | 128 | " | " | 78 | 154 | " | *PC* | 125 | 174 | 1926 | *PC* | 88 |
| 32 | 1927 | *C* | 1 | 82 | 1927 | *C* | 117 | 135 | 1927 | *C* | 210 | 155 | 1927 | *C* | 947 | 179 | " | " | 129 |
| 46 | " | " | 179 | 101 | 1926 | *PC* | 54 | 142 | 1926 | " | 853 | 160 | " | " | 207 | 184 | 1927 | *C* | 180 |
| 49 | 1926 | *PC* | 2 | 107 | " | " | 126 | 144 | 1927 | " | 199 | 165 | " | " | 213 | 192 | " | " | 268 |

## 31 Calcutta Weekly Notes=All India Reporter—(*Concld.*)

| CWN) | A. I. R. | | | CWN) | A. I. R. | | | CWN) | A. I. R. | | | CWN) | A. I. R. | | | CWN) | A. I. R. | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 195 | 1927 | *C* | 224 | 384 | 1927 | *C* | 352 | 538 | 1926 | *PC* | 109 | 741 | 1927 | *PC* | 108 | 9 0 | 1927 | *PC* | 172 |
| 198 | 1926 | *PC* | 68 | 387 | " | " | 936 | 540 | 1927 | *C* | 481 | 744 | " | " | 60 | 953 | " | *C* | 714 |
| 205 | " | *C* | 916 | 388 | " | " | 343 | 550 | " | " | 492 | 747 | " | *C* | 605 | 960 | " | " | 702 |
| 215 | 1927 | " | 102 | 390 | " | *PC* | 1 | 552 | " | " | 561 | 750 | " | " | 565 | 963 | 1928 | " | 96 |
| 221 | 1926 | *PC* | 112 | 393 | " | " | 26 | 554 | " | " | 536 | 765 | " | " | 432 | 964 | 1927 | " | 701 |
| 231 | 1927 | *C* | 99 | 394 | " | *C* | 389 | 557 | " | " | 553 | 799 | " | *PC* | 80 | 965 | " | *PC* | 135 |
| 235 | " | " | 253 | 397 | " | " | 376 | 566 | " | *PC* | 50 | 804 | " | " | 17 | 972 | " | " | 101 |
| 239 | " | " | 265 | 406 | " | " | 411 | 570 | " | " | 56 | 806 | 1928 | *C* | 118 | 973 | " | *C* | 725 |
| 242 | " | " | 944 | 410 | " | " | 398 | 572 | " | *C* | 543 | 814 | 1927 | *C* | 598 | 985 | " | " | 665 |
| 245 | " | *PC* | 27 | 413 | 1926 | *PC* | 142 | 576 | " | " | 534 | 818 | " | " | 928 | 990 | " | " | 737 |
| 252 | 1926 | " | 77 | 417 | " | " | 91 | 580 | " | " | 513 | 822 | " | " | 920 | 996 | " | " | 724 |
| 254 | 1927 | *C* | 281 | 419 | 1927 | *C* | 345 | 583 | " | " | 505 | 825 | " | " | 621 | 998 | " | *PC* | 156 |
| 258 | " | " | 84 | 432 | " | " | 354 | 589 | " | *PC* | 73 | 828 | " | " | 628 | 1002 | " | " | 162 |
| 262 | " | " | 89 | 436 | " | " | 939 | 593 | " | *C* | 496 | 830 | " | *PC* | 59 | 1004 | " | *C* | 758 |
| 268 | " | " | 225 | 438 | 1926 | *PC* | 97 | 615 | " | " | 114 | 835 | " | " | 72 | 1007 | " | " | 748 |
| 271 | " | *PC* | 44 | 444 | 1927 | " | 25 | 619 | " | " | 495 | 838 | " | *C* | 636 | 1012 | " | " | 921 |
| 281 | " | *C* | 284 | 446 | " | *C* | 391 | 621 | " | *PC* | 15 | 847 | " | " | 629 | 1016 | " | " | 752 |
| 282 | " | " | 279 | 448 | " | " | 933 | 625 | " | " | 22 | 850 | " | " | 652 | 1021 | " | *PC* | 131 |
| 286 | " | " | 286 | 450 | " | " | 406 | 630 | " | *C* | 518 | 853 | " | *PC* | 113 | 1027 | " | " | 164 |
| 290 | " | " | 285 | 454 | " | " | 382 | 634 | " | " | 488 | 857 | " | " | 70 | 1030 | " | *C* | 780 |
| 293 | 1926 | *PC* | 105 | 462 | " | *PC* | 37 | 646 | " | *PC* | 97 | 860 | 1926 | *C* | 1037 | 1031 | " | " | 773 |
| 299 | 1927 | *C* | 315 | 469 | " | " | 18 | 649 | " | " | 57 | 864 | 1927 | " | 659 | *N* | | | |
| 308 | " | " | 305 | 473 | " | *C* | 403 | 653 | " | *C* | 581 | 874 | " | " | 654 | 1033 | " | " | 786 |
| 310 | " | " | 327 | 485 | " | *PC* | 8 | 667 | " | " | 527 | 878 | " | " | 642 | 1035 | " | " | 21 |
| 314 | " | " | 324 | 495 | " | " | 110 | 670 | " | *PC* | 32 | 881 | " | " | 631 | 1040 | " | " | 802 |
| 317 | 1926 | *PC* | 121 | 496 | " | *C* | 462 | 677 | " | " | 102 | 885 | " | *PC* | 117 | 1045 | " | " | 775 |
| 324 | " | " | 85 | 499 | " | " | 458 | 683 | " | *C* | 612 | 890 | " | " | 111 | 1047 | " | " | 793 |
| 329 | 1927 | *C* | 322 | 502 | " | " | 474 | 686 | " | " | 601 | 894 | " | *C* | 689 | 1050 | " | " | 817 |
| 332 | " | " | 312 | 506 | " | " | 509 | 691 | " | " | 575 | 898 | " | " | 421 | 1052 | " | " | 782 |
| 334 | " | " | 313 | 509 | " | *PC* | 42 | 693 | " | *PC* | 84 | 906 | " | " | 692 | 1053 | " | *PC* | 165 |
| 337 | " | " | 330 | 514 | " | " | 20 | 700 | " | " | 116 | 908 | " | " | 679 | 1063 | " | " | 128 |
| 340 | " | " | 306 | 517 | " | *C* | 562 | 703 | " | *C* | 538 | 910 | " | *PC* | 139 | 1068 | " | *C* | 808 |
| 341 | 1926 | *PC* | 60 | 521 | " | " | 522 | 711 | " | " | 593 | 921 | " | *C* | 694 | 1078 | " | *PC* | 151 |
| 348 | 1927 | *C* | 365 | 527 | " | " | 520 | 717 | " | *PC* | 89 | 926 | " | " | 704 | 1087 | " | " | 123 |
| 358 | " | " | 394 | 530 | " | " | 70 | 730 | " | *C* | 647 | 936 | " | " | 686 | 1092 | " | " | 191 |
| 365 | " | *PC* | 2 | 532 | " | " | 931 | 738 | " | " | 604 | 940 | " | " | 644 | 1097 | " | *C* | 853 |
| 374 | " | *C* | 425 | 533 | " | *PC* | 52 | 739 | " | " | 578 | 643 | | *PC* | 159 | 1099 | " | " | 913 |
| 382 | " | " | 298 | | | | | | | | | | | | | 1102 | " | " | 787 |

## 7 & 8 All India Criminal Reports=All India Reporter.

| A.I. Cr.R. | A. I. R. | A.I. Cr. R. | A. I. R. | A.I. Cr. R. | A. I. R. | A. I. Cr. R. | A.I.R. | A.I. Cr. R. | A. I. R. |
|---|---|---|---|---|---|---|---|---|---|

*Please refer to* COMPARATIVE TABLE *No. II in* A. I. R. 1927 Allahabad.

## 28 Cr. L. J. & 99 to 105 Indian Cases=All India Reporter

| Cr.LJ & I.C. | A. I. R. | Cr.LJ & I.C. | A. I. R. | Cr.LJ & I.C | A. I. R. | Cr.LJ & I.C. | A. I. R. | Cr.LJ & I.C. | A. I. R. |
|---|---|---|---|---|---|---|---|---|---|

*Please refer to* COMPARATIVE TABLE *No. II in* A. I. R. 1927 Lahore.

## TABLE No. III

Showing seriatim the pages of the ALL INDIA REPORTER, 1927, CALCUTTA SECTION with corresponding references of other REPORTS, JOURNALS AND PERIODICALS, including the INDIAN LAW REPORTS.

*N. B.*—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1927 CALCUTTA.
Column No. 2 denotes corresponding references of other REPORTS, JOURNALS AND PERIODICALS.

## A. I. R. 1927 Calcutta=Other Journals

| A.I.R. | Other Journals | A.I.R. | Other Journals | A.I.R. | Other Journals | A.I.R. | Other Journals | A.I.R. | Other Journals |
|---|---|---|---|---|---|---|---|---|---|
| 1 | 81 *C W N* 32 | 11 | 44 *C L J* 470 | 15 | 97 *I C* 385 | 17 | 99 *I C* 227 | | |
| | 99 *I C* 189 | | 54 *Cal* 171 | 16 | 97 *I C* 395 | | 28 *Cr L J* 99 | | |
| 11 | 97 *I C* 845 | 18 | 97 *I C* 564 | 17 | 44 *C L J* 253 | | 54 *Cal* 237 | | |

# A. I. R. 1927 Calcutta=Other Journals—(*contd.*)

| AIR | Other Journals | | | AIR | Other Journals | | | AIR | Other Journals | | | AIR | Other Journals | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 21 | 53 | *Cal* | 856 | 87 | 97 | *I C* | 979 | 196 | 28 | *Cr L J* | 155 | 250 | 45 | *C L J* | 8 |
| | 97 | *I C* | 731 | 89 | 53 | *Cal* | 901 | | 54 | *Cal* | 359 | | 100 | *I C* | 377 |
| | 31 | *C W N* | 1035 | | 97 | *I C* | 838 | | 7 | *A I Cr R* | 452 | | 28 | *Cr L J* | 297 |
| 25 | 97 | *I C* | 755 | | 44 | *C L J* | 544 | 197 | 44 | *C L J* | 490 | | 54 | *Cal* | 286 |
| 27 | 44 | *C L J* | 269 | | 31 | *C W N* | 262 | | 100 | *I C* | 296 | | 7 | *A I Cr R* | 421 |
| | 98 | *I C* | 860 | 93 | 97 | *I C* | 955 | 199 | 31 | *C W N* | 144 | 253 | 45 | *C L J* | 63 |
| 28 | 44 | *C L J* | 250 | | 27 | *Cr L J* | 1195 | | 99 | *I C* | 349 | | 31 | *C W N* | 235 |
| | 99 | *I C* | 36 | 95 | 53 | *Cal* | 824 | | 28 | *Cr L J* | 141 | | 100 | *I C* | 140 |
| | 54 | *Cal* | 152 | | 99 | *I C* | 118 | | 7 | *A I Cr* | 463 | 256 | 53 | *Cal* | 955 |
| | 28 | *Cr L J* | 4 | | 28 | *Cr L J* | 86 | 200 | 31 | *C W N* | 171 | FB | 100 | *I C* | 289 |
| 29 | 44 | *C L J* | 248 | 96 | 91 | *I C* | 183 | | 99 | *I C* | 937 | 257 | 53 | *Cal* | 980 |
| | 98 | *I C* | 825 | 97 | 43 | *C L J* | 180 | | 28 | *Cr L J* | 201 | | 28 | *Cr L J* | 273 |
| 30 | 97 | *I C* | 635 | | 94 | *I C* | 5 | | 45 | *C L J* | 584 | | 100 | *I C* | 353 |
| 32 | 97 | *I C* | 792 | 98 | 53 | *Cal* | 827 | | 7 | *A I Cr R* | 459 | | 7 | *A I Cr R* | 417 |
| 34 | 97 | *I C* | 625 | | 99 | *I C* | 124 | 203 | 44 | *C L J* | 441 | 259 | 45 | *C L J* | 4 |
| 37 | 44 | *C L J* | 243 | | 28 | *Cr L J* | 92 | | 100 | *I C* | 309 | | 100 | *I C* | 420 |
| | 98 | *I C* | 822 | 100 | 91 | *I C* | 501 | 207 | 31 | *C W N* | 160 | 261 | 44 | *C L J* | 593 |
| 39 | 97 | *I C* | 817 | 102 | 31 | *C W N* | 215 | | 100 | *I C* | 177 | | 99 | *I C* | 1010 |
| | 31 | *C W N* | 231 | | 98 | *I C* | 147 | 210 | 31 | *C W N* | 135 | | 28 | *Cr L J* | 210 |
| | 54 | *Cal* | 333 | 106 | 53 | *Cal* | 837 | | 100 | *I C* | 453 | | 7 | *A I Cr R* | 383 |
| 41 | 44 | *C L J* | 220 | | 99 | *I C* | 180 | 213 | 31 | *C W N* | 165 | 262 | 45 | *C L J* | 41 |
| | 98 | *I C* | 46 | 109 | 98 | *I C* | 140 | | 44 | *C L J* | 314 | | 102 | *I C* | 409 |
| 43 | 44 | *C L J* | 288 | 114 | 98 | *I C* | 89 | | 99 | *I C* | 234 | 265 | 31 | *C W N* | 239 |
| | 98 | *I C* | 852 | | 45 | *C L J* | 213 | | 28 | *Cr L J* | 106 | | 100 | *I C* | 113 |
| 45 | 97 | *I C* | 140 | | 31 | *C W N* | 615 | | 54 | *Cal* | 279 | | 28 | *Cr L J* | 241 |
| 46 | 44 | *C L J* | 271 | 117 | 31 | *C W N* | 82 | | 7 | *A I Cr R* | 243 | 268 | 31 | *C W N* | 192 |
| | 98 | *I C* | 862 | | 101 | *I C* | 62 | 214 | 98 | *I C* | 498 | | 100 | *I C* | 7 |
| 48 | 97 | *I C* | 513 | 126 | 98 | *I C* | 137 | 215 | 31 | *C W N* | 168 | 270 | 91 | *I C* | 113 |
| 49 | 44 | *C L J* | 265 | 130 | 44 | *C L J* | 339 | | 99 | *I C* | 941 | 275 | 45 | *C L J* | 32 |
| | 98 | *I C* | 849 | | 31 | *C W N* | 184 | | 28 | *Cr L J* | 205 | | 100 | *I C* | 404 |
| 51 | 97 | *I C* | 604 | | 99 | *I C* | 205 | | 45 | *C L J* | 432 | 277 | 100 | *I C* | 286 |
| 52 | 44 | *C L J* | 224 | 136 | 98 | *I C* | 211 | 216 | 44 | *C L J* | 467 | | 53 | *Cal* | 987 |
| | 98 | *I C* | 803 | 140 | 98 | *I C* | 129 | | 54 | *Cal* | 114 | 279 | 31 | *C W N* | 282 |
| 54 | 97 | *I C* | 441 | 148 | 97 | *I C* | 603 | | 100 | *I C* | 293 | | 100 | *I C* | 614 |
| 56 | 44 | *C L J* | 263 | 149 | 53 | *Cal* | 929 | 218 | 44 | *C L J* | 579 | | 47 | *C L J* | 27 |
| | 98 | *I C* | 845 | | 44 | *C L J* | 350 | | 99 | *I C* | 933 | 281 | 54 | *Cal* | 126 |
| 57 | 97 | *I C* | 697 | | 98 | *I C* | 116 | | 28 | *Cr L J* | 197 | | 31 | *C W N* | 254 |
| 61 | 44 | *C L J* | 205 | | 27 | *Cr L J* | 1268 | | 7 | *A I Cr R* | 330 | | 100 | *I C* | 797 |
| | 99 | *I C* | 91 | 156 | 53 | *Cal* | 913 | 220 | 44 | *C L J* | 434 | 284 | 31 | *C W N* | 281 |
| | 28 | *Cr L J* | 59 | | 99 | *I C* | 718 | | 100 | *I C* | 302 | | 100 | *I C* | 351 |
| 62 | 97 | *I C* | 372 | 158 | 98 | *I C* | 70 | 224 | 31 | *C W N* | 195 | | 54 | *Cal* | 355 |
| 63 | 44 | *C L J* | 216 | 160 | 31 | *C W N* | 65 | | 99 | *I C* | 1033 | 285 | 31 | *C W N* | 290 |
| | 99 | *I C* | 34 | | 98 | *I C* | 919 | | 28 | *Cr L J* | 233 | | 100 | *I C* | 735 |
| | 28 | *Cr L J* | 2 | 163 | 53 | *Cal* | 866 | | 7 | *A I Cr R* | 386 | 286 | 31 | *C W N* | 286 |
| 65 | 97 | *I C* | 539 | | 44 | *C L J* | 454 | 225 | 44 | *C L J* | 572 | | 100 | *I C* | 441 |
| 69 | 97 | *I C* | 463 | | 99 | *I C* | 736 | | 31 | *C W N* | 268 | | 45 | *C L J* | 244 |
| 70 | 44 | *C L J* | 211 | 168 | 44 | *C L J* | 385 | | 99 | *I C* | 921 | 289 | 44 | *C L J* | 285 |
| | 99 | *I C* | 62 | | 99 | *I C* | 258 | 227 | 44 | *C L J* | 422 | | 27 | *Cr L J* | 896 |
| | 28 | *Cr L J* | 30 | 174 | 43 | *C L J* | 104 | | 100 | *I C* | 299 | | 96 | *I C* | 160 |
| | 31 | *C W N* | 530 | | 94 | *I C* | 740 | 229 | 98 | *I C* | 1021 | 290 | 45 | *C L J* | 71 |
| | 7 | *A I Cr R* | 218 | 175(1) | 53 | *Cal* | 881 | 230 | 44 | *C L J* | 582 | | 100 | *I C* | 331 |
| 72 | 97 | *I C* | 479 | | 99 | *I C* | 761 | | 99 | *I C* | 907 | 291 | 54 | *Cal* | 97 |
| 73 | 44 | *C L J* | 208 | 175(2) | 31 | *C W N* | 124 | 232 | 98 | *I C* | 1008 | | 44 | *C L J* | 364 |
| | 99 | *I C* | 38 | | 99 | *I C* | 408 | 234 | 44 | *C L J* | 587 | | 99 | *I C* | 244 |
| | 28 | *Cr L* | 6 | | 28 | *Cr L J* | 152 | | 99 | *I C* | 910 | 296 | 54 | *Cal* | 155 |
| 75 | 97 | *I C* | 546 | 177 | 98 | *I C* | 43 | 237 | 44 | *C L J* | 293 | | 101 | *I C* | 594 |
| 76 | 53 | *Cal* | 844 | 179 | 31 | *C W N* | 46 | | 99 | *I C* | 177 | | 28 | *Cr L J* | 466 |
| | 31 | *C W N* | 22 | | 99 | *I C* | 200 | 238 | 44 | *C L J* | 557 | | 8 | *A I Cr R* | 62 |
| | 98 | *I C* | 781 | 182 | 53 | *Cal* | 902 | | 99 | *I C* | 901 | 297 | 54 | *Cal* | 73 |
| 78 | 44 | *C L J* | 230 | | 31 | *C W N* | 112 | 239 | 98 | *I C* | 988 | | 101 | *I C* | 565 |
| | 99 | *I C* | 57 | | 99 | *I C* | 428 | 240 | 44 | *C L J* | 553 | 298 | 31 | *C W N* | 382 |
| | 28 | *Cr L J* | 25 | 189 | 98 | *I C* | 85 | | 99 | *I C* | 895 | | 101 | *I C* | 537 |
| | 7 | *A I Cr R* | 177 | 191 | 44 | *C L J* | 311 | 242 | 44 | *L* | 541 | 299 | 45 | *C L J* | 95 |
| 79 | 97 | *I C* | 444 | | 99 | *I C* | 216 | | 99 | *C* | 930 | | 100 | *I C* | 875 |
| 81 | 97 | *I C* | 489 | 193 | 44 | *C L J* | 475 | | 28 | *Cr L J* | 194 | 303 | 54 | *Cal* | 137 |
| 82 | 97 | *I C* | 757 | | 98 | *I C* | 381 | 243 | 98 | *I C* | 977 | | 101 | *I C* | 600 |
| 84 | 97 | *I C* | 879 | 195 | 98 | *I C* | 504 | 244 | 99 | *I C* | 917 | | 28 | *Cr L J* | 472 |
| | 31 | *C W N* | 258 | 196 | 31 | *C W N* | 167 | | 44 | *C L J* | 522 | | | | |
| 86 | 44 | *C L J* | 282 | | 44 | *C L J* | 575 | 247 | 53 | *Cal* | 1008 | 305 | 31 | *C W N* | 308 |
| | 98 | *I C* | 835 | | 99 | *I C* | 411 | | 100 | *I C* | 318 | | 100 | *I C* | 791 |

## A. I. R. 1927 Calcutta=Other Journals—(*Contd.*)

| A.I.R. | Other Journals | | | A.I.R. | Other Journals | | | A.I.R. | Other Journals | | | A.I.R. | Other Journals | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 306 | 31 | C W N | 340 | 376 | 31 | C W N | 397 | 474 | 102 | I C | 115 | 534 | 31 | C W N | 576 |
| | 45 | C L J | 202 | | 54 | Cal | 380 | 477 | 100 | I C | 469 | | 103 | I C | 69 |
| | 28 | Cr L J | 350 | | 101 | I C | 573 | 478 | 28 | Cr L J | 324 | 536 | 31 | C W N | 554 |
| | 100 | I C | 830 | 381 | 45 | C L J | 229 | | 100 | I C | 708 | | 54 | Cal | 721 |
| | 7 | A I Cr R | 540 | | 102 | I C | 125 | | 7 | A I Cr R | 551 | 538 | 45 | C L J | 233 |
| 307 | 54 | Cal | 52 | 382 | 31 | C W N | 454 | 479 | 100 | I C | 521 | | 31 | C W N | 703 |
| | 101 | I C | 657 | | 101 | I C | 104 | 480 | 28 | Cr L J | 327 | | 102 | I C | 871 |
| | 28 | Cr L J | 481 | 388 | 45 | C L J | 218 | | 100 | I C | 711 | 543 | 45 | C L J | 426 |
| 309 | 45 | C L J | 68 | | 101 | I C | 688 | | 7 | A I Cr R | 515 | | 31 | C W N | 572 |
| | 100 | I C | 264 | 389 | 31 | C W N | 394 | 481 | 31 | C W N | 540 | | 103 | I C | 65 |
| 311 | 54 | Cal | 44 | | 101 | I C | 609 | | 103 | I C | 561 | 546 | 101 | I C | 45 |
| | 101 | I C | 581 | 391 | 31 | C W N | 446 | 488 | 31 | C W N | 634 | 548 | 101 | I C | 112 |
| 312 | 45 | C L J | 142 | | 102 | I C | 395 | | 54 | Cal | 450 | 553 | 31 | C W N | 557 |
| | 31 | C W N | 332 | 393 | 45 | C L J | 191 | | 103 | I C | 124 | | 54 | Cal | 630 |
| | 101 | I C | 133 | | 101 | I C | 130 | 492 | 54 | Cal | 328 | | 103 | I C | 609 |
| | 54 | Cal | 374 | | 54 | Cal | 424 | | 31 | C W N | 550 | 559 | 101 | I C | 15 |
| 313 | 31 | C W N | 334 | 394 | 31 | C W N | 358 | | 103 | I C | 538 | 561 | 31 | C W N | 552 |
| | 28 | Cr L J | 343 | | 100 | I C | 903 | 493 | 101 | I C | 347 | | 103 | I C | 542 |
| | 100 | I C | 823 | | 54 | Cal | 430 | 494 | 101 | I C | 339 | 562 | 31 | C W N | 517 |
| | 7 | A I Cr R | 556 | 398 | 31 | C W N | 410 | 495 | 31 | C W N | 619 | | 102 | I C | 108 |
| 315 | 45 | C L J | 78 | | 101 | I C | 661 | | 102 | I C | 617 | | 45 | C L J | 597 |
| | 31 | C W N | 299 | | 28 | Cr L J | 485 | 496 | 31 | C W N | 593 | 565 | 31 | C W N | 750 |
| | 100 | I C | 997 | | 8 | A I Cr R | 134 | | 102 | I C | 647 | | 104 | I C | 547 |
| 322 | 54 | Cal | 119 | 401 | 45 | C L J | 194 | | 8 | A I Cr R | 121 | 574 | 54 | Cal | 394 |
| | 31 | C W N | 329 | | 102 | I C | 384 | | 54 | Cal | 727 | | 28 | Cr L J | 639 |
| | 100 | I C | 887 | 403 | 31 | C W N | 473 | 505 | 31 | C W N | 583 | | 103 | I C | 63 |
| 323 | 97 | I C | 760 | | 103 | I C | 13 | | 103 | I C | 553 | | 8 | A I Cr R | 257 |
| 324 | 45 | C L J | 131 | | 46 | C L J | 322 | | 28 | Cr C J | 697 | 575 | 31 | C W N | 691 |
| | 31 | C W N | 314 | 405 | 28 | Cr L J | 316 | 509 | 31 | C W N | 506 | | 103 | I C | 799 |
| | 28 | Cr L J | 334 | | 100 | I C | 540 | | 101 | I C | 183 | | 28 | Cr L J | 751 |
| | 100 | I C | 718 | | 54 | Cal | 371 | | 45 | C L J | 469 | | 8 | A I Cr R | 380 |
| | 7 | A I Cr R | 546 | 406 | 31 | C W N | 450 | | 28 | Cr L J | 407 | 576 | 101 | I C | 792 |
| 327 | 31 | C W N | 310 | | 102 | I C | 323 | | 8 | A I Cr R | 35 | 578 | 31 | C W N | 739 |
| | 28 | Cr L J | 329 | 409 | 45 | C L J | 207 | | 54 | Cal | 532 | | 103 | I C | 644 |
| | 100 | I C | 713 | | 101 | I C | 597 | 511 | 101 | I C | 334 | 579 | 54 | Cal | 363 |
| | 45 | C L J | 537 | | 28 | Cr L J | 469 | 513 | 31 | C W N | 580 | | 101 | I C | 760 |
| 330 | 31 | C W N | 337 | 410 | 100 | I C | 525 | 514 | 54 | Cal | 307 | | 46 | C L J | 592 |
| | 28 | Cr L J | 347 | 411 | 31 | C W N | 406 | | 102 | I C | 550 | 581 | 31 | C W N | 653 |
| | 100 | I C | 827 | | 101 | I C | 622 | | 28 | Cr L J | 582 | | 102 | I C | 513 |
| | 7 | A I Cr R | 553 | | 54 | Cal | 524 | | 8 | A I Cr R | 112 | 592 | 101 | I C | 755 |
| | 45 | C L J | 591 | 413 | 100 | I C | 466 | 515 | 28 | Cr L J | 310 | 593 | 31 | C W N | 711 |
| 332 | 45 | C L J | 161 | 415 | 45 | C L J | 185 | | 100 | I C | 534 | | 28 | Cr L J | 615 |
| | 101 | I C | 854 | | 101 | I C | 349 | | 8 | A I Cr R | 103 | | 102 | I C | 903 |
| 339 | 98 | I C | 541 | 417 | 100 | I C | 607 | 516 | 54 | Cal | 296 | | 8 | A I Cr R | 265 |
| 340 | 45 | C L J | 146 | 418 | 45 | C L J | 225 | | 102 | I C | 498 | | 54 | Cal | 1026 |
| | 101 | I C | 527 | | 101 | I C | 901 | | 28 | Cr L J | 562 | 598 | 31 | C W N | 814 |
| 343 | 45 | C L J | 211 | 420 | 100 | I C | 518 | 518 | 31 | C W N | 630 | | 105 | I C | 348 |
| | 31 | C W N | 388 | 421 | 100 | I C | 510 | | 103 | I C | 120 | 601 | 31 | C W N | 686 |
| | 101 | I C | 607 | | 31 | C W N | 898 | 520 | 31 | C W N | 527 | | 103 | I C | 634 |
| | 28 | Cr L J | 479 | | 46 | C L J | 596 | | 101 | I C | 180 | 603 | 101 | I C | 800 |
| 344 | 100 | I C | 197 | 425 | 31 | C W N | 374 | | 54 | Cal | 476 | 604 | 31 | C W N | 738 |
| 345 | 31 | C W N | 419 | | 101 | I C | 530 | | 28 | Cr L J | 404 | | 103 | I C | 655 |
| | 45 | C L J | 474 | 431 | 100 | I C | 427 | | 8 | A I Cr R | 56 | 605 | 31 | C W N | 747 |
| | 102 | I C | 870 | 432 | 45 | C L J | 323 | 522 | 45 | C L J | 255 | | 104 | I C | 559 |
| 352 | 31 | C W N | 384 | FB | 31 | C W N | 765 | | 31 | C W N | 521 | 606 | 101 | I C | 758 |
| | 101 | I C | 539 | | 102 | I C | 845 | | 101 | I C | 124 | 608 | 101 | I C | 738 |
| 354 | 31 | C W N | 432 | | 54 | Cal | 863 | 527 | 31 | C W N | 667 | 612 | 31 | C W N | 683 |
| | 101 | I C | 9 | 457 | 100 | I C | 507 | | 102 | I C | 547 | 614 | 54 | Cal | 419 |
| 357 | 100 | I C | 190 | 458 | 31 | C W N | 499 | | 28 | Cr L J | 579 | .. | 103 | I C | 233 |
| 359 | 45 | C L J | 151 | | 102 | I C | 113 | | 54 | Cal | 601 | 616 | 45 | C L J | 462 |
| | 100 | I C | 413 | 460 | 28 | Cr L J | 278 | | 8 | A I Cr R | 114 | | 103 | I C | 639 |
| 365 | 31 | C W N | 848 | | 100 | I C | 358 | 529 | 54 | Cal | 317 | 619 | 45 | C L J | 458 |
| | 100 | I C | 866 | 462 | 31 | C W N | 496 | | 102 | I C | 539 | | 103 | I C | 625 |
| 372 | 45 | C L J | 199 | | 101 | I C | 27 | 532 | 54 | Cal | 283 | 621 | 31 | C W N | 825 |
| | 101 | I C | 478 | 464 | 100 | I C | 726 | | 102 | I C | 482 | | 104 | I C | 249 |
| | 28 | Cr L J | 446 | 465 | 54 | Cal | 189 | | 28 | Cr L J | 546 | | 28 | Cr L J | 809 |
| 378 | 100 | I C | 167 | | 103 | I C | 2 | | 8 | A I Cr R | 179 | | 54 | Cal | 481 |
| 374 | 100 | I C | 146 | 472 | 100 | I C | 680 | 533 | 54 | Cal | 312 | 623 | 45 | C L J | 553 |
| 375 | 45 | C L J | 280 | | 54 | Cal | 445 | | 102 | I C | 479 | | 103 | I C | 235 |
| | 102 | I C | 128 | 474 | 31 | C W N | 502 | 534 | 54 | Cal | 405 | | | | |

# A. I. R. 1927 Calcutta=Other Journals—(*Contd.*)

| A.I.R. | Other Journals | | | A.I.R. | Other Journals | | | A.I.R. | Other Journals | | | A.I.R. | Other Journals | | | A.I.R. | Other Journals | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 625 | 54 | *Cal* | 345 | 702 | 31 | *C W N* | 960 | 783 | 105 | *I C* | 188 | 850 | 55 | *Cal* | 219 | 850 | 55 | *Cal* | 219 |
| | 103 | *I C* | 629 | | 104 | *I C* | 447 | 786 | 31 | *C W N* | 1033 | | 47 | *C L J* | 69 | | 47 | *C L J* | 69 |
| 628 | 31 | *C W N* | 828 | | 8 | *A I Cr R* | 438 | | 105 | *I C* | 565 | 853 | 31 | *C W N* | 1097 | | 31 | *C W N* | 1097 |
| | 104 | *I C* | 111 | | 28 | *Cr L J* | 831 | 787 | 46 | *C L J* | 160 | | 104 | *I C* | 808 | | 104 | *I C* | 808 |
| | 8 | *A I Cr R* | 319 | 704 | 31 | *C W N* | 926 | | 31 | *C W N* | 1102 | 855 | 46 | *C L J* | 258 | | 46 | *C L J* | 258 |
| | 28 | *Cr L J* | 783 | | 103 | *I C* | 890 | | 28 | *Cr C J* | 889 | | 104 | *I C* | 733 | | 104 | *I C* | 733 |
| 629 | 31 | *C W N* | 847 | 711 | 46 | *C L J* | 46 | | 104 | *I C* | 905 | 857 | 54 | *Cal* | 799 | | 54 | *Cal* | 799 |
| | 103 | *I C* | 754 | | 104 | *I C* | 349 | 791 | 54 | *Cal* | 607 | | 46 | *C L J* | 297 | | 46 | *C L J* | 297 |
| 631 | 46 | *C L J* | 31 | 714 | 31 | *C W N* | 953 | | 105 | *I C* | 184 | | 32 | *C W N* | 81 | | 32 | *C W N* | 81 |
| | 31 | *C W N* | 881 | | 104 | *I C* | 387 | 793 | 31 | *C W N* | 1047 | | 105 | *I C* | 279 | | 105 | *I C* | 279 |
| | 103 | *I C* | 790 | | 55 | *Cal* | 113 | | 106 | *I C* | 353 | 862 | 46 | *C L J* | 282 | | 46 | *C L J* | 282 |
| | 8 | *A I Cr R* | 316 | 718 | 46 | *C L J* | 40 | 794 | 46 | *C L J* | 118 | | 105 | *I C* | 255 | | 105 | *I C* | 255 |
| | 28 | *Cr L J* | 742 | | 104 | *I C* | 456 | | 104 | *I C* | 576 | 865 | 46 | *C L J* | 287 | | 46 | *C L J* | 287 |
| 633 | 45 | *C L J* | 566 | | 8 | *A I Cr R* | 433 | 796 | 103 | *I C* | 522 | | 105 | *I C* | 199 | | 105 | *I C* | 199 |
| | 104 | *I C* | 199 | | 28 | *Cr L J* | 840 | | 46 | *C L J* | 441 | 867 | 104 | *I C* | 331 | | 104 | *I C* | 331 |
| | 32 | *C W N* | 57 | 721 | 46 | *C L J* | 35 | 801 | 46 | *C L J* | 186 | 868 | 104 | *I C* | 284 | | 104 | *I C* | 284 |
| 636 | 31 | *C W N* | 838 | | 104 | *I C* | 433 | | 9 | *A I Cr R* | 25 | 870 | 104 | *I C* | 219 | | 104 | *I C* | 219 |
| | 46 | *C L J* | 197 | | 28 | *Cr L J* | 817 | | 28 | *Cr L J* | 871 | | 55 | *Cal* | 210 | | 55 | *Cal* | 210 |
| | 103 | *I C* | 725 | 724 | 31 | *C W N* | 996 | | 104 | *I C* | 711 | 873 | 104 | *I C* | 196 | | 104 | *I C* | 196 |
| | 54 | *Cal* | 836 | | 46 | *C L J* | 550 | 802 | 46 | *C L J* | 260 | 874 | 104 | *I C* | 129 | | 104 | *I C* | 129 |
| 642 | 31 | *C W N* | 878 | | 8 | *A I Cr R* | 445 | | 31 | *C W N* | 1040 | 878 | 104 | *I C* | 150 | | 104 | *I C* | 150 |
| | 104 | *I C* | 422 | | 28 | *Cr L J* | 887 | | 103 | *I C* | 533 | 880 | 104 | *I C* | 623 | | 104 | *I C* | 623 |
| 644 | 45 | *C L J* | 561 | | 104 | *I C* | 903 | | 55 | *Cal* | 228 | 881 | 104 | *I C* | 384 | | 104 | *I C* | 384 |
| | 31 | *C W N* | 940 | 725 | 31 | *C W N* | 973 | 806 | 46 | *C L J* | 149 | 882 | 104 | *I C* | 366 | | 104 | *I C* | 366 |
| | 104 | *I C* | 245 | | 104 | *I C* | 484 | | 105 | *I C* | 22 | 884 | 104 | *I C* | 353 | | 104 | *I C* | 353 |
| | 28 | *Cr L J* | 805 | | 54 | *Cal* | 813 | 808 | 54 | *Cal* | 754 | | 55 | *Cal* | 104 | | 55 | *Cal* | 104 |
| 647 | 31 | *C W N* | 730 | 733 | 46 | *C L J* | 51 | | 31 | *C W N* | 1068 | 885 | 104 | *I C* | 340 | | 104 | *I C* | 340 |
| | 103 | *I C* | 648 | | 104 | *I C* | 151 | | 105 | *I C* | 67 | 887 | 104 | *I C* | 360 | | 104 | *I C* | 360 |
| | 55 | *Cal* | 180 | 737 | 31 | *C W N* | 990 | 816 | 46 | *C L J* | 121 | | 47 | *C L J* | 59 | | 47 | *C L J* | 59 |
| 652 | 31 | *C W N* | 850 | | 104 | *I C* | 775 | | 104 | *I C* | 449 | 888 | 104 | *I C* | 347 | | 104 | *I C* | 347 |
| | 103 | *I C* | 740 | 741 | 46 | *C L J* | 93 | | 28 | *Cr L J* | 833 | 889 | 104 | *I C* | 527 | | 104 | *I C* | 527 |
| | 55 | *Cal* | 26 | | 104 | *I C* | 494 | 817 | 31 | *C W N* | 1050 | 900 | 104 | *I C* | 619 | | 104 | *I C* | 619 |
| 654 | 31 | *C W N* | 874 | 747 | 46 | *C L J* | 154 | | 55 | *Cal* | 108 | 902 | 104 | *I C* | 655 | | 104 | *I C* | 655 |
| | 103 | *I C* | 692 | | 9 | *A I Cr R* | 44 | | 106 | *I C* | 143 | | 55 | *Cal* | 201 | | 55 | *Cal* | 201 |
| 657 | 45 | *C L J* | 557 | | 28 | *Cr L J* | 897 | 818 | 54 | *Cal* | 493 | 904 | 54 | *Cal* | 1052 | | 54 | *Cal* | 1052 |
| | 104 | *I C* | 188 | | 105 | *I C* | 225 | | 103 | *I C* | 621 | | 104 | *I C* | 466 | | 104 | *I C* | 466 |
| 659 | 31 | *C W N* | 864 | 748 | 31 | *C W N* | 1007 | | 47 | *C L J* | 75 | 906 | 104 | *I C* | 799 | | 104 | *I C* | 799 |
| | 103 | *I C* | 683 | | 103 | *I C* | 674 | 820 | 46 | *C L J* | 241 | 907 | 104 | *I C* | 814 | | 104 | *I C* | 814 |
| | 46 | *C L J* | 535 | 751 | 46 | *C L J* | 156 | | 9 | *A I Cr R* | 20 | 908 | 54 | *Cal* | 485 | | 54 | *Cal* | 485 |
| 665 | 45 | *C L J* | 571 | | 9 | *A I Cr R* | 47 | | 28 | *Cr L J* | 874 | | 106 | *I C* | 477 | | 106 | *I C* | 477 |
| | 31 | *C W N* | 985 | | 28 | *Cr L J* | 900 | | 104 | *I C* | 714 | 911 | 104 | *I C* | 763 | | 104 | *I C* | 763 |
| | 104 | *I C* | 206 | | 105 | *I C* | 228 | 821 | 103 | *I C* | 853 | 913 | 31 | *C W N* | 1099 | | 31 | *C W N* | 1099 |
| 668 | 54 | *Cal* | 549 | 752 | 31 | *C W N* | 1016 | | 47 | *C L J* | 66 | | 104 | *I C* | 812 | | 104 | *I C* | 812 |
| | 104 | *I C* | 268 | | 104 | *I C* | 180 | 823 | 46 | *C L J* | 227 | 914 | 105 | *I C* | 52 | | 105 | *I C* | 52 |
| 679 | 31 | *C W N* | 908 | 756 | 46 | *C L J* | 145 | | 55 | *Cal* | 85 | 916 | 45 | *C L J* | 588 | | 45 | *C L J* | 588 |
| | 103 | *I C* | 846 | | 105 | 1 *C* | 12 | | 28 | *Cr L J* | 877 | | 106 | *I C* | 371 | | 106 | *I C* | 371 |
| | 28 | *Cr L J* | 766 | 758 | 31 | *C W N* | 1004 | | 104 | *I C* | 717 | 917 | 104 | *I C* | 704 | | 104 | *I C* | 704 |
| 680 | 54 | *Cal* | 539 | | 54 | *Cal* | 1057 | 825 | 103 | *I C* | 707 | 918 | 45 | *C L J* | 138 | | 45 | *C L J* | 138 |
| | 103 | *I C* | 545 | | 105 | *I C* | 356 | 827 | 103 | *I C* | 714 | | 101 | *I C* | 542 | | 101 | *I C* | 542 |
| | 8 | *A I Cr R* | 309 | 760 | 46 | *C L J* | 111 | 829 | 46 | *C L J* | 257 | 920 | 31 | *C W N* | 822 | | 31 | *C W N* | 822 |
| | 28 | *Cr L J* | 689 | | 104 | *I C* | 566 | | 105 | *I C* | 217 | | 104 | *I C* | 136 | | 104 | *I C* | 136 |
| 682 | 54 | *Cal* | 513 | 763 | 103 | *I C* | 662 | 830 | 103 | *I C* | 700 | 921 (1) | 100 | *I C* | 687 | | 100 | *I C* | 687 |
| | 103 | *I C* | 748 | | 55 | *Cal* | 67 | 831 | 46 | *C L J* | 247 | 921 (2) | 31 | *C W N* | 1012 | | 31 | *C W N* | 1012 |
| 686 | 31 | *C W N* | 936 | 766 | 46 | *C L J* | 168 | | 105 | *I C* | 600 | | 104 | *I C* | 742 | | 104 | *I C* | 742 |
| | 104 | *I C* | 828 | | 104 | *I C* | 822 | 833 | 46 | *C L J* | 172 | 924 | 46 | *C L J* | 250 | | 46 | *C L J* | 250 |
| 689 | 31 | *C W N* | 894 | 768 | 54 | *Cal* | 655 | | 104 | *I C* | 825 | | 105 | *I C* | 605 | | 105 | *I C* | 605 |
| | 103 | *I C* | 659 | | 104 | *I C* | 721 | 834 | 103 | *I C* | 695 | 925 | 103 | *I C* | 823 | | 103 | *I C* | 823 |
| 691 | 46 | *C L J* | 225 | 773 | 31 | *C W N* | 1031*n* | 836 | 54 | *Cal* | 687 | 926 | 45 | *C L J* | 577 | | 45 | *C L J* | 577 |
| | 104 | *I C* | 729 | | 105 | *I C* | 564 | | 104 | *I C* | 833 | | 105 | *I C* | 28 | | 105 | *I C* | 28 |
| 692 | 31 | *C W N* | 906 | 775 | 31 | *C W N* | 1045 | 844 | 54 | *Cal* | 716 | 928 | 46 | *C L J* | 182 | | 46 | *C L J* | 182 |
| | 103 | *I C* | 860 | | 106 | *I C* | 335 | | 104 | *I C* | 842 | | 31 | *C W N* | 818 | | 31 | *C W N* | 818 |
| | 55 | *Cal* | 78 | 776 | 46 | *C L J* | 175 | 845 | 54 | *Cal* | 1050 | | 103 | *I C* | 468 | | 103 | *I C* | 468 |
| 694 | 31 | *C W N* | 921 | | 104 | *I C* | 694 | | 103 | *I C* | 705 | | 104 | *I C* | 357 | | 104 | *I C* | 357 |
| | 104 | *I C* | 4 | 780 | 31 | *C W N* | 1030 | 846 | 54 | *Cal* | 681 | 930 | 8 | *A I Cr R* | 163 | | 8 | *A I Cr R* | 163 |
| 698 | 45 | *C L J* | 638 | | 105 | *I C* | 568 | | 104 | *I C* | 744 | 931 (1) | 31 | *C W N* | 532 | | 31 | *C W N* | 532 |
| | 103 | *I C* | 771 | 781 | 54 | *Cal* | 624 | 847 | 103 | *I C* | 698 | | 28 | *Cr L J* | 484 | | 28 | *Cr L J* | 484 |
| | 28 | *Cr L J* | 723 | | 105 | *I C* | 193 | 848 | 54 | *Cal* | 708 | | 101 | *I C* | 660 | | 101 | *I C* | 660 |
| 701 | 31 | *C W N* | 964 | 782 | 31 | *C W N* | 1052 | | 28 | *Cr L J* | 903 | | 45 | *C L J* | 126 | | 45 | *C L J* | 126 |
| | 104 | *I C* | 443 | | 106 | *I C* | 146 | | 105 | *I C* | 281 | 931 (2) | 100 | *I C* | 278 | | 100 | *I C* | 278 |
| | 28 | *Cr L J* | 827 | 783 | 54 | *Cal* | 614 | 850 | 103 | *I C* | 864 | | | | | | | | |

## A. I. R. 1927 Calcutta=Other Journals—(*Concld.*)

| A.I.R. | Other Journals | A.I.R. | Other Journals | A.I.R. | Other Journals | A.I.R. | Other Journals |
|---|---|---|---|---|---|---|---|
| 933 | 31 *C W N* 448 | 939 | 102 *I C* 357 | 946 | 100 *I C* 371 | 954 | 105 *I C* 860 |
| | 102 *I C* 398 | 940 | 100 *I C* 603 | 947 | 31 *C W N* 155 | 956 | 55 *Cal* 35 |
| 934 | 100 *I C* 641 | 941 | 45 *C L* 249 | | 100 *I C* 182 | | 46 *C L J* 307 |
| 935 | 46 *C L J* 116 | | 103 *I C* 93 | 949 | 8 *A I Cr R* 64 | | 32 *C W N* 16 |
| | 104 *I C* 571 | 944 | 7 *A I Cr R* 357 | | 45 *C L J* 204 | | 106 *I C* 117 |
| 936 (1) | 31 *C W N* 387 | | 31 *C W N* 242 | | 28 *Cr L J* 449 | | 105 *I C* 612 |
| | 28 *Cr L J* 478 | | 28 *Cr L J* 245 | | 101 *I C* 481 | 964 | 46 *C L J* 527 |
| | 101 *I C* 606 | | 100 *I C* 117 | 951 | 100 *I C* 501 | 965 | 32 *C W N* 160 |
| 936 (2) | 102 *I C* 148 | 945 | 103 *I C* 827 | 952 | 47 *C L J* 38 | 966 | 105 *I C* 857 |
| 938 | 45 *C L J* 60 | 946 | 7 *A I Cr R* 426 | | 32 *C W N* 192 | 968 | 105 *I C* 377 |
| | 100 *I C* 343 | | 45 *C L J* 1 | | 104 *I C* 668 | 970 | 105 *I C* 841 |
| 939 | 31 *C W N* 436 | | 28 *Cr L J* 291 | | | | |

THE

# ALL INDIA REPORTER

1927 CALCUTTA

---

## I. L. R. ALPHABETICAL INDEX

**of Cases reported in**

I. L. R. 54 CALCUTTA

WITH REFERENCES TO THE PAGES OF

**The All India Reporter**

[102 Cases]


| Names of Parties | I. L. R. | pp. | A. I. R. | | pp. |
|---|---|---|---|---|---|
| Abani Nath Mukherjee v. Secretary of State for India ... | | 119 | 1927 | C | 322 |
| Ali Mia v. Emperor ... ... ... ... | | 155 | " | " | 296 |
| Asrafennessa Khatun v. Heramba Chandra Chowdhry ... | | 114 | " | " | 216 |
| Aswini Kumar Dutta v. Sashi Bhushan Das... ... | | 1050 | " | " | 845 |
| Azimuddy v. Emperor ... ... ... | | 237 | " | " | 17 |
| Badu Mir v. Emperor ... ... ... | | 279 | 1927 | C | 213 |
| Banku Behari Chatterji v. Naraindas Dutt ... ... | PC | 500 | " | PC | 73 |
| Bansidhar Marwari v. Secretary of State for India ... | | 312 | " | C | 533 |
| Basiram Saha Roy v. Ram Ratan Roy ... ... | PC | 586 | " | PC | 117 |
| Bechu Lal Kayastha v. Emperor ... ... ... | | 286 | " | C | 250 |
| Behari Lal Mullick, *In the matter of* ... ... | | 630 | " | " | 553 |
| Bejoy Lal Seal v. Benarsidas Khandelwal ... ... | | 948 | 1928 | C | 99 |
| Bengal National Bank, Limited v. Janaki Nath Roy ... | | 813 | 1927 | C | 725 |
| Bhuban Mohan Sinha v. Ram Gobinda Goswami ... | | 179 | 1926 | C | 1218 |
| Brojo Gopal Naik v. Lakshimoni Dassi... ... ... | | 607 | 1927 | C | 791 |
| Carmen v. O'Brien ... ... ... ... | | 1041 | 1928 | C | 97 |
| Chakravarti, P. K. v. Emperor ... ... ... | | 59 | 1926 | C | 1133 |
| Chandi Charan Das v. Dulal Chandra Paik ... ... | | 30 | " | " | 1083 |
| Debendra Lal Khan v. F. M. A. Cohen ... ... | | 485 | 1927 | C | 908 |
| Debendra Narain Sarkar v Satya Charan Mukerji ... | | 614 | " | " | 783 |
| Dharani Mohan Ray v. Kshitipati Ray ... ... | | 782 | 1928 | C | 62 |
| Dibakar Das v. Saktidhar Kabiraj ... ... | | 476 | 1927 | C | 520 |
| Durga Charan Chandra v. Ambica Charan Chandra ... | | 424 | " | " | 393 |
| Emperor v. Har Mohan Das ... ... ... | | 708 | 1927 | C | 848 |
| ——v. Probhat Chandra Barua ... ... | FB | 863 | " | " | 432 |
| ——v. Satish Chandra Singha ... ... | | 721 | " | " | 536 |
| Enatullah v. Kowsher Ali ... ... ... | SB | 266 | 1926 | C | 1153 |

| Names of Parties | I. L. R. | pp. | A. I. R. | | pp. |
|---|---|---|---|---|---|
| Fakir Chand Mandal v. Daiba Charan Parni... | ... | 1052 | 1927 | C | 904 |
| Fakir Prasad Ghose v. Kripasindhu Pal Bhuti | ... | 137 | " | " | 303 |
| Gallagher v. Emperor ... ... | ... | 52 | 1927 | C | 307 |
| Girindra Nath Banerjee v. Birendra Nath Pal | ... | 727 | " | " | 496 |
| Gocouldas v. Chaganlal ... ... | ... | 655 | " | " | 768 |
| Gonesh Das Aurora, *In the goods of* ... | ... | 186 | 1926 | C | 1056 |
| Gopal Chandra Saha v. Abdar Rahim Biswas | ... | 328 | 1927 | C | 492 |
| Gopal Krishna Saha v. Matilal Singh ... | ... | 359 | " | " | 196 |
| Gregory J. M., *In re* ... ... ... | ... | 858 | 1928 | C | 50 |
| Haji Ayub Mandal v. Emperor ... ... | ... | 539 | 1927 | C | 680 |
| Hamid Ali v. Madhu Sudan Das Sarkar ... | ... | 355 | " | " | 284 |
| Harbhanjan Sao v. Emperor ... ... | ... | 601 | " | " | 527 |
| Hogarth v. Cory Brothers & Co. Ltd. ... | ... PC | 84 | 1926 | PC | 121 |
| Holmes Wilson & Co., Ltd. v. Bata Kristo De | ... | 549 | 1927 | C | 668 |
| India General Navigation and Railway Co., Ltd. v. Giridharilal Gobardhone Das ... | ... | 430 | 1927 | C | 394 |
| International Continental Caoutchoue Compagnie v. Mehta & Co. ... ... ... | ... | 1057 | " | " | 758 |
| Isaf Nasya v. Emperor ... ... | ... | 303 | 1928 | C | 24 |
| Jagannath Prosad Singh Chowdhury v. Surajmal Jalal | ... PC | 161 | 1927 | PC | 1 |
| Jalim Chand Patwari v. Yusuf Ali Chowdhuri | ... | 143 | 1025 | C | 1012 |
| Jamiruddin Ahammed v. Sahera Khatun Bibi | ... | 363 | 1927 | C | 579 |
| Japan Cotton Trading Co., Ltd. v. Jajodia Cotton Mills, Ltd. ... ... ... | ... | 345 | " | " | 625 |
| Jharu Mandal v. Khetra Mahton Bera ... | ... FB | 15 | 1926 | C | 934 |
| Jnanendra Bala Debi v. Official Assignee of Calcutta | ... | 251 | " | " | 597 |
| Joges Chandra Roy v.Sharfuddin ... | ... | 799 | 1927 | C | 857 |
| John Carapiet Galstaun v. Mrs. Diana Sarkies | ... | 1075 | 1928 | C | 177 |
| Jones, J. D. & Co., Ltd. v. Ranjit Roy ... | ... | 513 | 1927 | C | 682 |
| Kala Chand Banerjee v. Jagannath Marwari... | ... PC | 595 | 1927 | PC | 108 |
| Kasiswar Ray v. Satya Bhama Das ... | ... | 374 | " | C | 312 |
| Keshoram Poddar v. Nuhdo Lal Mallick ... | ... PC | 508 | " | PC | 97 |
| Kessoram Poddar & Co. v. Secretary of State for India | ... | 969 | 1928 | C | 74 |
| Khetra Mohan Saha v. Jamini Kanta Dewan | ... | 445 | 1927 | C | 472 |
| Kishen Dayal Chaukidar v. Darjeeling Municipality | ... | 394 | " | " | 574 |
| Krishan Doyal Jalan v. Corporation of Calcutta | ... | 532 | " | " | 509 |
| Krishna Chandra Dutta Chowdhury v. Dina Nath Biswas | | 1064 | 1928 | C | 94 |
| Krishna Kishore Adhicary, *In re*... ... | ... | 650 | " | " | 21 |
| Krishnendra Nath Sarkar v. Kusum Kamini Debi | ... PC | 166 | 1927 | PC | 20 |
| Madari Sikdar v. Emperor ... ... | ... | 307 | 1927 | C | 514 |
| Mahomed Ebrahim Molla v. Commissioners for the Port of Chittagong ... ... | ... | 189 | " | " | 465 |
| Mary Rebeiro v. Vincent Sherlock Rebeiro ... | ... | 80 | 1926 | C | 1014 |
| Mati Lal Lyall v. Premi Lyall ... | ... | 1038 | 1928 | C | 114 |
| Meghraj Kanyalal v. Durga Sahay Buldeodas | ... | 97 | 1927 | C | 291 |
| Midnapore Zamindary Co., Ltd., v. Naresh Narain Roy... | | 716 | " | " | 844 |
| Midnapore Zamindary Co., Ltd. v. Sadhumoni Dasi | ... | 681 | " | " | 846 |
| Moslem Mandal v. Emperor ... ... | ... | 134 | 1926 | C | 1224 |
| Moslem Sirkar v. Emperor ... ... | ... | 296 | 1927 | C | 516 |
| Muhammad Suleman v. Emperor ... | ... FB | 218 | 1926 | C | 1121 |

| Names of Parties | I. L. R. | pp. | A. I. R. | pp. |
|---|---|---|---|---|
| Narayan Das Khettry v. Jatindra Nath Roy Chowdhury | PC | 669 | 1927 | PC 135 |
| Official Assignee of Calcutta v. Ramratan Das Bagree ... | | 317 | 1927 | C 529 |
| Pran Kumar Pal Chaudhury v. Darpohari Pal Chaudhury | | 126 | 1927 | C 281 |
| Protap Chandra Deo v. Jagadish Chandra Deo ... | PC | 955 | " | PC 159 |
| Radha Binode Mandal v. Gopal Jiu Thakur... ... | PC | 770 | 1927 | PC 128 |
| Radhika Mohan Das v. Hamid Ali ... ... | | 371 | " | C 405 |
| Rahamat Shaikh v. Emperor ... ... ... | | 1026 | " | " 593 |
| Ramdas Singh v. Emperor ... ... ... | | 152 | " | " 28 |
| Ramgopal Ghose v. Dhirendra Nath Sen ... ... | | 380 | " | " 376 |
| Rash Behari Mandal v. Hemanta Kumar Ghose ... | | 788 | 1928 | C 52 |
| Sabjan Bibi v. Ashanulla Bepari... ... ... | | 524 | 1927 | C 411 |
| Sambhu Chandra Dey v. Kartick Chandra Dey ... | | 171 | " | " 11 |
| Sarada Kanta Sen Gupta v. Nabin Chandra Sen Gupta ... | | 333 | " | " 39 |
| Sarat Chandra Bose v. Bisweswar Mitra ... ... | | 405 | " | " 534 |
| Sarat Chandra Khan v. Upendra Nath Bose... ... | | 481 | " | " 623 |
| Saroj Basini Debi v. Mahendra Nath Bhaduri ... | | 836 | " | " 636 |
| Satindra Narain Sinha v. Chunilal Jamadar... ... | | 493 | " | " 818 |
| Satish Chandra Banerjee v. Hasemali Kazi ... ... | | 450 | " | " 488 |
| Satish Chandra Das v. Secretary of State for India ... | | 44 | " | " 311 |
| Sattar Ali v. Afzal Mahomed ... ... ... | | 283 | " | " 532 |
| Secretary of State for India v. Tarak Chandra Sadhukan | PC | 582 | " | PC 172 |
| Sharifuddin Mahammad v. Mohiuddin Mahammad ... | | 754 | " | C 808 |
| Solema Bibi v. Hafez Mahammad Hossein ... ... | | 687 | " | " 836 |
| Sonaton Pal v. Galstaun ... ... ... | PC | 414 | " | PC 60 |
| Subhash Chandra Bose v. R. Knight & Sons... ... | | 73 | " | C 297 |
| Sukumari Debi v. Mugneeram Bhangar & Co. ... | | 1 | 1926 | C 889 |
| Thansing Karamchand v. Hafez Mahammad Hossein ... | | 687 | 1927 | C 836 |
| Umamoyee Dasya v. Jatan Bewa. ... ... ... | | 624 | 1927 | C 781 |
| Umapati Mukerjee v. Sheik Soleman ... ... | | 419 | " | " 614 |
| Umed Mal v. Chand Mal ... ... ... | PC | 338 | 1926 | PC 142 |


## LIST OF OVERRULED CASES

## 1927 CALCUTTA

King Emperor v. Indu Bhusan Sarkar,
53 Cal. 524=A. I. R. 1926 Cal. 819
=95 I. C. 539.

Overruled in A. I. R. 1927 Cal. 432 (F. B.).

THE

# ALL INDIA REPORTER

## 1927

CALCUTTA HIGH COURT

## ** A. I. R. 1927 Calcutta 1

SANDERSON, C. J., AND PANTON AND GRAHAM, JJ.

*Brojendra Kishore Roy Chaudhuri*—Appellant.

v.

*Mohim Chandra Bhattacharji* and *others*—Respondents.

Letters Patent Appeal No. 6 of 1926, Decided on 25th June 1926, from the decree of Cuming and Mukerji, JJ., D/- 8th February 1926, in Second Appeal No. 2467 of 1923.

(a) *Evidence Act, S.* 13 (a)—*"Claim" must be asserted in presence of the party to be affected thereby.*

(*Per Cuming and Mukerji, JJ.*)—The word "claim" implies that the right is asserted to the knowledge and in the presence of the person whose right will be derogated by the establishment of the claim. The mere assertion of the right in a document, to which the person against whom the right is asserted is not a party and of which he knows nothing is not to claim the right. [P. 2, C. 2.]

(b) *Evidence Act, S.* 13—*Benami transaction is not admissible under S.* 13.

*Per Cuming and Mukerji, JJ.*—A benami transaction is a fictitious transaction and as such cannot be let in evidence under S. 13. [P. 2, C. 2]

(c) *Evidence—Objection to, is not justified in second appeal* (*contra Cuming and Mukerji, JJ.*)

It is unfair to allow a party in second appeal for the first time to object to the reception of evidence with the possible necessity of the case being sent back for rehearing. [P. 2, C. 2]

* (d) *Evidence Act, S.* 13—*Transaction by which right is asserted is admissible.*

A transaction or instance in which there is a mere assertion of a right or custom does not come within S. 13 but only such a transaction is admissible by which the right or custom is asserted or denied : 11 *C. W. N.* 703, *Foll.* [P. 5, C. 2]

* (e) *Evidence Act, S.* 167—*Evidence improperly admitted—High Court cannot examine whether other evidence is sufficient and should therefore remand the case for rehearing.*

There is great difficulty in applying the provisions of S. 167 to the generality of cases which come before the High Court on second appeal. When evidence has been improperly admitted, the High Court, not being a Court of fact, cannot decide whether the remaining evidence in the case is sufficient to warrant the finding, but should remand the case to the lower Court for rehearing. [P. 8, C. 2]

** (f) *Civil P. C., S.* 103 (*as amended by Act.* 6 *of* 1926, *S.* 2)—*High Court's powers—Civil P. C., S.* 100.

According to the amendment of S. 103, the High Court can decide, if there is sufficient evidence, a question of fact wrongly decided by the lower appellate Court. [P. 10, C. 1]

(g) *Bengal Tenancy Act, S.* 103-*B* (5)—*Rent not paid—Period of tenants' possession indefinite—Evidence is not sufficient to prove, the entry in record-of-rights that rent is assessable, is incorrect.*

When the period, during which the tenants have been in possession is left in an indefinite and nebulous state, that is not sufficient, even when taken with the fact that no rent has been paid, to show that the entry in the record of rights, viz., "Rent assessable but not taken and realised," is incorrect. [P. 10, C. 1]

*Brojo Lal Chuckerburty, Naresh Ch. Sen Gupta, Ramani Mohan Chatterji* and *Rebati Mohan Chatterji*—for Appellant.

*Gunoda Charan Sen* and *Birendra Kumar De*—for Respondents.

**Cuming, J.**—The facts of the case out of which this appeal arises are briefly these.

The plaintiff sued for the assessment of a fair rent on a certain plot of land some 2·48 acres in area and arrears of rent for the years 1325—1328 with the usual cesses. His case was that the de-

fendants had an occupancy right only in the land. The defence was that the land was held rent-free.

The first Court decreed the plaintiff's suit. The Court of appeal held that the defence had proved that they had been in possession of the land for a long period (some 80 years at least) without paying rent and from this fact he inferred that the original grant was a rent-free one and dismissed the plaintiff's suit.

The plaintiff has appealed and he has put forward three contentions. (1) That the lower Court wrongly admitted in evidence certain kobala Ex. A. The kobala was executed in 1281 by one Govinda, the predecessor-in-interest of the defendants by which he purported to sell the land in dispute together with some other land to his sister. In the document the vendor described his title as a nishkar brahmattar right.

The appellant contends that this statement is not admissible in evidence against him as he was no party to the document and also that as it was a benami document there was no real transaction and for that reason only S. 13, of the Evidence Act would not make the statement admissible. The respondent relies on S. 13, Evidence Act.

Section 13 is divided into two Cls. (a) and (b). (a) is as follows :

> Any transaction by which the right or custom in question was claimed, created, modified, recognised, asserted or denied.

The respondent contends that by the sale the nishkar right was claimed or asserted.

Now the transaction was the sale of the property. Can it be said that the nishkar right was asserted or claimed by this sale ? I think not. All that could be said to be asserted by the sale was that the vendor had some saleable interest in the property, not what the nature of that saleable interest was. The nishkar right of the vendor was no doubt asserted in the document by which the sale was effected but not by the transaction or sale. Cl. (a) does not I think help the respondents. We must then consider Cl. (b). Cl. (b) is divided into two parts, first particular instances in which the right was claimed, recognised or exercised. The respondent would contend that this is an instance where the right was claimed. I do not think so. It is no doubt an instance in which the right is asserted but to assert a right is not the same as to claim it.

This I think is clear from the fact that in Cl. (a) both words are used. "Claim" I think must mean that the right is asserted to the knowledge and in the presence of the person whose right will be derogated by the establishment of the claim. The mere assertion of the right in a document, to which the person against whom the right is asserted, is not a party and of which he knows nothing is not to claim the right. This part of Cl. (b) does not help the respondent. Neither does the second part of Cl. (b) which is as follows :

> Instance in which its exercise is disputed, asserted or departed from.

The mere statement in the deed of sale that the vendor had a nishkar right cannot be said to be an instance when the exercise of the right was asserted. It is difficult for me to conceive how a nishkar right can be exercised except perhaps by the refusal to pay rent.

There is a further argument that has been put forward by the appellant. The Court has found that the sale was a fictitious one. I have considerable doubts whether the execution of a benami document by which nothing really passes can be called a transaction. It is obviously a fictitious transaction and as such would not come within S. 13. I am of the opinion that the kobala Ex. A is not admissible. I do not, however, think that the admission vitiates the decision of the lower appellate Court. It is to be noted that it was admitted without objection in both the lower Courts and the objection is raised for the first time in second appeal. It has not been specifically taken in the ground of appeal.

Had the objection been taken in either of the Courts of fact, it could then have been dealt with. It seems to me to be unfair to allow a party in second appeal for the first time to object to the reception of evidence with the possible necessity of the case being sent back for rehearing. Neither do I think that the Court relied on this piece of evidence in coming to its decision. Reading the judgment as a whole I think it is quite clear that the judgment is really based on the inference which the Courts drew from the long and uninterrupted possession without paying rent. In such a case it is not necessary to send back the case to be re-considered excluding the inadmissible evidence. See the case of *Womesh Chunder Chatterji* v. *Chundee Churn*

*Roy* (1). I do not think therefore that the admission of this evidence is a ground for interfering with the decision of the lower Court.

The next contention put forward is that the settlement record shows that the land is liable to pay rent and that in accordance with S. 103B, Bengal Tenancy Act, there is a presumption of the correctness of the entry. The lower appellate Court has not considered the record or definitely found that it had been rebutted. There is little substance in this contention. The learned Judge had obviously the settlement record before him, for he twice refers to it. No doubt he does not state in so many words that the entry in the settlement record has been rebutted but it is perfectly clear from a perusal of the whole judgment that this is what he has found. The effect of the presumption in the settlement record is to throw on the defendant the burden of proving that his land is not rent-paying. The learned Judge has obviovsly dealt with the case from this point of view.

He dealt at some length with the question whether the defendant has or has not ever paid rent. He finds that he has not done so for some 80 years at least and from that fact draws the inference that the land is rent-free, or, in other words, that the entry in the record-of-rights that it is liable to pay rent has been rebutted. A perusal of the judgment makes it clear that he placed the onus of proving the rent-free nature of the holding on the defendant.

The last contention would seem to be that the learned Judge was not correct in holding that long possession without payment of rent raises the presumption of a rent-free title. It no doubt would have been more correct to say that long and uninterrupted possession without the payment of rent entitles the Court to presume or perhaps more correctly to infer that the original grant was a rent-free one and I think, reading the judgment as a whole, this is what the learned Judge meant.

No doubt in one portion of his judgment he uses the expression that long possession without paying rent raises the presumption of a rent-free title, but before this he had after discussing the evidence and finding that defendant had never paid rent remarked that in such circumstances the proper inference to be drawn was that the defendants held under a rent-free title. The learned Judge in dealing with the case had before him the decisions of this Court reported in *Biprodas Pal Choudhury* v. *Manoroma Debi* (2) and *Nabab Ali* v. *Birendra Kishore* (3) where the law is stated on the particular point and I have no reason to think he misunderstood these decisions.

Lastly, it was argued that the plaintiff's right as proprietor having been admitted it was for the defendant to show that he had a rent-free title. I think that is what the learned Judge has done. He has gone into the case of the defendants that it is nishkar and having found that proved then states that the zemindars must then prove that it is rent-paying. He has for his authority, in so dealing with the case a decision of this Court *Biprodas Pal Choudhury* v. *Manoroma Debi* (2). This objection has no substance. I would, therefore, dismiss the appeal with costs.

**By Court.**—The result is that the appeal fails and is dismissed with costs.

**Mukerji, J.**—This appeal arises out of a suit for assessment of rent and for recovery of arrears of rent. The plaintiff's case is that the defendants are in possession of the lands in suit under him in ordinary jote right and they have been recorded in the finally published record-of-rights as "madhya satyadhikaris," that is to say, tenure-holders who do not pay any rent but are liable to be assessed with rent. The defendants alleged that the lands are nishkar ;brahmattar and are not liable to be so assessed. The Munsif decreed the suit, but on appeal the Subordinate Judge has dismissed it. The plaintiff has preferred this second appeal.

A preliminary objection was taken to the competency of the appeal on the ground that it is barred by reason of the provisions of S. 153 of the Bengal Tenancy Act. I am of opinion that this objection should be overruled, as the decree appealed from, by overruling the plaintiff's contention as to his right to have the rent assessed and giving effect to the defendants' contention that they had a nishkar brahmattar right, in a suit

(1) [1881] 7 Cal. 293.

(2) [1917] 45 Cal. 574=47 I. C. 49=22 C.W.N. 396.

(3) [1913] 22 C. L. J. 124=24 I. C. 424.

in which assessment of rent was claimed decided a question of the amount of rent annually payable. On the merits I have the misfortune to differ from the order which my learned brother desires to pass in this appeal. I am clearly of opinion that the appeal should succeed, and that upon two main grounds, if not on a third ground as well.

The first ground is to the effect that the entry in the record-of-rights as regards the assessability of the land to rent creates a presumption in plaintiff's favour and that presumption has not been taken into account at all by the learned Subordinate Judge. The learned Judge has referred to the settlement records in three places in his judgment: once when he has set out the plaintiff's case, again when he has remarked that the lands are recorded as jote of Gopinath (the grandfather of the defendants), and a third time when he has adverted to the fact that the defendants were recorded as being in possession of the lands. There is nothing to indicate that he had in his mind the presumption which the entry creates or that he has thrown this presumption into the scale when weighing the evidence.

The respondents' answer to this contention is two-fold. It is said in the first place that every Subordinate Judge, and especially this learned Judge who, it is said, is an officer of great experience, must be supposed to know that such a presumption arises under the law and therefore it must be supposed that he has taken it into account. In the next place it is said that the plaintiff himself disputed the correctness of the entry in so far as it records the defendants as tenure-holders and therefore did not rely on it, and under such circumstances the presumption does not arise. As regards the first answer it is true that every Judge is presumed to know the law that he administers; so also is every litigant; but we can only go by the judgment which is before us. The law enjoins that the Judge in dealing with a case which is open to appeal must give his reasons for his decision. If in the decision no reference is made to such an important presumption of law as this and if from nothing that has been expressed in or can be implied from the decision it can be gathered that the Judge had it in his mind, I find myself unable to act upon a mere supposition of this character.

As regards the second answer it is not correct to say that the plaintiff himself repudiated the entry; only he did not rely on that part of it which related to the defendants' status. In the plaint the portion of the entry relating to the assessability of the lands has been relied upon; and even assuming that the other portion namely, that relating to the defendants' status, was falsely alleged to be wrong, the plaintiff cannot be penalized by being deprived of the presumption which necessarily arises in his favour under the law.

The second ground relates to the admissibility and evidentiary value of the recital in the kobala Ex. A. The learned Subordinate Judge observes thus with reference to this document:

> The kabala Ex. A, dated 31st Aswin 1281, shows that in that year Gopinath's son Govinda (meaning the father of the defendants) purported to sell the plaint lands along with other lands to his sister alleging that the lands were his nishkar brahmattar and that his father Gopinath was in possession of those lands in nishkar right. The evidence shows thot notwithstanding the kobala Govinda did not part with the possession of the plaint land. From this it is urged that the kobala was a benami document and has no value. It may be a benami document, but the recital in the kobala has some value having been made by a person in possession so far back as 1281.

Unfortunately the decided cases bearing on this point are not uniform and do not profess to give sufficient reasons for holding that a particular document is or is not admissible; and I may also say, with the utmost deference, that in some of them is noticeable a confusion between admissibility of evidence and the value of it. I propose to refer to some of them presently, but I would prefer to deal with the section first. In the words of Garth, C. J., in the case of *Gujja Lal* v. *Fatteh Lal* (4).

> a transaction is a business or dealing which is carried on or transacted between two or more persons.

That a deed is evidence of a transaction cannot be disputed; the very illustration to the section shows that it is. The sale deed, therefore, is evidence of a transaction which may come in under Cl. (a) of S. 13 if the requirements of that clause are satisfied. That clause runs in these words:

> Any transaction by which the right or custom in question was created, claimed, modified, recog-

(4) [1880] 6 Cal. 171=6 C. L. R. 439 (F. B.).

nized, asserted or denied or which was inconsistent with its existence.

The question being whether the defendants have a nishkar brahmattar right, a deed conferring the nishkar brahmattar right on the defendants' predecessor would be admissible as a transaction by which the right was "created," but not a sale deed executed by the defendants in respect of that right. The word "claimed" need not be considered, as the word implies a demand which involves the presence of the party against whom such damand is made and who may have an opportunity either to comply with it or refuse it. There is no question of "modification," "recognition" or "denial" in such a case as that of a deed of sale. The sale of a right is not inconsistent with the existence of the right but is on the other hand inconsistent with its non-existence. The deed, however, is a transaction in which the right is asserted for the sale involves an assertion of the existence of the right. As pointed by Geidt, J., in the case of *Bansi Singh* v. *Mir Amir Ali* (5), the word "by" and not "in" appears in the clause and that stress should be laid on the use of the word "by" in this clause is also the view expressed by Seshagiri Aiyar, J., in the case of *Saripatti* v. *Fota* (6).

The question, therefore, arises whether the assertion of the nishkar brahmattar right in the deed is an assertion of that right by the transaction constituted by the deed; or, in other words, was this right asserted by the business or dealing as between the vendors and the vendee in respect of this deed. I am of opinion that it is not; the transaction is one by which the vendor asserted his competency to transfer the property, that is to say, that he had such interest in the property as would enable him to sell it, but that is all, and by this transaction the other incidents of the right are not asserted. The deed, therefore, does not come within Cl. (a). To turn now to Cl. (b). The wording of this clause is different from that of Cl. (a) in several respects. It speaks in the first place of "particular instances" showing that evidence to be admissible must relate to such "instances" as distinguished from "transactions."

An instance of the creation or modification of a right or custom would be inconceivable apart from the transaction by which it was created or modified and so the words "created and modified are omitted in Cl. (b). There may be a transaction by which there has been the recognition of a right or custom, there may also be particular instances of its recognition, and so "recognized" appears in both the clauses. Instead of the words, by which the right or custom is asserted or denied or which was inconsistent with its existence, we have the words:

In which the right or custom was exercised or in which exercise was disputed, asserted or departed from.

It is clear that in Cl. (b) instances of assertions or denials of right or custom do not come in, but only instances of its exercise or instances when its exercise was disputed, asserted or departed from. Can any conceivable ground be suggested why if a mere assertion or denial in respect of a right or custom was to be evidence, no evidence of "particular instances" of such assertion or denial could be given and yet evidence would be admissible in respect of "transactions" in which there has been such assertion or denials? I fail to see any.

I am, therefore, of opinion that a transaction or instance in which there is a mere assertion or denial of a right or custom does not come within S. 13 but only such a transaction is admissible by which the right or custom is asserted or denied. It has been urged that the illustration militates against this view, but I do not see that it does. The illustration speaks of a case where the question is whether A has a right to a fishery. In such a case a deed conferring the fishery on A's ancestors should be a transaction by which a right to the fishery was created; so a mortgage by A's father would be a transaction by which a right to the fishery would be asserted; and so also a subsequent grant of the fishery by A's father irreconcilable with the mortgage. All these would come under Cl. (a). Instances in which A's father exercised the right or in which the exercise of the right was stopped by A's neighbour would come under Cl. (b). The reason of the rule why instances of exercise of the right are admissible has been clearly explained by Parke, B., in *Jones* v. *Williams* (7):

The ground on which such acts are admissible is not the acquiescence of any party. They are

(5) [1907] 11 C. W. N. 703.
(6) [1914] M. W. N. 779=26 I. C. 747.
(7) [1837] 2 M. & W. 326.

admissible of themselves *proprio vigore*, for they tend to prove that he who does them is the owner of the soil; though if they are done in the absence of all persons interested to dispute them, they are of less weight.

Recitals in a deed are not transactions but instances of assertions or denials of the existence of the right. They come neither under Cl. (a) nor under Cl. (b). They are statements which unless they are relevant under some other provisions of the law, e. g., as admissions or statements of deceased persons, etc., are not admissible in evidence. In the case of *Brojeswari Peshkar* v. *Budhanuddi* (8), Garth, C. J., observed thus:

> A recital in a deed or other instrument is in some cases conclusive and in all class of cases evidence as against the parties who make it . . . . . But it is no more evidence as against other persons than any other statement would be.

The Judicial Committee in the case of *Banga Chandra Dhur Biswas* v. *Jagat Kishore Acharjya* (9) observed thus:

> Under ordinary circumstances and apart from statute recitals in deeds can only be evidence as between the parties to the conveyance and those who claim under them.

As has been observed by a very learned Judge, where a document is admitted in evidence of a transaction the parties are often apt to refer to the recitals therein as relevant evidence, and the distinction between the deed as a transaction and the recitals contained in the deed is frequently overlooked. In the case of *Dwarka Nath Bakshi* v. *Mukunda Lal Choudhury* (10), which was a case in which a deed of sale and a mortgage deed, though not inter partes containing recitals that a particular land belongs to a particular howla, were sought to be admitted in a suit in which the question was whether the land belonged to that howla or not, as far as can be made out of the facts from the report of the case, they were documents executed by strangers in favour of one of the defendants to the suit who was a co-sharer of the other defendants whose share the plaintiff's father had purchased at an execution sale. Rampini, J., purporting to rely upon the cases of *Daitari Mahanti* v. *Jagabandhu Mahanti* (11) and *Vythilinga* v. *Venkatachala* (12), held that they were admissible under S. 11 (b) and S. 13 of the Evidence Act, and observed that they may be very weak evidence or even of no weight at all, but they could not be rejected as inadmissible.

Geidt, J., held that they were admissible as transactions by which the right to hold the land as part of the howla was recognised. This decision, however, was treated as obiter in a later case of this Court, namely, that of *Abdul Ali* v. *Syed Rejanali* (13) in which the cases of *Daitari Mahanti* v. *Jagabandhu Mahanti* (11) and *Vythilinga* v. *Venkatachala* (12) were distinguished and it was thus observed:

> We know of no authority for saying that a private transaction between persons who have no power to bind a person whose right is sought thereby to affect can be admitted as evidence against him and the obvious dangers that might arise from such a proceeding make us very unwilling to hold that a transaction is one that comes under S. 13 unless we are obliged to.

The authority of the decision in the case of *Dwarka Nath Bakshi* v. *Mukunda Lal Choudhury* (10) has been doubted in the more recent decisions of this Court. e. g., *Saraj Kumar Acharji* v. *Umed Ali Howladar* (14) and *Pramatha Nath Choudhuri* v. *Krishna Chandra Bhattacharji* (15), though the latter two cases, in my opinion, are clearly distinguishable from that case. In *Sabran Sheikh* v. *Udai Mahto* (16) the learned Judges of the Patna High Court in a suit in which the plaintiffs claimed some land as their mal land and the defendant claimed it as his jote, an ekrarnama addressed by a third person to an ancestor of the plaintiff in which the land was described as mal land was held admissible both under Clause (a) and Clause (b) of S. 13, on the ground that it was a transaction in which the right was claimed and an instance in which the right was exercised.

In this decision the authority of the decision in *Abdul Ali* v. *Syed Rejanali* (13) was doubted and reliance was placed amongst others upon the cases of *Daitari Mahanti* v. *Jagabandhu Mahanti* (11) and *Vythilinga* v. *Venkachala* (12) and also upon the decision in *Jones* v. *Williams* (7). In a later decision of this Court in the case of *Jnanendra Nath Dutt* v. *Nasea Dasi* (17), which was a suit by a landlord against a tenant

(8) [1880] 6 Cal. 268=7 C. L. R. 6.
(9) [1916] 44 Cal. 186=36 I. C. 420=43 I. A. 249 (P. C.).
(10) [1906] 5 C. L. J. 55.
(11) [1875] 23 W. R. 293.
(12) [1892] 16 Mad. 194.
(13) [1913] 19 C. W. N. 468=21 I. C. 618.
(14) [1921] 25 C. W. N. 1022=63 I. C. 954.
(15) A. I. R. 1924 Cal. 1067.
(16) A. I. R. 1922 Patna 488=1 Pat. 375.
(17) A. I. R. 1924 Cal. 991.

who claimed a permanent tenure, Rankin J., held that an assertion in the kobala executed by a tenant in favour of his transferee that his right in it was a permanent one was admissible under S. 13. It will serve no useful purpose to refer to other cases bearing on the point, as the conflict in the decisions it is impossible to reconcile.

Now, whatever may be the correct view as regards the admissibility of the kobala or of its recitals, I do not think it can be ever urged that the recitals contained therein can go in evidence under S. 13 in view of the fact that the transaction was held by the Munsif to be a benami one, and the Subordinate Judge has not dissented from that view. The learned Judge was of opinion that the recital has some value. He must have taken that value of it into his consideration, and if he has done so his judgment must have been affected by it. I am not prepared to read his judgment, as I have been asked to do, as meaning that the recitals had no value, in the face of the express statement that they had some value. A transaction contemplated by S. 13 is a genuine and bona fide transaction, but a benami transaction which is one not meant to be acted upon is a fictitious transaction and in the eye of law is no transaction at all. Such a transaction in my opinion cannot be led in as evidence in proof of a right or custom. The plaintiff, in my judgment can legitimately complain, if this piece of evidence has been used against him. The argument that the document was admitted without objection and therefore its admissibility cannot be challenged now, does not appeal to me as it is difficult to imagine that the appellant could foresee that the recitals would be used as evidence against him.

The third ground is one about which I am not so very definite. That relates to the onus of proof. There are passages in the judgment of the learned Subordinate Judge which may be taken as suggesting that he has mixed up the case of a contest between a Zemindar and a tenant, the former claiming an alleged lakheraj tenure as being included within his mal lands and on that ground claiming rent from the latter, and a case like the present one in which a rent-free title is claimed by a tenant in defence to a suit for rent. There are passages also which would indicate that the learned Judge was relying upon the failure on the part of the plaintiff to prove that he ever realized rent from the defendants as negativing his claim : for assessment and recovery of rent.

There is also a vein of reasoning running through the judgment of the learned Judge suggesting that non-realization of rent for a long series of years, during which the tenant is in possession, raises, as if in law, a presumption of a rent-free title in the latter, and in support of this position two cases have been cited and relied upon. Those cases, however, appear to have been decided on their own special facts. On the other hand, it is not impossible to take the view that the Judge has kept in view the fact that the onus is on the defendants and that from the fact that they have been in possession for a long series of years without payment of rent—a circumstance which called for some explanation from the plaintiff and in respect of which no explanation was offered by him and possibly from other facts as well the learned Judge drew the inference as he was entitled to do, that there was a contract or grant which created a rent-free title in the defendants. If this ground therefore had stood alone I should not have been prepared to interfere with the decree of the learned Subordinate Judge As, however, I am of opinion that the decree should be set aside on the other two grounds to which I have referred, I would remand the case to the Court of appeal below in order that the whole appeal may be re-heard and disposed of in accordance with law and in the light of this my judgment. Costs of this appeal will abide the result.

The judgment in L. P. Appeal against the above decision was as follows :

**Sanderson, C. J.**—This is an appeal under the Letters Patent of this Court from a decision of my learned brother Mr. Justice Cuming. The suit was brought by the plaintiff for assessment of rent and for the recovery of arrears. The learned Munsif, who tried the case, decided that the plaintiff was entitled to recover rent for the period in suit at the rate of Rs. 4-6-8 pies with usual cesses and damages therein and that he should recover enhancement at the progressive rate mentioned in the judgment. The defendants appealed and the learned

Subordinate Judge allowed the appeal and dismissed the suit. He held that the lands in suit were not liable to be assessed with rent.

At the hearing of the appeal in the High Court, my learned brother, Mr. Justice Cuming was of opinion that the appeal should be dismissed and my learned brother Mr. Justice Mukerji was of the opinion that the matter should be remanded to the lower appellate Court in order that the appeal might be re-heard and disposed of in accordance with law in the light of the learned Judge's judgment. The result was that the opinion of Mr. Justice Cuming prevailed and the appeal was dismissed. Consequently the plaintiff has appealed under the Letters Patent to this Court.

Three main matters were argued by the learned vakil who appeared for the plaintiff. The first was that the learned Subordinate Judge had improperly relied upon a recital in a kobala which was marked Ex. A and dated the 31st of Aswin, 1281 B. S. which corresponds to the year 1874 That was a document, whereby one of the defendants' predecessors, Govinda by name, purported to sell the plaint lands with other lands to his sister alleging that the lands were his nishkar brahmattar and that his father Gopinath was in possession of these lands in nishkar right.

Both the lower Courts seem to have come to the conclusion that this was a benami document, but the learned Subordinate Judge considered that, even though it were a benami document, the recital in the kobala had some value, having been made by the person in possession so far back as 1874. Both the learned Judges of the Division Bench of this Court agreed that the recital in the kobala should not have been admitted in evidence.

My learned brother Mr. Justice Cuming, however, was of the opinion that the admission did not vitiate the decision of the lower appellate Court. He came to the conclusion that the Court did not rely upon this piece of evidence in coming to its decision. He thought that the judgment was really based on the inference which the Court drew from the long and uninterrupted possession without paying rent. On the other hand, my learned brother, Mr. Justice Mukerji, came to the conclusion that it was impossible to say to what extent the learned Judge's mind was influenced by this piece of evidence which was improperly admitted.

There is no doubt about the principle upon which this matter should be dealt with. That has been laid down by this Court in the case of *Woomesh Ch. Chatterji* v. *Chundee Churn Roy Choudhuri* (1). The learned Chief Justice said at page 295 :

> The 167th section of the Evidence Act provides : "That the improper admission of evidence shall not be ground of itself for a new trial, if it shall appear to the Court before which the objection is raised, that, independently of the evidence objected to and admitted there was sufficient evidence to justify the decision.' t seems to me, however, that there is great difficulty in applying the provisions of this section to the generality of cases which come before the High Court on second appeal, and the difficulty arises thus.
>
> On second appeal we have no power to deal with the sufficiency of the evidence ; we have only a right to entertain questions of law. And our duty being thus confined, it seems to me, that when evidence has been wrongly admitted by the Court below, this Court has, generally speaking, no right to decide, whether the remaining evidence in the case, other than that which has been improperly admitted, is sufficient to warrant the finding of the Court below.
>
> We cannot decide that question, as it seems to me, without examining in detail that other evidence, and determining, as a question of fact whether it is sufficient of itself to warrant the lower Court's finding.

My learned brother Mr. Justice Cuming did not act on that principle. The evidence was not examined by the Division Bench, but the learned Judge apparently relied upon the further observation of the learned Chief Justice at page 296 where he is reported to have said as follows :

> On further consideration, I think that the only cases, which we may with propriety dispose of under such circumstances without a remand, are those where, independently of the evidence improperly admitted, the lower Court has apparently arrived at its conclusion upon other grounds. Where this appears pretty clear from the judgment, a remand is unnecessary, because then the error committed by the lower Court has not affected the decision upon the merits.

I regret that I am unable to agree with my learned brother Mr. Justice Cuming on this part of the case. I say "regret" because I should have liked to have agreed with him and disagreement with him means that this case has to be remanded. But I am unable to say that it is apparent from the judgment of the learned Subordinate Judge that he decided the case upon other evidence independently of the

recital in the kobala to which I have referred. The second point is that the lands in suit were recorded in the record-of-rights as being in the possession of the defendants or their predecessors with the remark that the lands were liable to be assessed with rent although no rent had been paid.

The entry to which I have referred is, under the provisions of S. 103-B of the Bengal Tenancy Act, evidence of the matter referred to in such entry and it shall be presumed to be correct until it is proved by evidence to be incorrect.

I have read the judgment of the learned Subordinate Judge more than once and although he referred to the entry in the record-of-rights three times. I am not satisfied that he approached the case from the right point of view having regard to the provisions of S. 103-B. In the first place, he referred to the entry when he stated the plaintiff's case at the beginning of his judgment. The second time he referred to the settlement proceedings and stated that the lands were recorded as jote Gopinath and the third time he stated that during the cadastral survey the lands were recorded in the defendants' possession. Except when he was dealing with the statement of the plaintiff's case, the learned Subordinate Judge referred to the entry in the record-of-rights merely for the purpose of showing that the lands were in the possession of the defendants and their predecessors.

I agree with my learned brother Mr. Justice Mukerji that the learned Subordinate Judge does not seem to have approached this case from the point of view that the entry in the record-of-rights had to be accepted as correct until it had been proved by evidence to be incorrect. For these two reasons I agree with my learned brother Mr. Justice Mukerji that this case ought to be remanded. I do not lay much stress on the third point which was referred to by the learned vakil because I think that it is quite open to this Court to read the learned Subordinate Judge's judgment as meaning that upon the evidence he inferred that there had been a grant of rent-free title to the defendants' predecessors. The result is that in my judgment the order of Mr. Justice Cuming should be set aside and the case should be remanded to the lower appellate Court in order that the appeal may be re-heard and decided in accordance with law.

I endeavoured to see whether it was possible for this Court to determine the issue of fact and to dispose of this appeal without remanding it. I find that under S. 103 of the Code of civil Procedure, the power of the High Court with regard to such an appeal as this is limited. The issue of fact in this case was determined by the Court below, and we have no jurisdiction to dispose of the appeal finally here much as I should have liked so to do.

As regards the costs of the hearing before the Division Bench Mr. Justice Mukerji's directions will stand, and there will be no order as to costs of the Letters Patent appeal. Costs of the first hearing in the lower appellate Court will abide the event of the second hearing.

**Panton, J.**—I agree.

**Graham, J.**—I agree.

(On the appeal being subsequently reheard the judgment was as follows.)

**Sanderson, C. J.**—This is a re-hearing of the Letters Patent Appeal No. 6 of 1926. It was heard by my learned brothers and me on the 16th of this month, and this Court came to the conclusion that the order which was suggested by my learned brother Mr. Justice Mukerji should be carried out, namely, that the case should be remanded to the lower appellate Court in order that the appeal might be re-heard, and we expressed regret that we were not able to decide finally the matters which were in controversy because of the limitation involved in the provisions of S. 103 of the Civil P. C.

My learned brother Mr. Justice Panton and I had signed the the judgment, but my learned brother Mr. Justice Graham had not signed it. We then discovered that Act VI of 1926, which amended S. 103 of the Civil P. C., had come into force in February 1926 and consequently was in force at the time when we heard the appeal. My learned brothers and I considered that this Court had jurisdiction to re-hear the appeal and decide the case in accordance with the provisions of the amended S. 103 and both the learned advocates who appear for the respective parties in this appeal have agreed that this Court has jurisdiction to re-hear it.

Section 2 of Act VI of 1926 provides as follows :

In S. 103 of the Code of Civil Procedure, 1908, for the words ' but not determined by the lower appellate Court ' the words ' which has not been determined by the lower appellate Court or which has been wrongly determined by such Court by reason of any illegality, omission, error or defect such as is referred to in sub-S. (1) of S. 100 ' shall be substituted.

In view of that alteration I have no doubt that this Court has jurisdiction to decide finally the issues with which this Court dealt in its judgment on the 16th of June 1926.

The main issue in the case is whether the entry in the record-of-rights has been shown to be incorrect.

The entry in the record-of-rights with regard to the property in suit is as follows :

Rent assessable but not taken and realised.

That record-of-rights was finally published in the year 1913. No steps were taken on behalf of the defendants to have that entry in the record-of-rights corrected or altered, and it was not until 1922 when the plaintiff brought this suit for the purpose of recovering rent from the defendants that the defendants for the first time asserted that the entry in the record-of-rights was incorrect.

The provision relating to this matter is S. 103-B (5) of the Bengal Tenancy Act and it is so well-known that it is hardly necessary to read it. The words are as follows :

Every entry in record-of-rights finally published shall be evidence of the matter referred to in such entry and shall be presumed to be correct until it is proved by evidence to be incorrect.

The only question in this case, which I think it is necessary to consider at present, is whether the defendants by the evidence, which has been produced in this case, have shown that the entry in the record-of-rights is incorrect.

The defendants rely principally upon two matters, first : that they and their predecessors have been in possession of the land in suit for a long period ; and secondly, that they have not paid any rent.

The time during which the defendants have been in possession, in my judgment, has been left indefinite and I am not prepared to hold that, when the period during which the defendants have been in possession is left in an indefinite and nebulous state, that is sufficient, even when taken with the fact that no rent has been paid to show that the entry in the record-of-rights is incorrect.

The learned advocates who appeared for the respective parties in this case have dealt with the evidence on the one side and on the other and have drawn our attention to the material documents, but I am not prepared to say that the defendants have succeeded in showing that the entry in the record-of-rights is incorrect.

The result, in my judgment, is that the decree of the lower appellate Court must be set aside and that the judgment of the learned Munsif in this respect must be restored.

A further point, however, was taken by the learned advocate for the defendants, namely, that the learned Munsif was wrong in holding that the rent was liable to be enhanced under S. 30 (b) of the Bengal Tenancy Act at the progressive rate which is mentioned in his judgment. It was pointed out by the learned advocate that the learned Munsif in an earlier part of his judgment had proceeded in accordance with the provisions of S. 7 of the Bengal Tenancy Act, which is a section in the chapter which relates to tenure-holders. He further drew our attention to the entry in the record-of-rights, which being translated is " holder of a middleman's interest, " and he further relied upon the finding of the learned Munsif that the plaintiff's contention that the defendants were ordinary occupancy-holders was incorrect. He, therefore, argued that the learned Munsif was wrong in applying S. 30 (b) to this case.

The learned advocate for the plaintiff in his reply was constrained to admit that there was really no answer on this part of the case to the argument which had been advanced on behalf of the defendants.

In my judgment the argument on behalf of the defendants in this respect is correct.

Consequently the decree in this case must be confined to the decree that the plaintiff is entitled to recover for the period in suit rent at the annual rate of Rs. 4-6-8 pies with the usual cesses and damages therein. The parties will pay their own costs in all the Courts.

**Panton, J.**—I am of the same opinion.

**Graham, J.**—I am also of the same opinion.

*Appeal allowed.*

## * A. I. R. 1927 Calcutta 11

GREAVES AND MUKERJI, JJ.

*Shambo Chandra De* and *others*—Plaintiffs—Appellants.

v.

*Kartick Chunder Dey*—Defendant—Respondent.

Appeal No. 189 of 1924, Decided on 18th May 1926, from the appellate decree of the Addl. Sub-J., Howrah, D/- 6th September 1923.

(a) *Hindu Law—Succession — Samanodaka and Sakulyas—Kinsmen ex parte materna are not Sakulyas.*

Though every person is competent to present libation of water to every other the law of inheritance has given a limited signification to the term "Samanodaka." It is not every person who is competent to present the water that must be considered an heir, and among the Samanodakas those alone are entitled to the inheritance who are also Sakulyas or allied by the family with the deceased. The kinsmen ex parte materna are excluded from Sakulyas.

[P. 12, C. 2]

(b) *Hindu Law—Succession—Dayabhaga and Mitakshara are radically distinct.*

The scheme of the Dayabhaga is radically distinct from and to some extent incompatible with the scheme of the Mitakshara, and the one cannot well be made to supplement the other so far as the law of inheritance is concerned : 16 *C. L. J.* 14, *Rel. on.* [P. 13, C. 1]

* (c) *Hindu Law—Succession—Dayabhaga.*

Maternal-great-great-grandfather's daughter's son's son is no heir under Dayabagha.

[P. 11, C. 2]

*Jogendra Chandra Ghose, Promode Kumar Ghose* and *Indu Prokas Chatterjee*—for Appellants.

*Bijan Kumar Mukherjee*—for Respondent.

**Mukerji, J.**—(After giving pedigree his Lordship proceeded.) The plaintiff sued for a declaration that he is entitled to receive the rent of a patni to the extent of 8 annas from the defendant. The facts are not disputed. The patni mehal belonged to Rashbehary Chodhury, and on his death was inherited by his sons Sadananda and Bankubehary in equal shares. Sadananda's 8 annnas share was inherited by his sons Nimai and Badan, each having a 4 annas share. Badan's 4 annas share was inherited, on his death, by his daughters Nityamoyee and Kritarthamoyee, and on the death of the former her interest passed on to the latter. Nimai's 4 annas share passed on his death, to his widow Pearymoyee, and on the latter's death to Haridas, son of Kritarthamoyee. Kritarthamoyee and Haridas leased the 8 annas patni right to defendant. Haridas died leaving a widow, Kirandasi, who is also dead, and Kritarthamoyee died after her. The plaintiff's case is that on the death of Kritarthamoyee he has inherited the said 8 annas interest.

The Munsif decreed the suit. The Subordinate Judge, on appeal, has given the plaintiff a decree for the 4 annas share which Kritarthamoyee has inherited from Badan and has disallowed the plaintiff's claim to the 4 annas share which Haridas had inherited from Nimai. The plaintiff has preferred this appeal which relates to the 4 annas share so disallowed. There is no cross-appeal on behalf of the defendant and we are no longer concerned with the other 4 annas share.

The Subordinate Judge has observed in his judgment that so far as Nimai's 4 annas share is concerned, Haridas got it absolutely and Haridas was the last male owner through whom the plaintiff should have claimed, but instead of that the plaintiff had rested his claim as heir of Badan and the claim, therefore, was misconceived. He has further observed that the plaintiff had not alleged that there was no person in the paternal family of Haridas who was competent to take as heir or that the plaintiff himself was such a person. On these grounds he dismissed the plaintiff's claim to the said 4 annas share. There is, however, very little substance in these grounds ; for the necessary facts are all alleged in the plaint, while it is not alleged on behalf of the defendant that there was any person in Haridas' paternal family competent to take as his heir. To justify the dismissal of the claim a positive finding as to the existence of such a person would be necesssary, provided, of course: that the plaintiff is competent to inherit at all under the the Bengal School of Hindu Law.

Now, what is the plaintiff's position in relation to Haridas ? He is Haridas's maternal - great - great - grand father's daughter's sons's son. The right of the daughter's son's son to inherit under the Bengal School of Law has been discussed in two recent decisions of this Court. In the case of *Radharaman Chowdhuri* v.

*Gopal Chandra Chakravarty* (1) all the more important arguments that may be advanced pro and con were noticed, but the question was not decided. In the case of *Nepaldas Mukherjee* v. *Probhas Chandra Mukherjee* (2) it has been held that a daughter's son's son is not an heir.

In the arguments before us the theory that the principle of spiritual benefit governs the law of inheritance in the Dayabhaga has been attacked and it has been urged that spiritual benefit is no test or at any rate is not the only test of heirship in that School and that the cases of *Gooroo Gobind Shaha* v. *Anund Lal Ghose* (3) and *Digumbar Ray Chowdhry* v. *Moti Lal Bundopadhya* (4) should be re-considered ; and an attempt has been made to re-open the question on lines similar to those that have been discouraged in the case of *Dino Nath Mohunto* v. *Chundi Koch* (5), *Kedar Nath Roy* v. *Amritalal Mookerjee* (6), *Kailash Chandra Adhikary* v. *Karuna Kantha Chowdhury* (7) and *Radharaman Chowdhuri* v. *Gopal Chandra Chakravarty* (1).

The arguments that are noticed in the last-mentioned case as being in support of the appellant's contention have been repeated before us. Reliance has also been placed on the test of Vishnupurana cited at page 79 of Mr. J. C. Ghose's Principles of Hindu Law, 2nd Edition. A further argument has also been advanced which, if I have appreciated it correctly, is that a daughter's son should be taken as including a daughter's son's son in view of the Judicial Committee in the case of *Buddha Singh* v. *Laltu Singh* (8) in which their Lordships interpreting Mitakshara, Ch. II, S. 5, Verse. 4 held that the word 'putra' which when used in relation to the last owner signifies and includes sons, grandsons and great grandsons, thus including three degrees in direct line of descent, is not to be construed in a literal and restricted sense, when used in connexion with collateral relations such as brother, uncle or grand-uncle. The interpretation given by Mr. Raj Kumar Sarvadhikari to the terms Sakulya and Samanodaka has been pressed upon us and we have been asked to a dopt it and remove what is said to be a reproach on the Bengal School.

Assuming that the appellant has succeeded in establishing the right of a daughter's son's son to inherit, all his difficulties are not over. Even according to the view propounded by Mr. Raj Kumar Sarvadhikari, though every person is competent to present libation of water to every other the law of inheritance has given a limited signification to the term Samanodaka.'

"It is not every person,"

says he,

"who is competent to present 'the water' that must be considered an heir."

and

"among the 'Samanodakas' those alone are entitled to the inheritance who are also 'Sakulyas' or allied by the family with the deceased. That Samanodaka alone is competent to inherit who belongs to the same kula or family of the deceased. The text of Dayabhaga, Ch. XI. S. 6.

Section 19 makes it perfectly clear that Jimutabahana while not confining the term 'kula' to the agnatic family but including within its significance the male descendants of the daughters of the family has excluded the kinsmen ex parte materna from the connotation of the word. The plaintiff does not profess to be a member of the agnatic family of Haridas and is not a descendant of a daughter of Haridas' family but of the family of Harida's maternal grand-father He is, therefore, competent to inherit only if the Mitakshara succession of bandhus ex parte materna applies and not otherwise.

The appellant's cause has also been advocated from this point of view. Reliance bas been placed in this behalf upon the opinion of Jagannatha and reference has been made to a passage in the judgment of Mitra, J., in the case of *Akshay Chandra Bhattachariya* v. *Hari Das Goswami* (9) for the proposition that in all cases of absence of any express texts or precedents under the Dayabhaga Law the Courts should have recourse to the theory of propinquity and natural love and affinity, as adopted by Vijnaneswara and the commentators of the

(1) [1920] 31 C. L. J. 81=56 I. C. 122=24 C. W. N. 316.
(2) A. I. R. 1926 Cal. 460.
(3) 13 W. R. 49=5 B. L. R. 15 (F. B.).
(4) [1883] 9 Cal. 563=12 C. L. R. 204 (F. B.).
(5) [1912] 16 C. L. J. 14=16 I. C. 349.
(6) [1912] 16 C. L. J. 342=17 I. C. 283=17 C. W. N. 492.
(7) [1913] 18 C. W. N. 477=19 I. C. 677.
(8) [1915] 37 All. 604=30 I. C. 529=42 I. A. 208 (P. C.).
(9) [1908] 35 Cal. 721=12 C. W. N. 511.

more ancient and orthodox Schools of Hindu Law, and a strong appeal has been made to us to rise above provincialism and to declare that the Hindu Law is one and the same all over. For this extreme position however, there is no authority, and as pointed out by Banerjee, J., in *Dino Nath Mohunto* v. *Chundi Kooh* (5):

> The scheme of the Dayabhage is radically distinct from and to some extent incompatible with the scheme of the Mitakshara, and the one cannot well be made to supplement the other so far as the law of inheritance is concerned . . . . . and although the Dayabhaga may be silent so far as express enumeration goes, it is not silent so far as the indicationof the general principle according to which hairship is to be determined is concerned.

The plaintiff, in my opinion, is no heir to Haridas, and his claim to the 4 annas share has been rightly dismissed. The appeal fails and is dismissed with costs.

**Greaves, J.**—I agree.

*Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 13

B. B. GHOSE AND GRAHAM, JJ.

*Samiulla*—Defendant—Appellant.

v.

*Nil Mamud*—Plaintiff—Respondent.

Appeal No. 89 of 1924, Decided on 18th March 1926, from the Appellate Decree of the Sub-J., Rangpur, D/- 31st August 1923.

(a) *Ejectment —Suit for— Damages for use and occupation may be claimed alternatively.*

In a suit for ejectment where plaintiff fails to prove the contract of tenancy, he is not precluded from urging his alternative claim for damages for use and occupation. [P. 14, C. 2]

(b) *Landlord and tenant—Suit for ejectment—Damages for use and occupation claimed in the alternative—Contract to pay rent by trespasser need not be proved.*

The circumstances need not be such as to imply a contract by a trespasser coming upon the land of a righful owner to pay rent in order to enable the rightful owner to recover damages for use and occupation. The plaintiff may waive the trespass and elect to treat the trespasser as a tenant. [P. 15, C. 1]

*A. C. Gupta* and *Radhika Ranjan Guha*—for Appellant.

*Hemendra Chandra Sen*—for Respondent.

**B.B. Ghose, J.**—Two points have been raised in this appeal on behalf of the defendant-appellant. The plaintiff sued the defendant for arrears of rent at a certain rate with regard to a piece of land in the possession of the defendant. In the alternative, he claimed that, if the tenancy was not proved, he might be allowed damages against the defendant for use and occupation of the land. The defendant denied the relationship of landlord and tenant and his case was that the land never belonged to the plaintiff, but was his own land. The plaintiff claimed title by virtue of an auction-purchase in execution of a decree on a mortgage alleged to have been executed by the defendant's father. The plaintiff's case was that after the auction-purchase he had been in possession of the land and that the defendant came into occupation in the year 1325 B. S. by virtue of a contract of lease. The defendant's plea was that the piece of land had never been mortgaged by his father, that assuming that it was mortgaged and sold in execution of the decree, the defendant or his father never gave up possession of the land but remained on it all along and that, if the plaintiff had derived any title by virtue of the auction-purchase, that title was barred by limitation. The defendant further said that, as the plaintiff had no subsisting title, he was not entitled to the property. The defendant also denied the contract of tenancy and pleaded that the plaintiff's suit was liable to be dismissed.

Two issues were raised in the trial Court: first, as to whether there was a relationship of landlord and tenant between the parties; and, secondly, whether the plaintiff had the right to get any damages for use and occupation of the land. The trial Court found both the issues against the plaintiff and dismissed the suit. The plaintiff appealed and only those two points were raised for decision before the learned Subordinate Judge. The Subordinate Judge held that the plaintiff had a subsisting title to the property; but he accepted the finding of the Munsif that the contract of tenancy set up by the plaintiff had not been proved, and, therefore, he held that the plaintiff was not entitled to recover rent on the basis of the alleged settlement but that he was entitled to damages for use and occupation; and upon that view, he calculated the amount of damages and awarded a decree in favour of the plaintiff. Against that decision, the defendant has preferred this appeal.

A preliminary objection was taken on behalf of the plaintiff-respondent that

the appeal was not maintainable under the provisions of S. 153 of the Bengal Tenancy Act as no question relating to title to land as between parties having conflicting claims thereto had been decided. It appears, however, that there was a question of conflicting title between the plaintiff and the defendant as the defendant claimed the property to be his on the ground that it was never conveyed by way of mortgage by his father, and that even if it was, any title acquired by the plaintiff was barred by the statute of limitation. This second appeal, therefore, is maintainable.

The learned advocate on behalf of the defendant-appellant has assailed the judgment of the Subordinate Judge on both the points, that is to say, with regard to the question of title as well as with regard to the plaintiff's right to recover damages for use and occupation. With regard to the question of title the argument addressed is that the Subordinate Judge has wrongly placed the onus upon the defendant to prove that the plaintiff's title had been extinguished by adverse possession. It does not appear to me that that would be a proper reading of the judgment. The plaintiff alleged that the defendant came to live in the land in the year 1325 B. S. The defendant said that he and his father had all along been living on the land and that the plaintiff or his predecessor, the auction-purchaser, never took possession of the disputed land by virtue of the auction-purchase. Upon this state of the pleadings the Subordinate Judge found that the plaintiff's predecessor had actually taken possession of the land after the auction-purchase. Then he dealt with the question whether the plaintiff's story of the defendant coming into possession was true or not. In dealing with the evidence he observed that the plaintiff's story that the defendant came in 1325 B. S. to live on the land was more probable. Then he considered the defendant's story and recorded this finding that the evidence on the record was too flimsy to show that the plaintiff or his lessor's right had been extinguished by any adverse possession.

The learned advocate for the appellant relies upon this passage of the judgment and contends that the previous statement is not a finding of the learned Judge, but his real finding is contained in the passage last cited. That does not seem to be the proper construction of his finding. He deals with the two stories piecemeal. Taking the plaintiff's story first, he finds it more probable, and again taking the defendant's story he says that the evidence is too flimsy to show that the plaintiff or his lessor's right has been extinguished by adverse possession. This ground, therefore, fails.

The next point is with regard to the question of damages for use and occupation. The contention is that in order to claim damages for use and occupation, the Court must find that the defendant came into occupation under such circumstances that an implied promise to pay for that occupation may be inferred. There was an alternative claim made by the plaintiff for damages for use and occupation, and, following the cases of this Court, the learned Judge held that it could not be said that because the plaintiff had failed to prove the contract on which he alleged the defendant came upon the land, he was precluded from urging his alternative claim for damages for use and occupation. The learned advocate for the appellant cites the case of *Nityanund Ghose* v. *Kissin Kishore* (1) which it may be said was the leading case on the subject, before the subsequent Full Bench case, referred to by the Subordinate Judge, that is, the case of *Lukhee Kant Dass Chowdhury* v. *Sumeerooddi Tustar* (2) and contends that, in that case, it was found that the circumstances showed that there was an implied contract between the plaintiff and the defendant creating relationship of landlord and tenant. There the learned Judges distinguished the position of the tenants in this country and in England. In that case, the plaintiff sued the defendant for rent. The defendant denied the plaintiff's right and claimed that he had held the land adversely to the plaintiff and that no relationship of landlord and tenant was existing. Even in such a case as that, it was held that the landlord was entitled to damages for use and occupation.

I may also cite the case of *Surnomoyee* v. *Deenunath Gir Sunnyasee* (3) where Garth, C. J., and Mr. Justice Macpherson held that, although the lands were in the possession of two persons as trespassers,

(1) [1864] W. R. Act X, Rule 82.
(2) 13 B. L. R. 243=21 W. R. 208.
(3) [1883] 9 Cal. 908=13 C. L. R. 69.

if the plaintiff had elected to waive the trespass, all the defendants might, on the authority of the cases in this Court, be treated as tenants and a decree for use and occupation might be given to them. Reference may also be made to the provisions of S. 157 of the Bengal Tenancy Act which says that when a plaintiff institutes a suit for ejectment against a trespasser, he may claim an alternative relief that the defendant be declared liable to pay for the land in his possession a fair and equitable rent to be determined by the Court and the Court may grant such relief accordingly. It seems to me that the rule implied here is that the circumstances need not be such as to imply a contract by a trespasser coming upon the land of a rightful owner to pay rent in order to enable the rightful owner to recover damages for use and occupation. The plaintiff may waive the trespass and elect to treat the trespasser as a tenant. It the trespasser does not like that position, he may vacate the land. There is no hardship in this procedure and I do not tbink that the Subordinate Judge has committed any error of law in allowing a decree to the plaintiff for use and occupation. In this view, the appeal fails and is dismissed with costs.

**Graham, J.**—I agree.

*Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 15

B. B. GHOSE AND PANTON, JJ.

*Birendra Kishore Manikya Bahadur*—Plaintiff—Appellant.

v.

*Bhola Mia Majumdar* and *others*—Defendants—Respondents.

Appeal No. 1908 of 1922, Decided on 9th February 1926, from the appellate decree of the Addl. Dist. J., Noakhali, D/- 8th April 1922.

*Landlord and tenant—Rent—Enhancement of—Standard of measurement at the time of letting out must be presumed to continue.*

The presumption in a suit for enhancement of rent on the ground of increased area, must be that the standard of measurement at the time of letting out continues until anything contrary is proved. [P 16 C 1]

*Gobinda Charan De* and *Roy Birendra Chandra Das*—for Appellant.

*Satyendra Nath Mitra*—for Respondent.

*Biraj Mohan Mazumdar*—for Deputy Registrar.

**B. B. Ghose, J.**—This appeal arises out of a suit for recovery of arrears of rent for the years 1920 to 1922 at the rate of Rs. 22-8-0 per year with cesses and damages and also for enhancement of rent under Ss. 7, 52 and 30 of the Bengal Tenancy Act. The plea of the defendants was that they held the land in mokurari mourasi interest, no kabuliyat had been executed by their predecessor as alleged by the plaintiff and that some of the lands alleged by the plaintiff as within the tenure were their lakheraj lands. The Munsif found that the lands held by the defendants constituted a tenure and that the defendants' predecessor had executed a kabuliyat in favour of the plaintiff's predecessor for some time in 1853. Then he found that under the terms of the kabuliyat the rent is liable to enhancement and upon the evidence he enhanced the rent by certain amount which it is not necessary now to state. The defendants appealed against the decision of the Munsif and the Additional District Judge of Noakhali has reversed the decision of the Munsif with regard to the right of the plaintiff to enhancement of rent. Before the District Judge it appears to have been contended on behalf of the defendants that under the terms of the kabuliyat they are not liable to pay enhanced rent for the increase of area because it is stipulated in the kabuliyat that the rent of Rs. 22-8-0 should be paid for the tenure until a Permanent Settlement is made by measuring the land and as no Permanent Settlement has been made the landlord is not entitled to any increase of rent for increase of area. This was accepted by the Judge. The second ground on which the learned Judge has reversed the Munsif's decision on this point is that there was no proof of the standard of measurement adopted at the time of letting out the disputed land. With regard to the first point, we are of opinion that the construction put upon the kabuliyat, which, it may be stated in passing was not the point raised in the trial Court by the defendants that the landlord is not entitled to increase of rent unless and until he offers a Permanent Settlement to the tenants is not correct. The kabuliyat stipulates that there should be measurement of the land before a Permanent Settlement is made. But there is nothing to show that if the tenant is found to be in possession of an

increased area, the landlord will not be entitled to ask for increase of rent for increase of area. The first ground. therefore, found in favour of the defendants, is not maintainable.

With regard to the question of standard of measurement the presumption must be that the standard of measurement at the time of letting out was the same as it is now unless anything to the contrary is proved. As there is no proof to the contrary it must be presumed that the same standard has continued. It is not a case of letting out a piece of land within specified boundaries. But it is a case of letting out by a statement of the area, and if the area found to be in excess of what was let out the landlord is evidently entitled to increase of rent for such increase of area.

The judgment and decree of the lower appellate Court disallowing the claim for enhancement of rent and for additional rent for excess area are, therefore, set aside and the case is sent back to that Court for the decision of the question of the amount of enhancement which the landlord is entitled to on the evidence upon the record.

Costs of this appeal will abide the result.

**Panton, J.**—I agree.

*Case sent back.*

---

## A. I. R. 1927 Calcutta 16

CUMMING AND PAGE, JJ.

*Aswini Kumar Dutta* and *another*—Plaintiffs—Appellants.

v.

*Gobinda Chandra Chanda* and *others*—Defendants—Respondents.

Appeal No. 368 of 1924, Decided on 21st April 1926, from the Appellate Decree of the Addl. Sub-J., Barisal, D/-13th September 1923.

*Easement—Licensee with interest cannot be evicted—License.*

Where there is a license coupled with an interest, the licensee cannot be evicted in the absence of satisfactory evidence that the interest has come to an end, [P. 16, C.2]

*Atul Chandra Gupta* and *Bankin Ch. Banerji*—for Appellants.

*Jogesh Ch. Roy Choudhuri* and *Satyendra N. Roy Choudhuri*—for Respondents.

**Page, J.**—This is not an easy case. The plaintiffs claim khas possession of four gundas of land. Upon these four gundas of land were planted some betel trees. There can be no doubt that the defendants were entitled by the leave and license of the plaintiffs to be upon the land for the purpose of gathering betel leaves; in other words the position of the parties was that the defendants were upon that land as licensees coupled with an interest to gather betel leaves until the plantation dried up.

The plaintiffs set up first a contract by which the Defendant No. 2 agreed to go out of the land after three years. That agreement was negatived. The plaintiffs in the alternative alleged that by the custom of the country the defendants must leave the land when the plantation failed. There is no direct finding that such a custom existed, although in both the Courts evidence appears to have been directed and the controversy raged over the question whether there was such a custom and if so, whether under the custom the time when the licensees must retire had arrived. The defendants' case was also negatived. In the event the learned advocate for the appellants has skilfully urged that, inasmuch as the appellants are entitled to the land, the right to possession, in the absence of any other countervailing right being made out, will follow the title. But that is not the position. The position here is that there was a license coupled with an interest and in the absence of any satisfactory evidence that this interest has come to an end we do not feel disposed to disturb the decision of the lower appellate Court that at the date when the suit was filed the plaintiffs' claim was premature.

Under the circumstances the appeal will be dismissed with costs. The cross objection not being passed is also dismissed but without costs.

**Cuming, J.**—I agree.

*Appeal dismissed.*

---

# * A. I. R. 1927 Calcutta 17

RANKIN AND DUVAL, JJ.

*Azimaddy* and *others*—Accused—Appellants.

v.

*Emperor*—Opposite Party.

Criminal Appeal No. 284 of 1926, Decided on 16th August 1926, from the judgment of the S. J., Assam Valley Districts.

* (a) *Criminal P.C., S. 162—Neither statement by accused nor first information report is covered by S. 162—Statements by third persons are admissible under certain limitations—Criminal P.C., S. 154—Evidence Act, Ss. 32, 145 and 157.*

Statements by accused are not within S. 162: *A. I. R.* 1926 *Rang.* 116 (*F.B.*); *A. I. R.* 1926 *Lah.* 88 and *A. I. R.* 1926 *Patna.* 232, *Foll.* [P. 18, C. 2]

The first information report against the accused is clearly not a statement within the contemplation of S. 162 because it is not made in the course of an investigation. Such report has to be tended under one or other of the provisions of the Evidence Act. The usual course is for the prosecution to call the informant and for the first information to be tendered as corroboration under S. 157; but it could also be tendered in a proper case under S. 32 (1) as a declaration as to the cause of the informant's death, or as part of the informant's conduct (of the res gestae) under S. 8. Theoretically, the defence could prove the information to impeach the informant's credit under S. 155 or to contradict him under S. 145. [P. 19, C. 1]

Statements made by third parties to the police in the course of their investigation can be used as corroboration under S. 157, or in contradiction under S. 145 or to impeach credit under S. 155 provided the person who made the statement is called as a witness. This would apply to the prosecution and to the defence indifferently under the Evidence Act. But S. 162 of the Criminal P.C. enacts first that if such a statement is not recorded in writing it cannot be used in evidence in any circumstance or for either side or for any purpose: *A. I. R.* 1926 *Rang.* 116 (*F. B.*); *A. I. R.* 1925 *Lah.* 399 and *A. I. R.* 1924 *Bom.* 510, *Foll.* [P. 19, C. 1]

If such a statement has been recorded in writing then it cannot be used for any purpose but one and that by the defence. Provided that the person who made it is called as a witness for the prosecution the defence may apply for a copy of the statement and if it be proved may use it under S. 145 of the Evidence Act to contradict that witness. [P. 19, C. 2]

It sometimes happens that after the first information has been laid against the accused, a counter information is laid against the complainant or his party by a member of the accused's party who is not himself an accused. As this comes under S. 154 and must be reduced to writing and signed, it cannot come within S. 162. Whether it is admissible at the trial of the accused will depend upon the circumstances and must be decided under Evidence Act. The police cannot of course treat statements as informations unless they are really received as such and come truly and properly within S. 154. [P. 19, C. 2]

Broadly speaking, a statement made by an accused to police officer may be proved against him under the Evidence Act if it is not a confession; and even if it is part of a confession it is admissible under S. 27 if a fact is deposed to as discovered in consequence of the information. S. 162 of the Criminal P.C. does not disturb this position, [P. 19, C. 2, P. 20, C. 1]

(b) *Criminal P. C., S. 233—Three murders committed in one transaction—Three separate heads of charge should be employed.*

Where in the course of one transaction three murders were committed and only one charge was framed against all accused:

*Held*: that three separate heads of charge should have been employed: *A. I. R.* 1922 *Cal.* 573, *Ref.* [P. 20, C. 2]

*D. N. Bhattacharjee*—for Appellants.

*Satindra Nath Mukherjee*—for the Crown.

**Rankin, J.**—In this case there are 5 appellants. They have been convicted by the learned Sessions Judge of Assam Valley Districts sitting with a jury of seven. There had been a previous trial and the case was sent back by this Court to be re-tried. The jury on this occasion were unanimous.

They have found all the appellants guilty under S. 302 read with S. 149, Indian P.C. Three of them have also been found guilty under S. 302 by itself while the other two have been found guilty under S. 324.

The fifth appellant, Rasir Haji, is the father of Appellants 1, 3 and 4, Aimaddy, Johifaddy and Rahimaddy. The second appellant, Sayad Ali, is a friend and neighbour.

The occurrence took place between 8 and 9 a.m. on the 7th March 1925. According to the prosecution it took place at the S. E. corner of the patta land of one Kimu where it abuts upon some khas land of which Basir and Sayed Ali were wanting to get settlement from Government. According to the defence it took place to begin with the E of Kimu's land and upon the adjacent plot of khas land marked N upon the plan. The prosecution story is that Kimu was erecting a hut at the S. E. corner of his own land when the accused with others came armed with spears and lathis to prevent this, and that when he called certain people who were in the field, an altercation commenced and the accused proceeded to attack Kimu's party. Three people were killed undoubtedly and others injured.

The case for the defence is that the accused were proceeding to erect a hut on the khas land and that the complainant's party attacked them.

The individual acts of each accused are not really in doubt. The first appellant killed a man called Alimuddin with a spear. The second appellant killed Kalimuddin and the third killed Mokim in like manner. The fourth appellant, a lad of about 18 years, struck Yaruddin with a spear in the buttock. Basir, who was armed with a ram-dao struck Mukdun and cut his arm. The injuries of Yaruddin and Mukdun amounted only to simple hurt.

Three passages in the summing up are objected to by the learned vakil for the appellants and as the first two of these raise questions under S. 162 of the Criminal P. C. I will deal with them first.

The occurrence having taken place about 9 a.m. the first information was given at the thana some five miles away at 12-30 p.m. by Abdul Basir P.W. 1. At 2-30 p.m. on the same day the first appellant, Azimaddy, laid an information at another thana accusing the complainant's party.

The learned Judge admitted this latter document in evidence. It is Ex. 6. It contains a statement that Baser Haji was beaten but that there was no injury. At the trial it was part of the defence case that Baser had considerable injuries wholly explained by the prosecution evidence. The learned Judge on this point and on others put Azimaddy's information to the jury. It is said that this is contrary to S. 162 of the Code.

The other passage to which objection is taken explains itself :

> On the other hand against the theory that the posts were in the first place erected by the accused on the land to the east we have Sub-Inspector Prodip Roy Deka's evidence that he found no trace of the erection of a house at the place pointed out to him by the accused Baser Haji, and Sub-Inspector Uday Chandra Sarma also says he found no trace of a house having been erected there though he reached the place at 3 p.m. the next day.

This too is said to be contrary to S. 162 of the Code.

The learned vakil who appears for the prosecution contends that S. 162 of the Code as it now stands has no application to the statements of accused persons who are on their trial. As regards the first of the two objections other points may arise—viz. whether a first information report is within S. 162 at all and whether if so this particular information laid at 2-30 p.m. wasmade to a police officer "in the course of an investigation" begun presumably at 12-30 on receipt of the prior information.

Now the effect of S. 162 of the Criminal P. C., as amended in 1923, has been the subject of much doubt and this is creating difficulty in the conduct of trials. There are unreported cases in this Court in which S. 162 has apparently been assumed to apply to statements made by the accused. I find, however, that in the High Courts of Patna, Lahore and Rangoon it has been held that statements by accused are not within the section : *Emperor* v. *Nga Tha Din* (1); *Rannun* v. *Emperor* (2); *Jagwa Dhanuk* v. *Emperor* (3). The first of these cases was decided by a Full Bench and the judgments including the dissenting judgment of Heald, J., deal very fully with the arguments pro and con.

In my opinion these decisions are right and should be followed in this Court. In this Court it is settled law, *Queen-Empress* v. *Jadab Das* (4), that in spite of the generality of the language of S. 161 of the Code, that section does not apply to an accused. Both the context of S. 162 and its contents point in the same direction. "Any person" means *quivis ex populo*. It is unreasonable in view of the special law applicable to the statements of accused persons to the police to refuse to apply the well-established rule "*generalla specialibus non deregant.*" A contrary view involves an implied but complete repeal of S. 27 of the Evidence Act. A clear and intelligible purpose can be collected from the section without involving any such consequences, viz., to prevent the statements of witnesses made before the police from being used by the prosecution under Ss. 145, 155 and 157 of the Evidence Act which sections are not confined to criminal cases. Lastly, while it is clear that S. 162, though amended in the interests of accused persons, does abridge certain rights of an accused in the matter of evidence, it would seem to require express and compelling language to deprive an accused of what is so often the mainstay of a good defence—the right to show

(1) A. I. R. 1926 Rang 116=4 Rang 72 (F. B.).
(2) A. I. R. 1926 Lah. 88=7 Lah. 84.
(3) A. I. R. 1926 Patna 232=5 Pat. 63.
(4) [1900] 27 Cal. 295=4 C. W. N. 129.

that the moment he was challenged he gave the explanation on which he still relies. It is difficult to believe in this as an amendment designed in the interest of accused persons ; while on the contrary view, it is comparatively easy to see that the rights of accused persons have been further abridged than may well have been thought necessary for the purpose above-mentioned. As this question has been thrashed out in the cases to which I have referred I prefer to put any further observations in the form of a statement of the law as I understand it.

The first information report against the accused is clearly not a statement within the contemplation of S. 162 because it is not made in the course of an investigation. Again S. 154 requires it to be signed : whereas statements within S. 162 are forbidden to be signed even when recorded in writing. It is usually put in by the prosecution which in any ordinary case has a duty to put it in. But however important First informations may be they do not prove themselves and have to be tendered under one or other of the provisions of the Evidence Act. The usual course is for the prosecution to call the informant and for the first information to be tendered as corroboration under S. 157 ; but it could also be tendered in a proper case under S. 32 (1) as a declaration as to the cause of the informant's death, or as part of the informant's conduct (of the res gestae) under S. 8. Theoretically, the defence could prove the information to impeach the informant's credit under S. 155 or to contradict him under S. 145.

Statements made by third parties to the police in the course of their investigation stand under the Evidence Act as follows : They can be used as corroboration under S. 157 or in contradiction under S. 145 or to impeach credit under S. 155 provided the person who made the statement is called as a witness. This would apply to the prosecution and to the defence indifferently under the Evidence Act. But S. 162 of the Criminal P. C. enacts first that if such a statement is not recorded in writing it cannot be used in evidence in any circumstance or for either side or for any purpose. This view of the section has been dissented from in one case at least in Madras, but it is in my opinion right and it has been adopted by at least three High Courts : *Emperor* v. *Nga Tha Din* (1) ; *Rakha* v. *Emperor* (5) ; *Emperor* v. *Vithu Balu* (6).

Secondly if such a statement has been recorded in writing then it cannot be used for any purpose but one and that by the defence : provided that the person who made it is called as a witness for the prosecution the defence may apply for a copy of the statement and if it be proved may use it under S. 145 of the Evidence Act to contradict that witness.

Two overriding considerations have to be noticed in connexion with S. 162 : (1) that the section does not affect any statement as to the cause of death under S. 32 (1) of the Evidence Act ; (2) that the section is dealing with "statements" ; not with conduct in the sense of S. 8, but with mere statements.

It sometimes happens that after the first information has been laid against the accused, a counter-information is laid against the complainant or his party by a member of the accused's party who is not himself an accused. As this comes under S. 154 and must be reduced to writing and signed, it cannot, in my opinion, come within S. 162. Whether it is admissible at the trial of the accused will depend upon the circumstances and must be decided under the Evidence Act. The police cannot of course treat statements as informations unless they are really received as such and come truly and properly within S. 154.

Statements made by an accused belong to a class which the Evidence Act calls " admissions " (Ss.17, 18), and prima facie they are evidence against the maker but not in his favour. " Confessions " are a sub-species of " statements " and a species of admissions Ss. 24, 25 and 26 of the Evidence Act provide that in criminal cases confessions are irrelevant if they are induced by threat or promise, and are inadmissible as against the accused if made to a police officer, or if made while the accused is in custody (unless made in the presence of a Magistrate ). As S. 162 of the Criminal P. C. is only concerned with statements made to a police officer, I need only observe here that broadly speaking a statement made by an accused to a police officer may be proved against him under the Evidence Act if it is not a confession ; and even if

(5) A. I. R. 1925 Lah. 399=6 Lah. 171.
(6) A. I. R. 1924 Bom. 510.

it is part of a confession it is admissible under S. 27 if a fact is deposed to as discovered in consequence of the information. In my opinion S. 162 of the Criminal P. C. does not disturb this position.

In the present case the two objections which I have referred to as made against the summing up of the learned Judge are not sustainable on this construction of S. 162. Both statements are statements by an accused : neither is a confession or part of a confession ; and one is an information recorded under S. 154.

There is, however, a third objection to the summing up which is well-founded. It appears that a complaint to a Magistrate was put in evidence to show that the accused's party had been trying to interfere with certain land in the possession of Mokim and there was other evidence that a similar interference with the rights of others had been attempted by the accused in the case of one Monu Fakir. I will not here consider the course of the case so as to enquire whether either or both pieces of evidence were relevant or were properly admitted at all. There seems in this case to be some reason for saying that they could not have been rejected. But the learned Judge in dealing with that matter says as follows :

> This is the information given by Mokim of an occurrence alleged to have taken place three days before this occurrence ( Ex. 4 read). If this information and the evidence that Monu was driven out of the plot (L) is true it would show that Basir Haji's party were capable of taking the aggressive though they were numerically weaker having only two baris containing (according to Kimu) 20 or 30 houses, while in Kimu's samaj there were 25 or 30 baris.

Now, it seems to me that it was necessary for the learned Judge, if he let in those two pieces of evidence at all to explain most carefully to the jury that the jury were not entitled to take it that the accused had committed the offences charged because they had previously been found to have attempted to commit similar offences. The learned Judge has not only given no such direction but the direction which he has given must have been taken by the jury as intended to be the contrary ; for he says that these previous circumstances would show that Basir Haji's party were capable of being the aggressors. This makes it necessary for us to consider carefully the question whether certain of the charges upon which the appellants have been convicted can be sustained. All the accused were found guilty under S. 302 read with S. 149. The common object alleged was to prevent Kimu from erecting a hut upon his own land or to interfere with his possession. If, therefore, there has been a misdirection going to the question which of these two parties was really the aggressor that misdirection seems to affect vitally any conviction under S. 149.

There is another objection to the conviction under S. 149. Apparently in this part of the world the Courts think no more of killing three men in one charge than the accused persons are supposed to do of killing three men in one fight, and the form of charge which has been employed in this case can only be described as a charge of constructive multiple murder. It is clear that the proper way would be to have had three separate heads of charge and the law upon this subject was laid down in the case of *Radha Nath Karmakar* v. *Emperor* (7). It is, however, plain that the three murders were all part of the same series of transactions and it is clear that three separate heads of charge could have been employed in the present case. The decision to which I have just referred as one in which in similar circumstances this Court thought it unsafe to proceed upon the basis of S. 149 and it appears to me that unless this is a case where the Court will go through all the facts and make a new finding for itself, it is not a case in which it is possible for the Court to uphold the conviction against all these appellants under S. 302 read with S. 149. I do not think that it is reasonable or right for us to try this case on the paper-book for ourselves as regards that particular point.

Having come to that finding, the next question is as to the consequence of this finding upon the other charges. Three of the accused have been found guilty under S. 302 by itself ; but if there be any doubt as to the spot upon which this fight began it is, at any rate, unsafe to say that those three appellants would not have had some case upon the question of private defence. It is quite clear on the facts of this case that they could not justify committing murder in the way they did under any right of private defence and it is, therefore, certain that

(7) A. I. R. 1922 Cal. 573=50 Cal. 94.

they must be convicted under S. 304 (1). Their other convictions are set aside. We have considered this matter carefully as regards the sentence and we are of opinion that it would be unjust to leave the sentence of transportation for life without substantial reduction and, in our opinion, the proper sentence for us to pass upon those three appellants is the sentence of ten years' rigorous imprisonment under S. 304 (1).

That leaves the case of Basir Haji and Rahimaddy who is the youngest of the three sons—apparently in the neighbourhood of 18 years of age. They have been convicted under S. 324 and until one settles the question whether there was some right of private defence it is difficult to say that the infliction of simple hurt may not have been justified. In their cases we are, therefore, faced with the alternatives of sending the case back for retrial or setting aside their convictions and refusing to order a retrial. So far as the youngest son Rahimaddy is concerned, as his father and his elder brothers were engaged together upon this land dispute, a reasonable knowledge of human nature leads one to suppose that he had not very much chance of keeping out of it. So far as he is concerned, as he only inflicted a simple hurt, I do not find very much difficulty in setting aside the conviction against him and refusing to allow him to be retried. I have, however, much more difficulty in the case of the father Basir Haji who is very probably, to put it no higher, the main source of all the trouble. It is, however, I think, important to notice that if this case is tried again at this distance of time, and after two previous trials it is almost inevitable that the third trial would be somewhat unjust. The witnesses must have forgotten much and the third trial would be, it seems to me, of a very difficult and doubtful nature. If I could have found any logical way of finding him guilty under S. 324 I confess I should not have been particularly sorry ; but it seems to me that there is no logical way of finding him guilty under S. 324 except by doing what I for one refuse to do, what it would be difficult to do, and what we should have to do in respect of all the appellants, namely, finding for ourselves on the paper-book who was really the aggressive party and on what exact spot. For these reasons all the convictions of Basir Haji and Rahimaddy will be set aside and, in the circumstances, we do not order a retrial.

**Duval, J.**—I agree.

*Convictions set aside.*

---

## * A. I. R. 1927 Calcutta 21

CUMING AND PAGE, JJ.

*Bhaniram Rathi*—Defendant 1—Appellant.

v.

*Ambica Charan Hazra* and *others*—Plaintiffs—Respondents.

Appeal No. 356 of 1924, Decided on 26th April 1926, from the appellate decree of the Dt. J., 24-Perghannas, D/- 28th September 1923.

(a) *Civil P. C., O. 47, R. 1—Review granted—Whole case need not necessarily be re-opened.*

The Court may, at its discretion, direct the whole case be re-opened if it is necessary in the interests of justice that such a course should be adopted ; but there is no authority for the proposition that whenever a review is granted on a particular point the whole case must be re-opened. [P, 22, C 2]

* (b) *Civil P. C., O. 47, R. 8—Re-hearing—Party is confined to additional evidence which formed subject-matter of review application and the Court ought not to allow evidence which should and could have been brought at the trial.*

A party is confined at the re-hearing, so far as additional evidence is concerned, to those pieces of evidence which actually formed the subject-matter of the application for review.

At the re-hearing of the case the Court ought to take into consideration the evidence adduced at the trial and the additional evidence, if duly proved, upon which the review was granted, and any relevant evidence in rebuttal of such additional evidence. The Court is also entitled to admit evidence, even if it was available to the party tendering it at the time when the case was first heard, if the Court is of opinion that it was relevant to an issue raised at trial and to be reconsidered at the re-hearing, and that the party tendering the evidence was prevented by some cause for which such party was not responsible from adducing the evidence at the trial ; or if the party refrained at the trial from adducing such evidence because in the absence of the additional evidence upon which the review was granted it was not reasonable or necessary that the party should have adduced it at the trial. But the Court at the re-hearing ought not to allow a party to adduce evidence which was available or with reasonable diligence might have been procured by such party at the time of the trial merely in order to re-inforce at the re-hearing of a case which the party raised or ought to have raised at the trial.

[P. 23, C. 1, P. 24, C. 2]

*S. C. Maity* and *Apurba Charan Mukherjee*—for Appellant.

*Gunada Charan Sen* and *Kali Kinkar Chakravarti*—for Respondents.

**Cuming, J.**—The facts of the case out of which this appeal arises are these: Defendant No. 1 brought a suit in the Small Cause Court against Defendants Nos. 2 to 6. He applied for attachment before judgment and the properties now in suit were attached. The Defendant No. 1 proceeded to sell the properties in suit in execution of the decree he obtained in his suit.

The plaintiff in this suit tendered a claim which was disallowed and hence this suit for declaration of title and recovery of possession. The defence seems to have been that the sale to the plaintiff was a sham transaction. The Court of first instance decreed the plaintiff's suit in full on the 4th March 1919. An application for review of judgment was then made. The basis of the application was that plaintiff was a man of straw which fact the defendant had tried to prove in the trial. He had now discovered some new and important evidence which he could not have discovered during or before the trial. This application was heard by another Judge Mr. Upendra Nath Biswas and he allowed the application for review of judgment on the 9th December 1919.

He then re-heard the case and once more the suit was decreed. The Defendant No. 1 appealed to the District Court. The main contention in that Court seems to have been that the Court on review was bound to re-open the whole case. Further that the Court hearing the case after review had been granted was bound to admit other evidence besides that on which the review had been granted. The District Court rejected the appeal and Defendant No. 1 has appealed to this Court.

The appellant contends that the application for review having been granted the Court hearing the case was bound to re-open the whole case, and not only the points on which further evidence had been admitted.

He contends that unless that Court granting the review restricts the review to any particular point the Court hearing the case on review must re-hear the whole case. In the present case the Judge who granted the review did not restrict the review to any particular point. We have been taken through a number of decisions, but none of them are authorities for the proposition that the learned advocate would ask us to accept. I will deal very briefly with some of them. *Sadar-ud-din* v. *Ekram-ud-din* (1): In that case it was contended that when an application for review had been granted the Court at the re-hearing is restricted to the particular ground on which the review was granted. The learned Judge held that that was not so, but that the Court might either hear the case as a whole or rehear special points. This case, is, therefore, only an authority for the proposition that the Court hearing the case on review may re-open the whole case.

The learned Judge referred to the case of *Bhugwandeen Doobey* v. *Myna Baee* (2) and the case of *Hurbans Sahye* v. *Thakoor Purshad* (3) where it was held that where a review had been granted on a particular ground it was open to the reviewing Court to either re-hear the whole case or restrict it to any particular point as this Court thought fit.

These authorities are obviously against the appellant's contention. The next case is the case of *Gour Sundar Bhoumik* v. *Rakhal Raj Bhoumik* (4). Mukerji, J., remarked that the view cannot be supported on principle that whenever an application for review is granted the entire case must necessarily be re-opened. The learned Judge then refers to a number of cases and remarks:

> These cases show that the Court may, at its discretion, direct the whole case be re-opened if it is necessary in the interest of justice that such a course should be adopted; but they are not authorities for the proposition that whenever a review is granted on a particular point the whole case must be re-opened. The case of *Gour Krishna Sircar* v. *Nilmadhab Saha* (5) was also referred to. It cannot be said that it in any way supports the appellant's contention.

It would be idle to refer to any further authorities. All these authorities I have been referred to are against the appellant and he has not cited a single authority in his favour. In view of these dicisions the point hardly called for any serious discussion. Probably, so far as also as the present case is concerned the point is really of academic interest because looking at the judgment on review of the learned

(1) [1913] 18 C. W. N. 22=20 I. C. 670=19 C. L. J. 225.
(2) [1866] 11 M. I. A. 487=9 W. R. 23=2 Suther 124=2 Sar. 327 (P. C.).
(3) [1883] 9 Cal. 209.
(4) [1916] 20 C. W. N. 1165=34 I. C. 592=27 C. L. J. 326.
(5) A. I. R. 1923 Cal. 113.

Judge, I am inclined to think that he actually re-heard the whole case for he does deal with some other points specifically as for instance whether the kobata was executed with the intent to defraud. The evidence used in the Court of first instance was made evidence in the case and the learned Judge concluded by saying: "For all these reasons I fully agree with the judgment of my learned predecessor on all points, who has very ably and carefully dealt with all the questions raised in this case.

The next ground argued by the learned advocate for the appellant is that the Court below erred in not admitting certain documents at the re-trial on the ground that they were not mentioned at the time when the review was granted and also some that were not mentioned in the application for review, but were filed in Court pending the hearing of the application for the review. It seems to me that the Judge was quite right in refusing to allow any new evidence to be adduced except the evidence the discovery of which after the trial formed the subject-matter of the application for review. For the review is granted because this particular evidence is new and important and was not within his knowledge at the time of trial. Until he establishes these facts he has no ground for review and the Court, before granting the review, must be satisfied on these facts. Now it is the Court granting the review which has to be satisfied, and it seems to me that it is that Court which has to determine whether any particular piece of evidence satisfies the condition of O 47, R. 1. To hold that it is sufficient after producing say one such piece of evidence and a review being granted on the strength of it that it is open to the party then to put in a large body of fresh evidence on the point should be most dangerous. I am of opinion that a party is confined at the re-hearing, so far as additional evidence is concerned, to those pieces of evidence which actually formed the subject-matter of the application for review. To hold otherwise is to open wide the door to fraud and forgery.

No other points have been argued in the appeal. There was a faint suggestion regarding S. 53 of the Transfer of Property Act on the ground that the plaintiff had notice apparently of the Defendant No. 1's suit. The learned Advocate did not attempt to argue it, probably for the reason that it was a question of fact and there is not the slightest indication that the point was taken in the lower appellate Court. The appeal must be dismissed with costs.

**Page, J.**—I agree that the appeal should be dismissed. In this case it is not necessary to consider the grounds upon which a Court ought to proceed on an application for a review of judgment being preferred under O. 47, R. 1. For the purpose of this appeal it must be taken that the order passed by the learned Subordinate Judge of Alipur on the 9th December 1919, granting a review of the judgment of his predecessor was duly made in accordance with law. The question that we have to determine is whether the learned Subordinate Judge, when reviewing the judgment of the 4th March 1919, was entitled to reject certain documents that were tendered by the party who had obtained the order of review upon the ground that the documents were available to the party tendering them, and could have been produced by him at the time when the decree was passed.

Now, when the Court orders that a judgment be reviewed, the case is to be reheard, and "re-heard on the merits"; see O. 47, R. 8, and per Jenkins, C. J., in *Vadilal* v. *Fulchand* (6). But what is meant by a re-hearing "on the merits"? The learned advocate for the appellants contends that when a review has been granted there must be a re-hearing of the whole case de novo and that the parties are entitled to adduce any evidence which is relevant to the issues raised by the pleadings. If this contention is sound the documents in question ought to have been admitted. On the other hand, the respondent contends that when a case is re-heard after a review has been granted the Court is entitled to take into consideration only the evidence that was before the Court at the trial, and the additional evidence upon which the review was granted. If that be so the documents in suit were rightly rejected.

I have examined the Indian cases that are *ad rem* and the English decisions on the subject of bills of review and actions of review to which I have been able to obtain access, but I can find no direct authority upon the question that we are

(6) [1906] 30 Bom. 56=7 Bom. L. R. 664.

called upon to decide in this case. The law relating to the review of judgments may be collected from the following decisions: *Nusseerooddeen Khan* v. *Indurnarain Chowdhry* (7); *Tekait Khood Narain Singh* v. *Toolsee Roy* (8); *Koleemoodeen Mundul* v. *Heerun Mundul* (9); *Sainal Ranchod* v. *Dullabh Dwarka* (10); *Reasut Hossein* v. *Hadjee Abdoollah* (11); *Ellam* v. *Basheer* (12); *Roy Meghraj* v. *Beejoy Gobind Burral* (13); *Hurbans Sahye* v. *Thakoor Purshad* (3); *Mahadeva Rayar* v. *Sappani* (14); *In re Appa Rao* (15), *Vadilal* v. *Fulchand* (6); *Sadar-ud-din* v. *Ekram-ud-din* (1); *Gour Sundar Bhoumik* v. *Rakhal Raj Bhoumik* (4); *Gour Krishna Sircar* v. *Nilmadhab* (5); *Hosking* v. *Terry* (16); *Bhugwandeen Doobey* v. *Myna Baee* (2); *Chhajju Ram* v. *Neki* (17); *Willan* v. *Willan* (18); *Young* v. *Keighly* (19); *Hungate* v. *Goscayne* (20); *Thomas* v. *Rawlings* (21); *Anderson* v. *Titmas* (22); *Boswell* v. *Cooks* (23); and *Charles Bright & Co.* v. *Seller* (24). See also Civil P. C., O. 13, R. 2.

The conclusion at which I have arrived, as the result of my investigation, is that at the time when an application for review of a judgment on the ground of the discovery of new and important evidence is before the Court it is open to the Court under O. 47, R. 8 to determine whether the case shall be re-heard in part or in its entirety. In the absence of any special directions in that behalf by the Court granting the review the whole case is re-opened, and the Court is not restricted to a re-consideration of the particular point upon which the application for a review succeeded.

At the re-hearing of the case the Court ought to take into consideration the evidence adduced at the trial and the additional evidence, if duly proved, upon which the review was granted, and any relevant evidence in rebuttal of such additional evidence. The Court is also entitled to admit evidence, even if it was available to the party tendering it at the time when the case was first heard, if the Court is of opinion that it was relevant to an issue raised at the trial and to be re-considered at the re-hearing, and that the party tendering the evidence was prevented by some cause for which such party was not responsible from adducing the evidence at the trial; or if the party refrained at the trial from adducing such evidence because in the absence of the additional evidence upon which the review was granted it was not reasonable or necessary that the party should have adduced it at the trial. But the Court at the re-hearing ought not to allow a party to adduce evidence which was available or with reasonable diligence might have been procured by such party at the time of the trial merely in order to re-inforce at the re-hearing a case which the party raised or ought to have raised at the trial. The reason for the restriction is to prevent the fabrication of false evidence, and it is an invariable

rule in all the Courts, and one founded upon the clearest principles of reason and justice, that if evidence which either was in the possession of parties at the trial, or by proper diligence might have been obtained, is either not produced or has not been procured and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by granting a new trial. If this were permitted it is obvious that parties might endeavour to obtain the determination of their case upon the least amount of evidence, reserving the right, if they failed, to have the case re-tried upon additional evidence which was all the time within their power: [Per Lord Chelmsford in *Shedden* v. *Patrick* 25].

Applying the above tests to the documents in question, I think that they were rightly rejected by the learned Judges in the lower Courts; and I am of opinion that the appeal fails and should be dismissed.

*Appeal dismissed.*

---

(7) 5 W. R. 93=B. L. R. Sup. Vol. 367.
(8) 15 W. R. 9.
(9) 24 W. R. 186.
(10) 10 B. H. C. 360.
(11) [1876] 2 Cal. 131=3 I. A. 221=26 W. R. 50=3 Sar. 221 (P. C.).
(12) [1875] 1 Cal. 184=24 W. R. 382.
(13) [1875] 1 Cal. 197=23 W. R 438.
(14) [1876] 1 Mad. 396.
(15) [1887] 10 Mad. 73=13 I. A. 155=4 Sar. 755 (P. C.).
(16) [1862] 15 Moor. P. C. 493=9 Jur. (N. S.) 975=10 W. R. 884=7 L. T. 52.
(17) A. I. R. 1922 P. C. 112=3 Lah. 127.
(18) [1810] 16 Ves. 72.
(19) [1809] 16 Ves. 348.
(20) [1846] 2 Ph. 25=10 Jur. 625=16 L. J. Ch. 382.
(21) [1864] 34 Beav. 50=11 L. T. 721=10 Jur. (N. S.) 1192=13 W. R. 248.
(22) [1877] 36 L. T. 711.
(23) [1894] 6 R. 167.
(24) [1904] 1 K. B. 6=52 W. R. 148=72 L. J. K. B. 921=20 T. L. R. 12=89 L. T. 431.
(25) 1 Scottish Appeals 545.

# * A. I. R. 1927 Calcutta 25

CUMING AND PAGE, JJ.

*Mt. Khayerunnessa Bibi* and *another* —Plaintiffs—Appellants.

v.

*Fazar Ali Sarkar* and *others*—Defendants—Respondents.

Appeal No. 57 of 1924, Decided on 25th May 1926, from appellate decree of the 6th Sub-J., Dacca, D/- 9th June 1923.

* *Landlord and tenant—Landlord is not entitled to recognize only such tenants as are recorded in his sherista and ignore others recorded in the record-of-rights — Rent-decree against former only—Sale does not pass latter's interest.*

It is not the law that a landlord in every case is entitled to regard as his tenants only those persons whose names are recorded as such in his sherista, and to disregard the interest of co-sharer tenants whose names are not so recorded, but are recorded in record-of-rights. Whether or not he may do so depends upon the circumstances of each case. [P 27, C 1]

There is no law which renders it obligatory upon the tenants who are not tenure-holders to get their names recorded in the landlord's sherista and, therefore, a sale of a jote in execution of a decree for rent obtained against recorded tenant only does not pass the interest of other tenants not made parties. [P 26, C 1; P 27, C 1]

*Prakash Chandra Pakrasi*—for Appellants.

*Suresh Chandra Talukdar* and *Amulya Charan Sen*—for Respondents.

**Cuming, J.**—In the suit out of which this appeal has arisen the plaintiff sued to recover khas possession of some three plots of land set forth in the schedule to the plaint after declaration of her title thereto. Her case was that the lands in suit together with some other lands formed the raiyati jote of one Arashali Prodhan who was the great-grandfather of the plaintiff. Arashali died leaving behind him four sons, Manik, Baramdi, Nandoo and Sonaulla. Nandoo and Sonaulla died childless and so the jote came into possession of the plaintiff's grandfather Manik and his brother Baramdi. Manik died and was succeeded by his son Azim. There was a private partition between Baramdi and Azim by which Azim got possession of the three disputed plots of land whereas Baramdi got the other plots. On the death of the plaintiff's father Azim the plaintiff came into possession as heir and was in possession of the disputed lands till Bhadra 1326 when she was dispossessed by the defendants and hence this suit.

Defendants Nos. 1 to 6 contested the suit. Their contention first of all was that the plaintiff had no title to the land because Azim predeceased his father Manik. Further they alleged that the holding in question was sold in execution of a decree for rent obtained against Baramdi and that as Baramdi was the only recorded tenant in the landlord's sherista the entire holding passed and this holding was purchased by Defendant No. 1 Fazaruddin. There was also a further plea of the bar of limitation.

The learned Munsif found in favour of the plaintiff and gave her a decree for khas possession of Survey Plots Nos. 1043 and 1045 and of the eastern and southern one pakhi of Survey Plot No. 1044. He further ordered that she would possess these plots exclusively in her 4 annas share in the entire jote. The learned Munsif also found that Azim did not predecease his father Manik. He further found that the suit was not barred by limitation. The defendants appealed to the District Court and the learned Subordinate Judge who had heard the appeal held that Azim did not predecease Manik. He, therefore, held that the plaintiff had title to the land. He, however, held that the decree in execution of which the property was purchased by Fazaruddin was a rent-decree and by this decree the holding itself passed. In this view of the case he decreed the appeal and entirely dismissed the plaintiff's suit.

The plaintiff has appealed to this Court. On her behalf Mr. Pakrasi contends first of all that the decree in execution of which Fazaruddin purchased the property was not a rent-decree as contemplated by the Bengal Tenancy Act, but was merely a money-decree and that nothing more passed by the sale than the right, title and interest of Baramdi the other co-sharer. That the plaintiff's 4 annas share did not pass by the sale. In support of his contention he relies on the evidence of the record-of-rights in which the plaintiff is shown as the holder of 4-annas share in this holding. Mr. Pakrasi contends that it is not sufficient that the landlord should bring a suit against the recorded tenant only. If it is within his knowledge, and, the learned vakil contends that it was within his knowledge that there are other cosharers in the holding it is not

sufficient for him to bring the suit against the recorded tenants only but he must bring the suit against all the tenants. Mr. Talukdar who appears for the respondents contends that it is sufficient for the landord in order to obtain a decree for rent to bring his suit against the recorded tenant only. He contends that the other tenants would be estopped from setting up their title having allowed the recorded tenant to hold himself out as the sole owner of the tenancy.

In support of his contention he has referred us to the case of *Profulla Kumar Sen* v. *Salimullah Bahadur* (1). Looking at the facts of that case I do not think it can really be considered as an authority for the proposition that Mr. Talukdar would ask us to accept. The facts of that case are these: One of the tenants of the holding for 17 years never attempted to get his name registered in the landlord's sherista. He never asserted his right as a tenant and had never paid any rent. In those particular circumstances the learned Judges held that in such a case he was not entitled to recover possession of his share in the tenancy. In that particular case the whole tenure had passed by a sale in execution of a decree against only the recorded tenant. On the other hand, we have the case of *Ashok Bhuiyan* v. *Karim Bepari* (2) on which Mr. Pakrasi relies where the learned Judges held that there was no law which rendered it obligatory upon the tenants who were not tenure-holders to get their names recorded in the landlord's sherista and, therefore, a sale of a jote in execution of a decree for rent obtained against the recorded tenant only did not pass the interest of a tenant whose name was not recorded in the landlord's sherista. Further in the case of *Jagattara Dassya* v. *Daulati Bewa* (3) having special reference to page 80 (of 37 C.) the learned Judges remarked as follows:

> He is also, we think, mistaken in saying that the case of *Rajani Kant Guho* v. *Srimutty-Uzir Bibi* (4) 'enunciates the principle that the landlord is not bound to look beyond his record.' The question under the present law is always one of fact, whether the recorded tenant represents the holding or not,

(1) [1919] 23 C. W. N. 590=52 I. C. 304.
(2) [1905] 9 C. W. N. 843.
(3) [1910] 37 Cal. 75=2 I. C. 695=13 C. W. N. 110.
(4) [1902] 7 C. W. N. 170.

In the present case the landlord had only to look to the record-of-rights to see that Baramdi was not the sole tenant of the holding but that the plaintiff had an interest to the extent of 4 annas. In the present case, therefore, we are of opinion that the landlord was not entitled only to sue Baramdi and that in order to obtain a rent-decree as contemplated by the Bengal Tenancy Act he was bound to have included the name of the plaintiff whose name appears in the Settlement Record which information was available to the landlord himself. We are, therefore, of opinion that the decree in execution of which Fazaruddin purchased the property was not a rent-decree and that nothing more passed by the sale excepting the right, title and interest of Baramdi and that the interest of the plaintiff did not pass.

Mr. Talukdar has raised an objection that if we find against him and hold that the decree under which Fazaruddin purchased was not a rent-decree the plaintiff or rather her representatives-in-interest for she is now dead, are not entitled to khas possession. His contention is as follows: Khayerunnessa, the plaintiff, died during the pendency of the appeal and under the order of the Court her mother and her husband were substituted as her legal representatives. Mr. Talukdar contends that these two persons are not her only legal representatives but that there are two uncles by the name of Nazir Mnhammad Paloan and Ahadi Paloan and in support of this contention has filed an affidavit. Now it would appear from the record that on the 5th March an application was made by the heirs of the deceased appellant Khyerunnessa, namely, her mother and her husband, for the substitution of their names in her place and this substitution was allowed. In accordance with the practice of this Court this substitution was made without notice to the respondents. Be that as it may this substitution would be considered as binding unless it is set aside by a proper and appropriate order. It was open to the respondents to have moved this Court to vacate this order on the ground that there were other heirs of Khayerunnessa who would be entitled to be substituted. Not, however, having done this, this order must be held as binding so far as this appeal is concerned.

The result, therefore, is, the appeal must succeed. The decree of the lower appellate Court is set aside and that of the trial Court restored. The appellants are entitled to their costs both here and in the lower appellate Court.

**Page, J.**—I agree. It is not the law that a landlord in every case is entitled to regard as his tenants only those persons whose names are recorded as such in his sherista, and to disregard the interest of co-sharer tenants whose names are not so recorded. Whether or not he may do so depends upon the circumstances of each case. It often happens, of course, that co-sharer tenants permit one of the co-sharers to represent them all *visa vis* the landlord with respect to the tenure, and allow his name to be recorded as representing the interest of all the co-sharers. In such a case. no doubt, the landlord is entitled to regard the recorded tenant as the sole person to whom he need apply for the rent due, as representing the tenure. It is a question of fact in each case. Under the circumstances of this case I agree that the plaintiff's interest in the tenure did not pass by the sale.

*Appeal allowed.*

---

## * A. I. R. 1927 Calcutta 27

GREAVES AND PANTON, JJ.

*Sm. Bhaba Sundari*—Defendant—Appellant.

v.

*Ram Kamal Dutta*—Plaintiff — Respondent.

Appeal No. 1032 of 1923, Decided on 13th November 1925, from the appellate decree of the Dist. J., Noakhali, D/- 18th December 1922.

* *Evidence Act, S. 92—Mortgage suit—Mortgagor can prove satisfaction by part-payment and remission of balance.*

In a mortgage suit it is open to the mortgagor to prove that the mortgage has been satisfied not merely by payment in full of the amount due thereon but by part payment and remission of the balance : 44 *Bom. 55, Diss. from.*

[P 27 C 2]

*Romesh Chandra Sen* and *Jitendra Kumar Sen Gupta*—for Appellant.

*Gunada Charan Sen* and *Nagendra Nath Bose*—for Respondent.

**Greaves, J.**—This is an appeal by the defendant in a mortgage suit. The mortgage bond was executed by the defendant's husband, who has died and the defence taken was that the mortgage had been discharged by a payment of the principal sum of Rs. 100 which was due thereon and that the interest which was due has been remitted by the plaintiff. The first Court dismissed the suit accepting the story of the defendant but the lower appellate Court has decreed the suit for what remained due on the mortgage holding that the evidence tendered by the defendant to show satisfaction by payment of Rs. 100 and by remission of the interest was not admissible having regard to the provisions of the Indian Evidence Act. In our opinion, the evidence is admissible to show satisfaction of the mortgage in the manner alleged by the defendant. We have been referred to two decisions, one of the Bombay High Court in *Jagannath* v. *Shankar* (1), and the other in *G. P. Mallappa* v. *Matun Naga Chetty* (2). There is no doubt that the decision in *Jagannath* v. *Shankar* (1) supports the view taken by the learned District Judge, namely, that the evidence tendered by the defendant on this point was not admissible. But sitting recently with Mr. Justice B. B. Ghose I had an occasion to consider the Bombay decision and the view we arrived at was that despite that decision it was open to the mortgagor to prove that the mortgage had been satisfied not merely by payment in full of the amount which was due thereon but by part payment and remission of the balance. That case is not reported and unfortunately we have not been able to refer to it. But I still adhere to the view expressed therein and this being so, we think that the learned District Judge was wrong in holding that the evidence tendered by the defendant was not admissible.

The result is that the decree of the lower appellate Court is set aside and the case is sent back to that Court in order that the learned Judge in that Court may arrive at a decision after considering the evidence given by the defendant as to the satisfaction of the mort-

(1) [1920] 44 Bom. 55=54 I.C. 689=22 Bom. L.R. 39.

(2) [1918] 42 Mad. 41=35 M.L.J. 555=8 L. W. 522=48 I. C. 158=(1918) M. W. N. 719.

gage by payment of Rs. 100 and remission of the interest due on the mortgage and may finally dispose of the appeal. Costs of this appeal will abide the result.

**Panton, J.**—I agree.

*Case remanded.*

---

## * A. I. R. 1927 Calcutta 28

MUKERJI AND G. N. ROY, JJ.

*Ram Das Singh* and *others*—Accused—Petitioners.

v.

*Emperor*—Opposite Party.

Criminal Revision No. 635 of 1926, Decided on 13th August 1926, from the order of the Addl. Presy. Mag., Calcutta, D/- 21st June 1926.

* *Penal Code, S.* 188—*Promulgation of order is not sufficient—Accused must be proved to have knowledge of the order.*

Section 188 requires that it should not merely be proved that there was an order which was duly promulgated under S. 134, Criminal P. C., but also that the accused person who is going to be convicted under the section was aware of it. The promulgation of the order is not sufficient to establish this knowledge: 22 *Cr. L. J.* 725, *Foll.* [P. 28, C. 2]

*Sures Chandra Taluqdar* and *Mahendra Kumar Ghose*—for Petitioners.

*Manindra Nath Banerjee*—for the Crown.

**Judgment.**—The petitioners, who are five in number, have been convicted by the Additional Presidency Magistrate of Calcutta under S. 188 of the I. P. C. The charge against the petitioners was that they had disobeyed an order which was passed under S. 144 of the Code of Criminal Procedure by the Chief Presidency Magistrate on the 4th April 1926. The order directed the public generally not to assemble or proceed in parties of more than 5 in number when frequenting streets and public places of Calcutta within a certain specified area. That the petitioners violated this order is clear from the finding of the learned Additional Presidency Magistrate. To convict the petitioners under S. 188 of the Indian P. C., however, it is necessary that it should be established that the petitioners knew that there was such an order which prevented them from assembling or proceeding in groups of more than five as referred to in the order. As regards this the learned Chief Presidency Magistrate held that there was a proper promulgation of this order in accordance with the provisions of S. 134, Cl. (2) of the Code of Criminal Procedure. The learned Magistrate was also of opinion that because such a promulgation has been proved it was not open to the petitioners to plead ignorance of the contents of the order. In my opinion the learned Magistrate was not right in the view that he has taken of the matter. S. 188 of the I. P. C., requires that it should not merely be proved that there was an order which was duly promulgated but that also that the accused person who is going to be convicted under the section was aware of it. That the promulgation is not sufficient to establish this knowledge has been held by the Lahore High Court in the case of *Emperor* v. *Abdulla* (1). In that case the learned Judges observed that it is the duty of the prosecution in a case under S. 188 of the I. P. C. to prove by positive evidence that the accused had knowledge of the order with the disobedience of which he is charged and that a proof of general notification promulgating the order does not satisfy the requirements of the section. With this observation of the learned Judges I entirely agree. It is true that it was open to the learned Magistrate to take into consideration the facts and circumstances of the case including the fact that the petitioners lived at the place where according to the police officer the order was duly promulgated in accordance with the provisions of S. 134, Cl. (2) and to come to a finding that the petitioners individually had knowledge of the order itself. The learned Magistrate, however, has not thought fit to draw any such inference from the facts and circumstances of the case; and the materials that have been placed before us by the learned vakil for the Crown in this rule do not satisfy us that in point of fact it may be held with any degree of certainty that the petitioners had any such knowledge. For these reasons we are of opinion that one of the cardinal elements necessary to justify a conviction under S. 188 has not been established and that the petitioner's conviction under that section should accordingly be set aside.

In the result, we make the Rule absolute, set aside the conviction of the

(1) [1921] 22 Cr. L. J. 705=63 I. C. 865.

petitioners under S. 188 of the I. P. C. and the sentences that have been passed on them all and direct that the petitioners be acquitted and discharged.

*Rule made absolute* : *Accused acquitted.*

---

## * A. I. R. 1927 Calcutta 29

CUMING AND B. B. GHOSE, JJ.

*Rebati Mohun Das* and *another*—Appellants.

v.

*Alauddin Ahammed Chowdhury* and *others*—Respondents.

Appeal No. 312 of 1924, Decided on 22nd December 1925, from the appellate order of the Dist. J., Dacca, D/- 29th May 1924.

* (a) *Limitation Act, Art.* 182—*Uncertified payment does not give fresh start for limitation.*

An uncertified payment does not give a fresh starting point to the limitation : 46 *Cal.* 22 and 43 *Cal.* 207, *Doubted and Dist.* [P 29 C 2]

* (b) *Limitation Act, Art.* 182 — *Certification is not a step-in-aid (obiter).*

(*Obiter*) *Per Cuming, J.*—A certification of payment by a judgment-debtor is not an application to the Court to take some step-in-aid of execution. It is merely a statement to the Court that something had been done and not an application to the Court to do something. [P 29 C 1]

*Rajendra Chandra Guha* — for Appellants.

*Asita Ranjan Ghose* — for Respondents.

**Cuming J.**—The facts of the case out of which this appeal arises are as follows: The present appellant obtained a decree against the respondents on the 15th of July 1916. Certain payments were made towards the satisfaction of the decree on the 29th of November 1916, 3rd October 1917, and 22nd December 1918, and these payments were certified to the Court. It has been held that certification of payment to the Court is a step in aid of execution so as to save limitation under the provisions of Art. 182, sub-Cl. (5) of the Limitation Act. Speaking for myself I feel considerable difficulty in holding that a certification of payment by a judgment-debtor is an application to the Court to take some step in aid of execution. Speaking for myself I should look upon it as merely a statement to the Court that something had been done and not an application to the Court to do something. However, so far as the present appeal is concerned it is not necessary to decide this point. It may be taken for the purpose of this appeal that certification of payment on the 22nd December 1918 was a step-in-aid of execution. The appellant then alleges that further payments were made on the 17th April 1919, and the 13th April 1922. These payments were not certified to the Court. On the 19th July 1922, he applied for execution of the decree.

Both the lower Courts have found that this application was time barred as it was not made within three years of the last steps in aid of the execution, namely, the certification of payment made on the 22nd December 1918.

The learned vakil who has appeared for the appellants would seem to argue that the uncertified payment made on the 17th April 1919, was within three years of the 22nd December 1918, the date of the last certified payment and that the uncertified payment made on the 13th April 1922, was within three years of the uncertified payment of the 17th April 1919, and that the application for execution made on the 17th July 1922, was within three years of the uncertified payment of the 13th April 1922, and that this would save limitation. He would contend that each of these uncertified payments gave a fresh starting point to the limitation and in support of his contention he would rely upon the cases of *Jatindra Kumar Das* v. *Gagan Chandra Pal* (1) and *Eusuff Zeman Sarkar* v. *Sanchia Lal* (2). At most these decisions would support the proposition that if a payment be made although uncertified within three years of the last certified payment and that this payment was itself certified within three years of the date of payment it would save limitation. With great respect to the learned Judges I have considerable difficulty in accepting the correctness of this decision. However, the principle laid down in those cases obviously does not apply to the present case, because admittedly the payment of the 17th April 1919, was not certified to the Court within three years of the date of payment and the payment

(1) [1919] 46 Cal. 22=45 I.C. 903.
(2) [1916] 43 Cal. 207=23 C.L.J. 390=34 I.C. 606=20 C.W.N. 272.

of the 13th April 1922, was not made within three years of the date of the last certified payment. It is therefore clear that the judgment of the lower appellate Court is right and that the application for execution is barred by limitation.

The appeal, therefore, fails and must be dismissed with costs. Hearing free three gold mohurs.

**B. B. Ghose, J.**—I agree that the appeal should be dismissed on the finding of the lower appellate Court that the payments of the 17th April 1919, and 13th April 1922, were not certified. The application of the 19th July 1922, for certifying the payment made on the 13th April 1922 would not save limitation.

*Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 30

CUMING AND PAGE, JJ.

*Abdul Gafur Chaudhury* and *another* —Defendants—Appellants.

v.

*Abdul Jabbar Mia* and *others*—Plaintiff — Pro forma Defendants—Respondents.

Appeal No. 170 of 1924, Decided on 15th March 1926, from the appellate decree of the 1st Sub-J., Bakarganj, D/- 18th September 1923.

(*a*) *Limitation Act, Art.* 120—*Entry in—Suit for declaration that entry is wrong—Limitation runs from date of final publication.*

In a suit for declaration that an entry in the Record of Rights is wrong, limitation runs from the date of the final publication of the Record of Rights : 23 *C. W. N.* 883, *Rel. on.* [P 31, C 1]

(*b*) *Civil P. C., S.* 100—*Limitation.*

Limitation is a mixed question of law and fact. [P 31, C 2]

(*c*) *Limitation Act, Arts.* 120 *and* 144—*Suit for declaration of title and confirmation of possession—No allegation as to disturbance of possession by defendants—Cause of action being erroneous entry in Record of Rights—Suit is governed by Art.* 120 *and not Art.* 144.

Where in a suit for a declaration of title and confirmation of possession the plaintiff does not allege that his possession has been disturbed or threatened by the defendants and the cause of action was for the declaration that the entry in the Record of Rights was erroneous, Art. 120 and not Art, 144 applies. [P 32, C 1]

(*d*) *Limitation—Duty of Court.*

A Court is bound to see whether a plaintiff has brought his suit within the statutory period fo limitation

*Sarat Chandra Roy Chowdhury* and *Sures Chandra Talukdar*—for Appellants.

*Jogesh Chandra Roy* and *Probodh Chandra Kar*—for Respondents.

**Cuming, J.**—In the suit out of which this appeal has arisen the plaintiff prayed for a declaration of his zemindari title to four-annas share in the land described in the khatian mentioned in the plaint ; that his possession thereto may be confirmed; and that the settlement khatian might be declared wrong and fraudulent. There was a further prayer that if the Court found that the plaintiff was out of possession, then possession of the said lands might be given to the plaintiff after declaration of title. His allegations in the plaint were that during the last Settlement operations, which took place in 1907, the lands in suit were recorded in the name of the principal defendants either through the fraud of the principal defendants or through the mistake of the Survey Amin, but that the lands were still in his possession. He then proceeded to state that the lands being at a great distance from his house, and near to the house of the principal defendants, the father of the principal defendants was entrusted with the task of recording ; and on account of their fraud the plaintiff could not know anything of the said record, and that he came to know of the incorrect entry in the Record of Rights in Falgoon 1323 B. S., corresponding to February 1919. The case of the defendants was that they were tenants in respect of the lands under the plaintiff and that they had been in possession for more than 12 years. The first Court dismissed the plaintiff's suit holding that the plaintiff was not in possession and that the Delendants Nos. 1 and 2 were in possession. He disallowed the plaintiff's prayer for khas possession on the ground that he had not been in possession within 12 years prior to the institution of the suit. He, therefore, held that the plaintiff's suit was barred by limitation.

On appeal this finding was reversed by the District Court. The District Court found that the plaintiff was still in possession and that defendants have never to the knowledge of the plaintiff asserted their adverse title and possessed the disputed lands for more than 12 years prior to the suit. He, therefore, found that there was no complete ouster

DEPARTMENT OF LAW
LIBRARY
UNIVERSITY OF KASHMIR

and that the suit was not time barred by the 12 years' rule and he decreed the plaintiff's suit in full with costs.

Defendants Nos. 1 and 2 have appealed to this Court. It is contended on their behalf that the plaintiff's suit is barred by limitation. Mr. Roy Choudhury, who has appeared for them, contends that Art. 120 and not Art. 144, which is apparently the article applied by the lower appellate Court, is the Article that applies. He then contends, that limitation runs from the date of the final publication of the Record of Rights; that the final publication was in 1907 and hence the suit is clearly barred by limitation. In support of his contention he has relied on the decision in the case of *Rajani Nath Pramanik* v. *Manaram Mandal* (1). Mr. Roy Chowdhury contends that the period of limitation must run from the date of the publication of the Record of Rights as there is no allegation in the plaint that the plaintiff's possession has in any way been disturbed by the defendants. Hence the only cause of action is the incorrect entry in the Record of Rights. The decision to which he has referred us undoubtedly lends support to the contention of the learned advocate. The facts of that case were very similar to those of the present case. In that case it was also pointed out that the plaintiff did not allege that his possession had been in any way disturbed or threatened to be disturbed by the defendant. It is quite clear from the plaint in the present case that the plaintiff bases his cause of action on the Record of Rights and on nothing else. There is no suggestion anywhere in the plaint that his possession has been in any way threatened or disturbed by the defendants. Therefore his only cause of action is this entry in the Record of Rights. If his cause of action dates from the date of the final publication of the Record of Rights then it is quite clear that the suit is barred by limitation.

In the plaint, however, there is an allegation that the plaintiff has been kept out of knowledge of the entry in the Record of Rights by the fraud of the defendants. It does not appear that the case was ever considered from this standpoint by either of the Courts below. The learned advocate who appears for the plaintiff-respondents contends that it is not open to appellant now for the first time in second appeal to raise this question of limitation. It seems to me, however, that this question of limitation is a mixed question of law and fact; the case made out really by the plaintiff in the plaint was that his cause of action dated from the Record of Rights and that he had been kept out of his knowledge of the incorrect entry by the fraud of the defendant and the Court was bound to see whether he had brought his suit within the statutory period. Admittedly the plaintiff must bring his suit within the statutory period of limitation. As far as I can see neither of the Courts below has approched the case from this point of view. It will, therefore, be necesssary for the case to be remanded to the lower Court to decide whether the plaintiff was kept out of knowledge of this entry in the Record of Rights by the fraud of the defendants until a date within the statutory period. If he finds that the plaintiff was so kept out of knowledge of the entry in the Record of Rights by the fraud of the defendants he will then hold that the suit is not barred by limitation and he will decree the appeal and the suit because all the other findings in his judgment are in favour of the plaintiff. If, on the contrary, he finds that the plaintiff was not kept out of his knowledge of the entry in the Record of Rights by the fraud of the defendants he will dismiss the appeal and dismiss the suit as being barred by limitation.

Costs of this appeal will abide the final result.

**Page, J.**—I regret that this remand is necessary because in my opinion it is due merely to defective pleadings on behalf of the plaintiff. If the plaintiff had set out in the plaint that he desired a declaration of title and confirmation of possession because the defendants were denying his title or disturbing or threatening to disturb his possession, I should not have consented to the remand being made. It is patent to my mind both from the written statement and the course which the proceeding took that in point of fact Defendants Nos. 1 and 2 were claiming to be tenants and the lower appellate Court has found that they adduced a forged pattah in support of their claim. On the other hand an owner of

(1) [1919] 23 C. W. N. 883=53 I. C. 963.

property is not entitled to launch proceedings for a declaratory decree merely for caprice or because it may be that he enjoys litigation. He must bring himself within the provisions of the Specific Relief Act in a case such as the present one. Now, in his plaint the plaintiff does not allege that his possession has been disturbed or threatened by the defendants. Upon the defect in the pleadings, although, as I have stated, in my view there is no substance in the point, it appears, having regard to the terms of the plaint alone, that the plaintiffs's real cause of action was for a declaration that the entry in the Record of Rights was erroneous. If that is so there is authority for the view that Art. 120 of the Limitation Act would apply. But the plaintiff alleges that the entry was fraudulently made by the father of Defendants Nos. 1 and 2 and that he actually became aware of this fraudulent entry at a later date, which, if made out, would entitle him to maintain the suit. I consent, therefore, to the remand being made in the terms and for the purpose which my learned brother has stated.

*Case remanded.*

---

## A. I. R. 1927 Calcutta 32

GREAVES AND MUKERJI, JJ.

*Gangadas Seal* and *another*—Insolvents—Appellants.

v.

*Percival* and *others*—Respondents.

Appeals Nos. 36 to 39 of 1926, Decided on 17th March 1926, from the orders of the Dist. J., Chittagong, D/- 24th November 1925.

*Provincial Insolvency Act* (1920), *S.* 24 (2)—*Sub-S.* (2) *is mandatory—Failure to examine vitiates order of adjudication.*

Sub-Section (2) is mandatory and if the debtors are present in Court, there is an obligation on the Court to examine them and failure to do so would vitiate the order of adjudication.

[P 33, C 1]

*Nripendra Chandra Das*—for Appellants.

*Narendra Kumar Das*—for Respondents.

**Greaves, J.**—These four appeals arise out of adjudication orders passed in insolvency by the District Judge of Chittagong on the 24th November last. Appeals Nos. 36 and 39 are appeals by one Gangadas Seal who was adjudicated on the 24th November 1925; Appeals Nos. 37 and 38 are appeals by Gurudas Seal who was adjudicated on the same date. The adjudications were made at the instance of the creditors. It appears that Gangadas, Gurudas, and Hara Gobinda were joint in estate and they carried on, as members of a joint Hindu family, a certain business. They had incurred debts; and on the 7th of September 1923 an application was made to the Court for the adjudication of Gangadas, Gurudas and Hara Gobinda, the applications for adjudication of all the three being included in the same petition. It was held that no adjudication order could be made under the circumstances on one petition; and accordingly the names of Gurudas and Hara Gobinda were struck out and the petition of the 7th September 1923 proceeded as against Gangadas alone. On the 29th September 1923 an application was made for adjudication of Gurudas and it is to this application that Appeal No. 37 relates. The acts of insolvency alleged were with regard to two transfers, dated the 9th June 1923, and the 23rd August 1923. On the 6th of October 1923 a petition was presented for adjudication of Gurudas Seal. Appeal No. 38 arises out of this petition. On the 8th October 1923 an application was made for adjudication of Gangadas and Appeal No. 39 arises out of the adjudication order made on this pettion.

Five points are urged before us in these appeals. It is said first of all that except as regards the petition of the 7th September 1923, which now relates to Gangadas alone, the applications are barred by limitation, because they were made more than three months after the acts of insolvency alleged or rather the act of insolvency relating, to the transfer of the 9th June 1923. Secondly, it is said that all the four adjudication orders are vitiated by the failure of the Court to examine the debtors under the provisions of S. 24, sub-S. (2) of the Provincial Insolvency Act. Thirdly, it is said that the adjudication orders are bad, because the period of discharge is not specified in the order in accordance with the directions given in S. 27 of the Act. Fourthly, it is said that there was no finding that the debtors were unable to pay their debts; and fifthly, it is said that the petitioners for

adjudication in a peals Nos. 38 and 39 were not present and, therefore, the adjudication orders are bad on that ground.

I shall deal first with Appeal No. 36. Here no question of limitation arises, as one of the acts of insolvency alleged, the transfer of 9th June, was within three months of the presentation of the petition. So far as the question of discharge is concerned, there is nothing in this as the time has subsequently been fixed for applying for the discharge. There is nothing in the point with regard to the proof of inability to pay debts, as oral evidence was given with regard to this and no cross-examination was directed against this evidence; and there is nothing, I think, in the last point, because there was evidence before the Court apart from that of the petitioners which would justify the Court in making the adjudication order. The only difficulty then is with regard to the failure to examine the debtors under the provisions of S. 24 sub-S. (2). This is mandatory; for the sub-section provides that the Court shall examine the debtors if they are present and Sub-S. (4) provides that a memorandum of the substance of debtors' examination shall be made by the Judge and shall form part of the record of the case. Prima facie, therefore, the obligation to examine the debtors if they are present is mandatory; and the failure to do so prima facie would vitiate the order of adjudication. But it is said that this is a provision inserted in the interest of the creditors and that it is only for them to complain and not the debtor if he is not examined.

We were referred to the provisions of S. 350 of the old Civil P. C., and to the case of *Gouri Kant Burman* v. *Damodar Das Burman* (1) as an authority for the contention put forward on behalf of the respondent. I do not think, however, that that case or S. 350 of the old Code is of any assistance to us. S. 350 occurs in a chapter of the old Code headed "Insolvent Judgment-debtor", and S. 350 is a section which stands by itself; and clearly, therefore, it was open to the Court to hold that S. 350 only applies to the judgment-debtor himself making the application and not to the application for adjudication by a creditor. In S. 24 of the Provincial Insolvency Act, we are dealing with a single section which contains amongst other things the provision in question; and although it is true that sub-Ss. (*b*) and (*c*) and sub-S. (1) of S. 24 only apply to the creditor and not to the debtor, I feel a difficulty in saying, having regard to the exact words of sub-S. (2), that failure to examine may not be a ground of complaint by the debtor himself. Upon the evidence before us which is uncontradicted, the debtors were present during the whole of the hearing, although their pleader did not argue as their application for adjournment was refused. But I think that the sub-section is mandatory and that if, as here, the debtors were present in Court, there was an obligation on the District Judge to examine them and that his failure to do so would vitiate the order of adjudication. Accordingly we think that the order of adjudication in respect of which Appeal No. 36 arises must be set aside, and the matter will go back to the Court below in order that the District Judge may examine the debtor under S. 24, sub-S. (2), if he is present and then pass orders on the petition.

So far as the other appeals, Nos. 37, 38 and 39 are concerned, we think having regard to the order passed by a Divisional Bench of this Court with regard to Hara Gobinda's appeal, a similar course as prescribed by the order in that case should be pursued with regard to these appeals, and that they should go back in order that the learned District Judge may consider the alleged act of insolvency of the 23rd August 1923, as he was directed to do by the Divisional Bench in Hara Gobinda's case; and during such investigation he should examine the debtors under S. 24, sub-S. (2) if they are present in Court.

The result, therefore, is that we set aside the orders of adjudication in all these appeals and the matters will go back for the examination and investigation which I have indicated and the appeals will be finally disposed of after this has been done.

Costs of these appeals will abide the result.

We assess the hearing fee at one gold mohur in each case.

**Mukerji, J.**—I agree.

*Cases remanded.*

(1) [1900] 5 C. W. N. 90.

## * A. I. R. 1927 Calcutta 34

GREAVES AND MUKERJI, J.

*Jogesh Chandra Ash* and *another*—Decree-holders—Appellants.

v.

*Entaz Ali* and *others*—Petitioners—Respondents.

Appeals Nos. 251 to 254 of 1925, Decided on 20th April 1926, from the appellate orders of the Dist.-J., Birbhum, D/-24th February 1925.

* *Evidence Act, S.* 115—*Estoppel—Only such person can take advantage of a representation for whom it was meant—Declaration in sale proclamation that property is not subject to any encumbrance—Only purchaser at auction sale can plead estoppel and not a private purchaser from judgment-debtor.*

Only the person to whom the representation was made or for whom it was designed can avail himself of it. If, however, the declaration was intended to be general, then, it seems that one who did not hear it, but to whom it was made known directly afterwards or within the time to be allowed for acting upon it, may act upon it.

A declaration in the sale proclamation by the decree-holder that the property advertised for sale is not subject to any encumbrance does not act as estoppel as against him in favour of a purchaser of the property privately from the judgment-debtor and not in auction sale to which the proclamation related: *Case law discussed.* [P. 36, C. 1]

*D. N. Mitter* and *Bijoy Kumar Bhattacharjee*—for Appellants.

*Bankim Chandra Mukerjee* and *Apurba Charan Mukherji* for *Charu Chandra Ganguly*—for Respondents.

**Mukerji, J.**—The facts necessary to be set out for the purposes of these four appeals are as follows:

There were four simple mortgages executed by one Sheikh Ajahar in favour of one Mahananda Ash,—the first dated——October 1901, the second dated——August 1902 which was in respect of some only of the properties covered by the first mortgage, the third dated——October 1903, which was in respect of the same properties as were covered by the second mortgage, and the fourth dated——April 1908, which related to such of the properties as were included in the first mortgage but not in the second or the third. Decrees were obtained in respect of the said four mortgages. In these appeals we are not concerned with the decree on the fourth mortgage, which it may be mentioned, has not yet been put into execution. In execution of the decree on the first mortgage the decree-holder put up the mortgaged properties to sale stating that there was no other incumbrance thereon, and purchased the said properties on the 13th June 1921. On the 24th June 1921, the judgment-debtors conveyed such of the properties as were covered by the second and the third mortgages to the respondents and with the money obtained by the said sale the decretal debt was satisfied and the sale in favour of the decree-holder was set aside on the 12th July 1921. The decree-holder then applied for execution of his decrees under the second and the third mortgages. The respondents put in objections to the effect that the properties were advertised for sale with a declaration that there was no other encumbrance on them and the respondents purchased them on the faith of that declaration and, therefore, the decree-holder was estopped from setting up the encumbrances and proceeding with the execution of the decrees. The Munsif overruled these objections, but the District Judge on appeal has given effect to them and has dismissed the execution cases. The decree-holder has thereupon preferred these appeals.

The learned Munsif took the view that a private purchaser from the judgment-debtors of the properties advertised for sale could not with propriety take advantage of the declaration in the sale proclamation and that such a purchaser stood on a different footing from a purchaser at the execution sale. The learned District Judge has dissented from the view taken by the learned Munsif and put it to the test as to whether if the sale had not been set aside, the decree-holder could have sold the self-same properties again in execution of his decrees on his other mortgages. He has held that the sale proclamation contained an express declaration that there was no other encumbrance on the properties, and the respondents bona fide purchased the properties from the judgment-debtors for valuable consideration on the faith of the said declaration. He has applied the principle that if a party having a title to an estate stands by and allows an innocent purchaser to expend money on the estate without giving him notice he would not be permitted in equity to assert that title against such purchaser. He has also relied upon the principle of *Pickard* v. *Sears* (1) that where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things and induces him to act on that belief, so as to alter his own previous position the former is concluded from averring against the latter a different state of things as existing at the same time.

Now the test applied by the learned Judge is hardly a test at all for the purchase having been made by the decree-holder himself; it does not stand to reason

(1) [1837] 6 Ad. & E. 469=45 R. R. 538=112 E. R. 179=2 N. L. P. 488.

that he would not put the properties to sale in execution of his other decrees; if the purchase was made by a third party the decree-holder would undoubtedly be estopped and this estoppel of which the execution purchaser may avail himself against the decree-holder, is based on the ground that it was the statutory duty of the decree-holder to notify before the sale all liens on the properties inclusive of those held by himself. It may be remarked here that if the sale for some reason or other fell through there would have been no bar to the decree-holder setting up the encumbrances again and putting the properties up to sale subject to those encumbrances in fresh or further execution proceeding relating to the same decree.

In the reasons that the learned District Judge has given for the view that he took I cannot but think that he has mixed up the principles underlying the different kinds of estoppel and has overlooked the cardinal essentials upon which they rest.

The estoppel pleaded in this case is to the effect that the decree-holder by declaring in the sale proclamation that there was no other encumbrance misled the respondents into a belief that there was none, that the respondents acted upon that belief and that, therefore, the decree-holder is estopped from denying the facts that he represented.

In *Pickard* v. *Sears* (1) Lord Denman said:

> The rule of law is clear, that, where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the time.

In *Freeman* v. *Cooke* (2), Parke, B., pointed out that the rule was founded on previous authorities and was stated more broadly by Lord Denman in *Gregg* v. *Wells* (3) thus:

> That a party, who negligently or culpably stands by and allows another to contract on the faith . . . . . of a fact which he can contradict cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving.

He then observed that the rule itself as laid down in *Pickard* v. *Sears* (1) must be considered as established and proceeded to say this:

> By the term 'wilfully' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly; and if whatever a man's real meaning may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth.

In the case of *Sarat Chandra Dey* v. *Gopal Chunder Laha* (4) their Lordships of the Judicial Committee referring to the passage in *Freeman* v. *Cooke* (2), quoted above, observed that Baron Parke in that case in effect stated that the term "wilfully" used in the previous case of *Pickard* v. *Sears* (1) was really equivalent to 'intentionally.' Their Lordships further observed that

> as the rule had been modified in England by substituting the word 'intentionally' in the rule established for the word 'wilfully' which had been previously used, it seems to their Lordships that the term 'intentionally' was used in the Evidence Act (1872) for the purpose of declaring the law in India to be precisely that of the law of England.

TheirLordships further went on to say:

> A person who, by his declaration, act, or omission had caused another to believe a thing to be true and to act upon that belief, must be held to have done so 'intentionally' within the meaning of the statute, if a reasonable man would take the representation to be true, and believe it was meant that he should act upon it. And to this view effect was given in the case of *Cornish* v. *Abington* (5) and the later cases.

In the case before us, then, in the light of the above principle, the question arises whether the respondents have shown that as reasonable men they took the representation to be true and believed that it was meant that they should act upon it. This is the crucial question upon which the estoppel rests, but to this question the attention of the learned Judge does not seem to have been directed. This is a question of fact, but it is open to us in the absence of any finding of the Court below on this question and in view of the admitted features of the case to arrive at a finding of our own in regard to it. So far as the first part of this question is concerned it may be conceded that when the decree-holder in the sale proclamation stated that

(2) [1848] 2 Ex. 654=18 L. J. Ex. 114=6 D. & L. 187=12 Jur. 777.
(3) [1839] 10 Ad. & E. 90=8 L. J. Q. B. 193=2 P. & D. 296=113 E. R. 35.
(4) [1893] 20 Cal. 296=19 I. A. 203=6 Sar. 224. (P. C.).
(5) [1859] 4 H. & N. 549=7 W. R. 564=28 L. J. Ex. 262=157 E. R. 956.

there was no other encumbrance the respondents had no reason to think that that statement was untrue and that as reasonable men they took the representation as a true one. But can it be said that they as reasonable men believed that it was meant that they should act on the statement ? In the first place no representation appears ever to have been made to the respondents by the decree-holder and what was made was meant for persons who intended to purchase at the auction-sale, and if the respondents were not such persons they cannot avail themselves of it. In connexion with this point the following passage may usefully be quoted from Bigelow on Estoppel, 6th Edition, page 708 :

> Only the person to whom the representation was made or for whom it was designed can avail himself of it. There has been some drifting indeed from the safe anchorage of this rule, in regard to the point stated, but the better cases hold well to the position.

Again at page 709 :

> A person who receives statements at second hand, not intended for him, clearly has no right to act upon them. Indeed it is equally clear that a mere by-stander who has overheard a statement made to and for another has no better right to act upon it than if it had been communicated without authority to him ; and so it has been decided. If, however, the declaration was intended to be general, then, it seems that one who did not hear it, but to whom it was made known directly afterwards, or within the time to be allowed for acting upon it, may act upon it. This should be the limit of the law : more than that would be to make a man responsible for an act not his own or that of his agent.

If the respondents were intending purchasers at the execution sale, all that the declaration should have conveyed to them as reasonable men was that for the purposes of the sale to which the proclamation referred there was no other encumbrance on the properties or in other words that the properties were to be sold free from all encumbrances. As soon as the sale took place the purpose of the declaration was over, and it would be most unreasonable to hold that any person who intended to deal with the property in any other way could reasonably believe that the representation was meant to be acted upon by him in such dealings. That this is the question on which the application of the doctrine rests is also clear from the case of *Pierson* v. *Altrincham Urban Council* (6).

(6) [1917] 86 L. J K. B. 969=81 J. P. 149=116 L. T. 314=15 L. G. R 228.

The same result follows from the application of the propositions enunciated by Brett, J., in the case of *Carr* v. *L. & N. W. Ry.* (7) which were approved in *Coventry* v. *G. E. Ry.* (8) and in *Selon* v. *Lafone* (9). In the last mentioned case Lord Esher, M. R. said :

> Estoppels may arise on various grounds, all of which the judgment in *Carr* v. *L. & N. W. Ry.* (7) endeavours to state and each of the grounds on which an estoppel may arise, there stated, is intended to be independent and exclusive of the others.

Of the four propositions enunciated in that case the first and the fourth have obviously no application. If the representation be taken to have been made to the respondents, then in accordance with the second of the propositions, the latter have to show that the decree-holder intended that they should act upon it in the matter of the purchase that they made from the judgment-debtors. Or if the conduct of the decree-holder in making such a declaration is relied upon, then in accordance with the third of those propositions the respondents have to show that a reasonable man would take that conduct as meaning that he was to act upon it in making such a purchase.

On behalf of the respondents some arguments have been advanced before us, based on the dictum of Lord Romilly in *Briggs* v. *Jones* (10) that a person, however innocent, who puts it in the power of another to deceive and raise money, must take the consequence. But as Lord Selborne has pointed out in *Dixon* v. *Muckleston* (11) it must be something which raises a positive equity against him, upon the principle which in equity as distinct from law is conveniently designated by the term ' Estoppel '. It is difficult to see how an equity arises in the present case as against the decree-holder and in favour of the respondents. The representation was made for one particular purpose. Even if the judgment-debtors used it for another purpose, of which, however there is no evidence, it is not easy to see how any negligence may be imputed to the decree-holder, or

(7) [1875] 10 C. P. 307=31 L. T. 785=44 L. J. C. P. 109=23 W. R. 747.
(8) [1883] 11Q. B. D. 776=49 L. T. 641=52 L. J. Q. B. 694.
(9) [1887] 19 Q, B. D 68=57 L. T. 547=56 L. J. Q. B. 415=35 W. R. 749.
(10) [1870] 10 Eq. 92=22 L. T. 212.
(11) [1873] 8 Ch. 155=27 L. T. 804=42 L. J. Ch. 210=21 W. R. 178.

even if there was any negligence on his part, how that negligence was a breach of any duty that he owed to the public or to the respondents.

I am, therefore, of opinion that the order passed by the learned District Judge is erroneous. The appeals accordingly are allowed, the order of the learned District Judge set aside and that of the learned Munsif restored with costs in this Court as also in the lower appellate Court. Hearing-fee in this Court will be assessed at one gold mohur in each case.

**Greaves, J.**—I agree.

*Appeal allowed.*

---

## * A. I. R. 1927 Calcutta 37

SUHRAWARDY AND MULLICK, J.

*Surya Kanta Jana* and *others*—Defendants—Applicants.

v.

*Tarak Nath Jana* and *others*—Plaintiffs—Opposite Party.

Civil Rule No. 315-M of 1926, Decided on 13th August 1926, from the original order of the 3rd Sub-J., 24-Parganas, D/- 29th January 1926.

* *Civil P. C., S. 151—High Court can add or transpose a party from one category to another—Civil P. C., O. 1, R. 10 and S. 107.*

The High Court has ample power in the interest of justice to add parties, or to transpose a party from one category to another.: 4 *C. W. N.* 58, *Dist.*; 10 *Bom.* 227, *not Foll.* [P 38 C 2]

*Sekhar Kumar Bose*—for Applicants.

*Hira Lal Chakrabarty*, *Sarat Chandra Mukherji* and *Debendra Nath Bhattacharjee* for *Indu Bhushan Mukherjee*—for Opposite Party.

**Suhrawardy, J.**—This Rule is issued as to why the petitioner should not be transferred from the category of respondents to that of appellants. The suit was brought by the appellants in Appeal from Order No. 433 of 1925 in the Court below against Defendant No. 1 (the executor) for accounts and other reliefs, as also for administration of the estate of the testator. The plaintiffs, as well as the various sets of respondents, are beneficiaries under the Will. The plaintiffs applied in the Court below for the appointment of a Receiver to the estate of the deceased. The learned Subordinate Judge appointed a receiver to a portion of the estate for reasons stated by him in his judgment. The plaintiffs thereupon preferred the miscellaneous appeal against that order of the Court below, making all the defendants respondents to the appeal. The present petitioners, who are some of the beneficiaries under the Will, and Defendants Nos. 5 to 7 in the suit have reason to believe that the plaintiffs have made up their differences with the executor (Defendant No. 1) and are not diligent in the prosecution of the appeal which may fail for want of prosecution. They have accordingly applied to be transposed to the category of appellants so that in the event of the present appellants failing to prosecute the appeal they may proceed with it. This application is opposed by the executor (Respondent No. 1) and by the plaintiffs-appellants.

The point which is strenuously argued before us is somewhat novel. It is contended that this Court, as a Court of appeal, has no power to transfer a respondent to the category of appellants. I may mention that such applications are often made to this Court and in many cases granted when a party is transposed from one category to the other. But we have been invited in this case to test the practice on legal grounds. The power that the appellate Court has got in this matter is generally said to have been derived from O. 1, R. 10 read with S. 107, Civil P. C. But in my opinion it is safer to rest it on the inherent jurisdiction of the Court to act in furtherance of the ends of justice. I intend first to examine the cases which have been cited by the learned vakil for Respondent No. 1 in support of this contention.

Reference has been made to a decision of Maclean, C. J., and Banerjee, J. in, *Dwarka Nath Biswas* v. *Debendra Nath Tagore* (1). The question in that case is with regard to the application of S. 27 of the Code of 1882 which corresponds to O. 1, R. 10, Cl. (1). whereas the present case comes under that rule and is governed by Cl. (2) which corresponds to S. 32 of the old Code. In that case the trustees preferred an appeal. Before the appeal was heard the trustees lost their interest in the property in suit. Th beneficiaries who succeeded in driving the trustees out applied to this Court for

(1) [1899] 4 C. W. N. 58.

prosecuting the appeal in place of the trustees. The learned Judges held that S. 27 of the Code of 1882 had no application. The reason which the learned Chief Justice gave for his decision was that on a proper reading of S. 582 of the old Code, which partially corresponds to S. 107 of the New Code, it was clear to his Lordship that the provisions of S. 27 were applicable to suits only. S. 582 runs thus :

> The appellate Court shall have, in appeals under this chapter, the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted under Ch. V & Ch. XXI so far as may be (the word 'plaintiff' shall be held to include a plaintiff-appellant, the word 'defendant' a plaintiff-respondent or defendant responaent and the word 'suit an appeal') in proceedings arising out of the death, marriage or insolvency of parties to an appeal.

The latter half of the section which has not been reproduced in S. 107 of the present Code, refers to special matters as death, marriage and insolvency where the word 'plaintiff' should be held to include appellant and 'defendant' should include respondent. With reference to this provision the learned Judges remarked thus :

> But having regard to the fact that S. 582, where it makes any special provisions applicable to suits applicable also to appeals, expressly enacts that such provisions shall be so applicable, I am of opinion that this could not be said that the earlier part of the section was intended to make all the provisions applicable to suits applicable also to appeals so as to make it possible for us to say that S. 27 applies to appeals, the word 'appeal' being substituted for the word suit' in that section and the word 'appellant' being substituted for the word 'plaintiff'.

The case therefore is no authority for the present purpose ; and it has further been dissented from by the Patna High Court in *Srimate Hemangini Debi* v. *Hari Das Banerji* (2). The same learned Judges (Maclean, C. J., and Banerjee, J.) subsequently held in *Gyanananda Asran* v. *Kristo Chandra Mukerjee* (3), that S. 32 coupled with S. 582, Civil P. C. (1882) gives the appellate Court power to add as parties to the appeal persons who are not parties to the original suit ; and they further went on to observe that even if this be not so, S. 32 is not exhaustive and the appellate Court had inherent power in a case dealing with public trusts to add in the appeal such new parties as might be necessary for the protection of public interest. The same view was taken by the Patna High Court in *Hemangini Debi* v. *Hari Das Banerji* (2) above referred to. These cases are instances where a person who was not even a party to the suit was added as a party to the appeal. If the Court has power to do that, there is no reason why it should not have the power to transfer a party from one category to another.

Reference was also made in this connexion to the case of *Vasudeo Balkrishna* v. *Salu Bai* (4), where it was held that there was no power in the Civil P. C. (Act XIV of 1882) to make a party to the suit a co-appellant and that Ss. 32 and 582 give the appellate Court power only to strike out the name of a party or to direct new parties to be added to the suit whether as plaintiff or as defendant. I am not prepared to follow the reasoning of the decision, but it may be distinguished on its own facts. There the suit was brought against a widow and her adopted son, on a mortgage bond executed by the widow alone. Her son did not appear at the hearing of the suit which was decreed against the mother. She preferred an appeal and, some time after the son wanted to be added as a co-appellant. The learned Judges refused the prayer, and on the facts of the case probably rightly. The defence of the mother was that she had never executed the bond. The son wanted to appear as an appellant and contended that even if the bond was executed by the mother she had no right to do so and it did not bind the properties in his hands. It was changing the nature of the litigation entirely and it was not proper that he should have been made a co-appellant and allowed to raise new issues. This decision moreover was passed at a time when the inherent jurisdiction of the Court was not fully realized.

I have carefully considered all the objections raised by the learned vakil for Respondent No. 1 as also by the learned advocate who represents the appellant in the miscellaneous appeal and I have come to the conclusion that this Court has ample power in the interest of justice to add parties or to transpose a party from one category to another. In the present case it is very desirable that it

(2) [1918] 3 Pat. L. J. 409= 5 Pat L. W. 216= 46 I. C. 398=1918 P. H. C. C. 276.
(3) [1903] 8 C. W. N. 404.
(4) [1885] 10 Bom. 227.

should be done. From the conduct of the parties it is apparent that the suspicion of the present petitioner that the appellant is colluding with Respondent No. 1, the executor, is not groundless.

The Rule is accordingly made absolute. The petitioners will be transferred from the category of respondents to that of appellants with permission to prosecute the appeal, if they so choose. The Respondent No. 1 and the appellant should pay one gold mohur each to the petitioner as hearing fee.

**Mullick, J.**—I agree.

*Rule made absolute.*

---

## A. I. R. 1927 Calcutta 39

CUMING and PAGE, JJ.

*Sarada Kanta Sen Gupta* and *another* —Defendants—Appellants.

v.

*Nabin Chandra Sen Gupta* and *others* —Plaintiffs—Respondents.

Appeal No. 394 of 1924, Decided on 23rd April 1926, from the appellate decree of the 1st Offg. Sub-J., Faridpur, D/- 13th September 1923.

*Landlord and tenant—Homestead or agricultural lands—Tenancy is not transferable in the absence of custom or express contract to the contrary.*

Under the law as it stood before the Transfer of Property Act, tenancies whether of homestead lands or of agricultural lands were not transferable in the absence of a custom to the contrary or of an express contract to that effect: 12 *W. R.* 495, *Diss*; 23 *C. W. N.* 201, *Foll.* [P. 40, C. 1]

*Brajendra Nath Chatterjee* and *Surendra Nath Das Gupta (II)*—for Appellants.

*Gunada Charan Sen*, *Hemendra Chandra Sen*, *Jitendra Mohan Banerji* and *Someswar Mukerji*—for Respondents.

**Page, J.**—The suit out of which this appeal arises was brought to recover khas possession of certain homestead land. The land in question for many years had been in the possession of one Tilak Das under a howla of which the plaintiffs possessed twelve annas and the pro forma defendant a four annas share. The defence to the suit was that the appellants-defendants in the suit had purchased the interest of Tilak Das in the land which was set out in, and controlled by, a kabuliyat executed by Tilak Das on the 24th Falgoon 1308, that is, in the year 1901.

The lower Court has found as a fact that the kabuliyat of 1901 was a document merely confirmatory of a pre-existing tenancy, and did not create a fresh tenancy. The learned advocate for the appellants has urged that this finding of fact cannot stand because there was no evidence on the record upon which the Judge could have based the conclusion that the kabuliyat merely confirmed a prior tenancy. This point, however, has not been raised in the grounds of appeal, and it is not open to the appellants to urge it before the High Court in second appeal. It must be taken, therefore, that the kabuliyat of 1901 merely confirmed an earlier tenancy. Now the kabuliyat was executed in 1901, and the learned Subordinate Judge in the course of his judgment stated that

> Admittedly Tilak Das Bairagi's tenancy with respect to the land in suit commenced about 50 years ago, that is, before the passing of the Transfer of Property Act.

It is necessary, therefore, for us to consider whether before the passing of the Transfer of Property Act in 1882 a lease of homestead land was transferable by law. The only authority which lays down that a lease of homestead land was transferable apart from custom or contract is the decision in *Beni Madhab Banerjee* v. *Jai Krishna Mookerjee* (1) in which case Peacock, C. J., expressed the opinion that

> speaking for myself, I should say that, if one man grants a tenure to another for the purpose of living upon the land, that tenure, in the absence of any evidence to the contrary, would be assignable.

It is to be observed that in that case the tenure was created for building purposes, and as such was both assignable and inheritable according to the custom of the country. A further ground upon which the decision in that case was based was that the landlord having stood by while pucca buildings were erected upon the land in such circumstances the tenant reasonably might imagine that if the landlord's rights were thereby being infringed he acquiesced in such a violation of his rights and the landlord was not entitled to treat the tenant as a person without a legal interest in the land in question. The observations of Peacock, C. J., in that case were cited apparently

(1) 7 B. L. R. 152=12 W. R. 495.

with approval, by Jackson and Ainsile JJ., in *Durga Prasad Misser* v. *Brindaban Sookal* (2). But that case was decided upon another ground. The view expressed by Peacock, C. J., since 1871 has never been cited with approval. On the contrary where, upon the facts of a case, the learned Judges were unable to distinguish *Beni Madhab Banerji's* case (1) they usually expressed their doubt as to the accuracy of Peacock, C. J.'s observation as a correct statement of the law prior to the Transfer of Property Act.

In *Madhu Sudan Sen* v. *Kamini Kanta Sen* (3) Maclean, C. J., stated that :

> there are, no doubt, certain observations of Chief Justice Peacock in that case, which give support to the appellant's contention. They were, however, unnecessary for the decision of the case, and we doubt whether they accurately state the law as now understood in Bengal.

See also *Hari Nath Karmakar* v. *Raj Chandra Karmakar* (4), *Nabu Mondal* v. *Cholim Mullik* (5), *Madhab Chandra Pal* v. *Bejoy Chand Mahatab* (6), *Ram Charan Naskar* v. *Hari Charan Guha* (7), *Ananda Mohan Saha* v. *Gobinda Chandra Roy* (8), *Manmatha Nath Mitter* v. *Anath Bandhu Pal* (9) and *Sulin Mohan Banerjee* v. *Raj Krishna Ghosh* (10). In the last case at page 197 Acting Chief Justice Mookerji observed that :

> under the law as it stood before the Transfer of Property Act, tenancies whether of homestead lands or of agricultural lands were not transferable, in the absence of a custom to the contrary or of an express contract to that effect.

In our opinion that must be taken to be the settled view of the Calcutta High Court. His Lordship in that case proceeded to add that the only recognized exception to this rule is that stated in the case of *Beni Madhab Banerji* v. *Jai Krishna Mookerjee* (1). In that case Sir Barnes Peacock, C. J., observed that if one man grants a tenure to another for the purpose of living upon the land, that tenure in the absence of evidence to the contrary is assignable. The same view was subsequently taken in the case of *Durga Prasad Misser* v. *Brindaban Sookul* (2).

The learned advocate for the appellants has contended, having regard to those observations of Acting Chief Justice Mookerjee, that it must be taken that where land was let for the purpose of residence before the Transfer of Property Act, 1882, the tenancy was assignable. We cannot accede to that contention. Acting Chief Justice Mookerji was also a party to *Ram Charan Naskar* v. *Hari Charan Guha* (7) in which Ramini and Mookerji, JJ., held that we think that this plea cannot be sustained in the face of the rule laid down in *Madhab Chandra Pal* v. *Bejoy Chand Mahtab* (6) and *Madhu Sudan Sen* v. *Kamini Kanta Sen* (3) in which it has been held that the incident of non-transferability was common to tenancies from year to year of homestead lands and agricultural lands created before the passing of the Transfer of Property Act in the absence of a custom to the contrary and we are of opinion that the Acting Chief Justice in *Sulin Mohan's* case (10) when referring to the case decided by Chief Justice Peacock did not do so for the purpose of expressing approval of the observations in that judgment which have been cited above.

In our opinion these observations of Peacock, C. J., are opposed to the settled view of this Court and cannot now be regarded as correctly stating the law. It follows, therefore, that by purchasing Tilak Das's interest in this land the defendants obtained no title or interest therein, and they have no defence to the claim of the plaintiffs to khas possession of this plot of land.

For these reasons, in our opinion, the appeal fails and must be dismissed with costs.

**Cuming, J.**—I agree.

*Appeal dismissed.*

---

(2) 7 B. L. R. 159=15 W. R. 274.
(3) [1905] 32 Cal. 1023=9 C. W. N. 895 (F. B.).
(4) [1897] 2 C. W. N. 122.
(5) [1898] 25 Cal. 896 (F. B.).
(6) [1899] 4 C. W. N. 574.
(7) [1903] 7 C. L. J. 107.
(8) [1916] 20 C. W. N. 322=33 I. C. 565.
(9) [1919] 23 C. W. N. 201=50 I. C. 222.
(10) [1921] 33 C. L. J. 193=60 I. C. 826=25 C. W. N. 420.

## * A. I. R. 1927 Calcutta 41

GREAVES AND MUKERJI, JJ.

*Jogesh Chandra Roy*—Plaintiff—Appellant.

v.

*Asaba Khatun* and *others* — Defendants—Respondents.

Appeals Nos. 323 to 325 of 1924, Decided on 19th May 1926, from the appellate decrees of the Dist. J., Chittagong, D/- 11th September 1923.

(a) *Bengal Tenancy Act, S.* 178 (1) (a) *and* (c)—*Proprietor creating putni lease with condition that putnidar should recover any lands that the proprietor required—Proprietor leasing out lands on the same condition—S.* 178 (1) (a) *and* (c) *is not infringed.*

The proprietor of the land created a putni lease and it was provided that if the proprietor required certain of the lands leased out these would be reconveyed or assigned to him by the putnidar and the lands therefore in the hands of the putnidar were subject to this obligation. The putnidar leased out the lands with the same condition about reconveyance as in the putni lease.

*Held* : that it cannot be said that the covenant entered into by the lessee and the putnidar was any infringement of the provisions of S. 178 (1) (a) and (c) and the proprietor was entitled to claim back the lands he wanted. [P 42 C 1]

(b) *Transfer of Property Act, S.* 14—*Reservation of right of reconveyance is not creation of interest.*

The rule against perpetuities is directed against the creation of interests in land which will not have effect within a certain period.

Where the proprietor of certain lands created a putni lease with a condition that the putnidar should reconvey such lands as might be required by the proprietor and the putnidar leased out the lands on the same condition.

*Held* : that there was merely reservation of rights in favour of the proprietor and the putnidar respectively and the covenant did not offend against the rule of perpetuities. [P 42 C 2]

* (c) *Transfer of Property Act, S.* 40—*Covenant running with the land is one restricting the user and not a positive covenant.*

A covenant that runs with the land is something which restricts the user of the land and not a positive covenant. A positive covenant never runs with the land either in law or in equity : 6 *Pat. L. J.* 163 (*P. C.*), *Foll.* [P 43 C 1]

*S. C. Bose* and *Nripendra Chandra Das*—for Appellant.

*Ram Chandra Majumdar, Biraj Mohan Majumdar* and *Chandra Sekhar Sen*—for Respondents.

**Greaves, J.**—These appeals are by the plaintiff from a decision of the District Judge of Chittagong which reverses a decision of the Munsiff of the first Court of the same place. In the year 1851 one Har Chandra Roy let out certain lands by way of a grant which was in the nature of a putni lease to one Ramjoy Khansama. The lease contained a provision that the lessee would give back to the lessor if so required such portions of the land as he required. Ramjoy in the year 1862 executed in favour of one Chunnu Mistry a Kaimi Estemrari Mokurari raiyati lease of these lands. This contained a similar provision to that contained in the head lease as to giving back any lands required by the lessor. The present plaintiff is the successor in interest of Har Chandra Roy. He wanted back some of the lands in dispute for the purpose of a market and a College and he sued the successor in interest of Ramjoy for a reconveyance of the lands which he required. Eventually Ramjoy's predecessor or rather the Court on his behalf executed a reconveyance of these lands to the present plaintiff by virtue of the covenant to that effect contained in the lease of 1851. But the plaintiff found the lands in the occupation of the defendants who had, as I have stated, obtained them from Chunnu Mistry the original tenant under Ramjoy, and thereupon the suits, out of which these appeals arise, were commenced to obtain possession of the lands which had been reconveyed to the plaintiff and to obtain vacant possession thereof. The first Court passed a decree, but the District Judge has dismissed the suit on the ground that the covenant was not enforceable by virtue of the provisions of S. 178 of the Bengal Tenancy Act ; and the question before us is whether the decision of the District Judge was correct. S. 178 (1) provides that nothing in any contract between a landlord and a tenant made before or after the passing of this Act, (a) shall bar in perpetuity the acquisition of an occupancy right in land, or (c) shall entitle a landlord to eject a tenant otherwise than in accordance with the provisions of the Act.

Sub-section (3) provides that nothing in any contract made between a landlord and a tenant after the passing of the Act (a) shall prevent a raiyat acquiring in accordance with this Act an occupancy right in land. S. 179 to which reference was made provides that nothing in the Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a

permanently settled area from granting a permanent mokurari lease on any terms agreed on between him and his tenant.

Now I will first dispose of the argument based on S. 179. In a decision of this Court reported in *Afiluddi* v. *Satish Chandra Banerjee* (1), it has been decided that S. 179 only, applies to a tenancy created after the passing of the Act, and assuming for the purposes of this appeal that this decision is correct, S. 179 cannot therefore be relied on by the appellant as an answer to the defendants' contention in the suit. But in my opinion S. 178, sub-S. (1) (a) and (c) have no application in circumstances of this kind. Here the bargain was made between the proprietor of the land and the putnidar which was a valid and a legal bargain and did not infringe any provision of the Bengal Tenancy Act or of any other Act. It was provided as I have already stated that if the proprietor required certain of the lands leased out these would be reconveyed or assigned to him by the putnidar and the lands therefore in the hands of the putnidar were subject to this obligation, that is to say, it was not possible for him to create any inferior interest in the lands except burdened with the condition which he himself was bound to observe if called upon to reconvey and re-assign the lands by the proprietor. Looked at in this light it cannot be said that the covenant entered into by the lessee and the putnidar was any infringement of the provision of S. 178 (1) (a) and (c). The lands as I have stated in the hands of the putnidar were not free for him to be dealt with as he wished. He could only create an interest subject to the obligation and liability to the reconveyance which he was bound to execute if called on so to do by his superior landlord. The result, therefore, I think, is that so far as this question is concerned S. 178 has no application in the facts and circumstances of these cases. The cases to which we were referred on the subject, some of them reported and some unreported were cases between a landlord and a tenant unaffected by any covenant with the superior landlord such as appears in the present case. They cannot therefore be taken as authorities for the purposes of this case. That I think disposes of the first and main question which arises in this appeal. But various other contentions had been urged before us on behalf of the respondents, and it is necessary to deal with them shortly. First of all it is said that the plaintiff in the present suit has no privity with the defendants and that the plaintiff cannot enforce the contract that was entered into by the tenant of the putnidar and the putnidar. It is quite true that there is no privity of contract between these parties, but I think this difficulty is cured by the conveyance executed by the Court in favour of the plaintiff. That document although not happily drawn or expressed contains these words :

> I do release in your favour the land &c., you being entitled to all the rights which your predecessor had therein.

Now one of the rights of the predecessor in the land was the right in the events which had happened to call upon his tenant to reconvey the land, and in my opinion although not aptly worded these words amount in equity to an assignment of the benefit covenant for reconveyance contained in the lease executed in 1862 in favour of the putnidar. No question therefore of privity of contract arises, for the plaintiff is enforcing his rights by virtue of the express assignment of the benefit of the covenant contained in the reconveyance to which I have just referred.

Then it is said that the covenant offends against the rule against perpetuities. This argument again is I think founded upon a misconception. The rule against perpetuities is directed against the creation of interests in land which will not have effect within a certain period. But no interest in land was created at the time of the original lease of 1851, and at the time of the lease of 1862 no interest in land was created by virtue of these covenants, but rights were merely reserved to the proprietor on the one hand and to the putnidar on the other by virtue of the sub-lease of 1862. Accordingly the cases to which we were referred which were cases in which interests in land were created have no bearing in the facts and circumstances of the case before us.

That I think disposes of all the questions that were raised. But I should like to say as this question has been decided on the documents before us by other Benches of this Court that I entirely

(1) [1916] 29 C. L. J. 40=34 I. C. 497.

dissent from the view that this covenant can be looked upon as a covenant running with the land. A covenant that runs with the land is something which restricts the user of the land and not a positive covenant of this nature. A positive covenant never runs with the land either in law or in equity. Of course if this is construed as a covenant running with the land there would be no difficulty; but for the reasons which I have stated it cannot be treated as a covenant running with the land because it is a positive covenant. If authority is desired for this proposition it will be found in the decision of the Judicial Committee in *Maharaj Bahadur Singh* v. *Lal Chand Chowdhury* (2).

The result therefore is that the appeals succeed and the appellant will be entitled to his costs in these appeals in all Courts. The reconveyance directed to be executed by the Court of first instance will be executed within 40 days of the arrival of the record in the lower Court. In default the reconveyance will be executed by this Court.

**Mukerji, J.**—I agree.

*Appeals allowed.*

(2) [1920] 6 Pat. L. J. 163=25 C. W.N. 770=62 I. C. 320=13 L. W. 365 (P. C.).

---

## A. I. R. 1927 Calcutta 43

CHATTERJEA AND PANTON, JJ.

*Mahim Chandra Guha*—Appellant.

v.

*Naba Chandra Chowdhury* and *others*—Respondents.

Appeal No. 247 of 1924, Decided on 30th March 1926, from the Original decree of the Sub-J., 1st Court, Chittagong, D/- 13th May 1924.

(a) *Civil P. C., O. 26, R. 8—No consent of party against whom evidence on commission offered—Party giving evidence must show that he was beyond jurisdiction when evidence was being read.*

Where there was no consent of the defendant to the evidence of the plaintiff taken on commission being read against him and on the contrary the defendant all along insisted upon the presence of the plaintiff in Court:

*Held*: that it was for the plaintiff to show that he was beyond the jurisdiction of the Court at the time when the evidence was going to be read in Court: *A. I. R. 1923 P. C. 73, Rel. on.* [P 44 C 2]

(b) *Civil P. C., O. 26, R. 8 (b)—Exercise of discretion by Court must appear from record.*

The Court has the power under Cl. (b) of O. 26, R. 8 to dispense with the proof of any of the circumstances mentioned in Cl. (a), and allow the evidence taken on commission being read as evidence in the suit notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same, but the exercise of that discretion must appear from the record. [P 44 C 2]

*Benode Mitter* and *Narendra Kumar Das*—for Appellants.

*Sarat Chandra Roy Chowdhury* and *Chandra Sekhar Sen*—for Respondents.

**Judgment.**—This appeal arises out of a suit to enforce a mortgage bond, The property belonged to the Defendant No. 12. On the 13th September 1916, he executed a conveyance of the property in favour of certain persons who are represented by Defendants Nos. 1 to 11; and on the same day those defendants executed a mortgage of the property to the plaintiff. On the 4th November 1916, the mortgagors executed a lease of a portion of the property for a term of three years in favour of the Defendant No. 12. The case of Defendant No. 12 is that though he executed the conveyance, there was an arrangement between him and the other defendants that the latter would hold the property in trust for him, borrow money to pay off his debts, and release the property to the Defendant No. 12 after the debts were paid off, and that as the defendant, as pleader, had conducted a number of suits for the plaintiff (among others a wakf case which lasted for about 90 days for which Rs. 9,000 was due to him as fees), it was arranged that the amount due to Defendant No. 12 on account of his fees would be set off against the interest payable to the plaintiff on the mortgage. The Court below decreed the suit and the Defendant No. 12 has appealed to this Court.

So far as the execution and consideration of the mortgage bond are concerned, we must accept the findings of the Court below upon the points, and no contention has been raised before us with regard to them on behalf of the appellant. With regard to the arrangement between the Defendant No. 12 and the Defendants Nos. 1 to 11 set up by the former, the Court below held that it was quite unnecessary to decide on what terms and conditions the conveyance was executed, and that

it might be that it was executed under the circumstances spoken of by the defendant and the terms and conditions as between the defendant and the Defendants 1 to 4, and the predecessors of Defendants Nos. 5 to 11 were such as narrated by the defendan t. But I cannot understand how that would affect the plaintiff's claim based on the mortgage bond,

as the plaintiff was not privy to or acquiesced in the arrangement set up.

It is contended, however, on behalf of the appellant that the question whether there was an agreement to set off the interest on the mortgage against the fees alleged to be due to Defendant No. 12 has not been properly tried, and for this reason the plaintiff applied for commission for his examination at Rangoon. It was granted; and he was examined on interrogatories and cross-interrogatories. This was in January 1923. When the case became ready for hearing the defendant wanted to have the plaintiff examined in Court and summons was issued on him. It appears from the peon's report that he refused to accept the summons. The summons was served at Dhurung—his ordinary place of residence in the district of Chittagong. A number of petitions was subsequently put in by the Defendant No. 12 in the Court below praying that the plaintiff might be examined in Court. The last application was made on the 22nd April 1924. The Court thereupon ordered the plaintiff

to appear before the Court if defendant deposits the costs of his travelling.

On the 3rd May, the defendant deposited Rs. 2. The case came on for hearing on the 5th May, when again the defendant put in a petition praying that the plaintlff might be examined in Court. That petition was rejected, the deposition of the plaintiff taken on commission was admitted in evidence, and the suit was decreed. O. 26, R. 8, Civil P. C. provides that

Evidence taken under a commission shall not read as evidence in the suit without the consent of the party against whom the same is offered unless (a) the person who gave the evidence is beyond the jurisdiction of the Court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or is a civil or military officer of Government who cannot, in the opinion of the Court attend without detriment to the public service; or (b) the Court in its discretion dispenses with the proof of any of the circumstanaes mentioned in Clause (a) and authorizes the evidence of any person being read as evidence in the suit, notwithst anding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

There was no consent of the defendant to the evidence of the plaintiff taken on commission being read against him. On the contrary the defendant all along insisted upon the presence of the plaintiff in Court. That being so it was for the plaintiff to show that he was beyond the jurisdiction of the Court at the time when the evidence was going to be read in Court. There is no such evidence. On the contrary one of the witnesses for the plaintiff said that the plaintiff was at home (i. e., at Dhurung in Chittagong) on the day the witness was examined. In these circumstances the evidence taken on commission under the law could not be read as evidence in the case against the defendant. We may refer to the case of *Satish Chandra* v. *Satish Kanta* (1) where the Judicial Committee observed:

Evidence taken on commission should only be permitted to be used where the witness is proved to be too ill or is absent or for other sufficient reason.

It is contended by the learned advocate for the respondent that although that is so, the Court has the power under Cl. (b) of O. 26, R. 8 to dispense with the proof of any of the circumstances mentioned in Cl. (a), and allow the evidence taken on commission being read as evidence in the suit notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same. The Court no doubt has the discretion, but the question is whether the Court exercised that discretion in the present case. No reasons are stated, and having regard to the laxity of practice with regard to evidence taken on commission being read as evidence in the mofussil Courts it is very likely that the Court allowed the evidence to be read without applying its mind to the matter, and without exercising its discretion. At any rate it does not appear from the record that the Court did exercise its discretion in the matter. In these circumstances we think that the evidence taken on commission could not properly be read in Court.

It is pointed out on behalf of the respondent that the Court below has disbelieved the evidence of the defendant as to the agreement set up by him. That is true. But the evidence of the plain-

(1) A. I. R. 1923 P. C. 73.

tiff taken on commission was on the record, and it is difficult to say how far the Court was influenced by the evidence of the plaintiff taken on commission. It is to be observed that apart from the evidence of the plaintiff himself there is no other evidence to contradict the evidence of the defendant on the point.

In these circumstances, we think that the case should go back to the Court below in order that the plaintiff may be examined in Court. If the Court, after considering the evidence of the plaintiff and other evidence in the case is of opinion that the agreement set up by the Defendant No. 12, viz., that the amount of fees payable to the Defendant No. 12 would be set off against the interest payable to the plaintiff, is proved, then the amount decreed by the Court below will be reduced to such sum as the Court may find, not exceeding Rs. 13,906-14-4 at which this appeal has been laid. If no such agreement is proved, then the decree of the lower Court will stand. Costs of this appeal abide the result.

*Case remanded.*

---

## * A. I. R. 1927 Calcutta 45

WALMSLEY AND CHAKRAVARTI, JJ.

*Secretary of State*—Opposite Party—Appellant.

v.

*K. S. Bannerjee*—Claimant—Respondent.

Appeal No. 159 of 1924, Decided on 15th January 1926, from the original decree of the Land Acquisition J., 24-Parganahs, D/-11th January 1924.

* *Court-Fees Act, S. 8—There is no discrimination between Court-fees payable by Secretary of State and the claimant from an appeal against award of the Judge—Land Acquisition Act* (1894), *S.* 26—*Land Acquisition Amendment Act* (1921), *S.* 2 (2).

The inference drawn from the discrimination made between the claimant and the Secretary of State in the matter of Court-fees to be paid on appeal from the award of the Land Acquisition Judge in S. 8, Court-Fees Act, is no longer warranted by reason of the Land Acquisition Amendment Act making the Judge's decision a decree. [P 45, C 2, P 46, C 1]

*Surendra Nath Guha* and *M. Nuruddin Ahmed*—for Appellant.

*S.M. Mullick* and *Mon Mohan Banerjee*—for Respondent.

**Walmsley, J.**—This appeal is preferred by the Secretary of State against the decision of the Land Acquisition Judge on a reference under the provisions of the Land Acquisition Act.

Some land was acquired for the extension of the Medical College Hospital, and the plot under consideration lies immediately to the east of the plot to which Appeal No. 158 relates. Before the Collector the claimant asked for compensation at the rate of Rs. 10,000 per katta and Rs. 20,000 for what was called severance. In the reference the claim per katta was reduced to Rs. 6,000 nothing was said about severance, but in the Judge's Court the sum demanded on that account was Rs. 4,500. The Collector awarded Rs. 4,000 per katta and gave nothing for severance. The Judge has enhanced the rate per katta to Rs. 5,000 and has added Rs. 2,500 for severance.

A preliminary objection has been taken on the ground that the appeal has been filed on a stamp of fifteen rupees only. It is said that full Court-fees on the value of the relief claimed should have been paid. It is conceded that the old practice was to pay ad valorem Court fees but the appellant has the authority of the Punjab and the Madras Courts for paying the smaller sum. The Court fees Act makes it clear that a claimant must pay ad valorem fees, but the wording of the section that makes that provision suggests that when the Secretary of State appeals for a reduction of the sum awarded some other rule applies ; and if the Court-fees payable by a claimant are not governed by the ordinary rules affecting decrees it seems that they cannot be applicable in the case of an appeal by the Secretary of State. If that is so, the only article in the Court Fees Act under which such an appeal can be classed though not very appropriately is Art. 17 (4), an appeal to set aside. I think, however, that the position has been changed by the recent amendment of the Land Acquisition Act. For a purpose unconnected with the matter of Court-fees the decision of the Judge has been made a decree, and the result is that the Secretary of State is appealing against a decree. Where a claimant demands an enhancement of the Judge's award he also is appealing against a decree, and the special provision of S. 8 of the Court Fees Act may now, probably, be regarded as redundant. At any rate the inference drawn from the discrimination made

beween the claimant and the Secretary of State is no longer warranted. I think, therefore, that ad valorem fees should be paid. As the smaller sum was paid on the authority of decisions by other High Courts, time will be given to the Secretary of State to put in the deficit.

Now I turn to the merits of the case. The learned Judge has referred to the situation of the land, and has shown that four of the sales and awards adduced for comparison cannot be accepted as showing the value of the plot under consideration. Other awards show that land with a frontage on Bowbazar Street may be valued at about Rs. 10,000 per katta. This plot is not on the street, but it differs from the plots on each side of it in this that access to the street is not completely cut off. The Collector considered that this gave the plot a greater value than the plots on each side of it, and the only question is how much greater is that value. The learned Judge thinks that compensation should be at the rate of Rs. 5,000 per katta. I think that is a generous estimate, but I am not satisfied that it is excessive.

The next question is whether the Judge is right in awarding compensation for what is called "severance." The term is not appropriate. The effect of the acquisition is to leave the owner in possession of a narrow strip of land at the south end of the plot acquired, which by its situation is awkwardly attached to the plot further south. It is said that shape and situation make it impossible to derive the fullest advantage from this narrow strip. In this case also, I think that the claimant is inconsistent; he bases his demands on proximity to Bowbazar Street, and the acquisition does not interfere with that. All that can be said is that the plots left to him are irregular in shape, but I do not think that that fact has any real effect on their value. I think, therefore, that compensation on this account should not be given.

In the result, I think, that the appeal should be allowed in part, the Judge's award being affirmed in regard to the compensation for the land and reversed in regard to compensation of the remainder.

The appellant will recover proportionate costs.

**Chakravarti, J.**—I agree.

*Appeal partly allowed.*

---

## A. I. R. 1927 Calcutta 46

GREAVES AND PANTON, JJ.

*Khetra Mohun Ghose* and *another*—Defendants—Appellants.

v.

*Lakhi Kanta Pal* and *others*—Plaintiffs—Respondents.

Appeal No. 1107 of 1923, Decided on 17th November 1925, from the appellate decree of the Sub-J., 2nd Court, Howrah, D/- 12th February 1923.

(a) *Bengal Tenancy Act* (1885), *S.* 19—*Occupancy rights.*

Occupancy rights acquired prior to 1885 are protected by the provisions of S. 19. [P 47 C 1]

(b) *Bengal Tenancy Act* (1885) *S.* 181—*S.* 181 *does not affect rights acquired under Act* (10 *of* 1859), *S.* 6.

The provisions of S. 181 relate to the prevention of the acquisition of occupancy rights during the continuation of the Act itself and they do not affect the rights acquired as under the provisions of S. 6 of Act 10 of 1859 : 27 *C. L. J.* 556 and 31 *Cal.* 1021, *Foll.* [P 47 C, 2]

(c) *Choukidari Chakran lands—Rights acquired under ; are not distinct those under chakran lands*

There is no distinction between the rights acquired in respect of chakran lands which are of a private nature and those acquired in respect of chowkidari chakran lands which are of a public nature. [P 47 C 2 P 48 C 1]

*Bijan Kumar Mukerji* for *Rupendra Kumar Mitter*—for Appellants.

*Radha Benode Pal*, *Bhupendra Krishna Bose* and *Hem Kumar Bose*—for Respondents.

**Greaves, J.**—This is an appeal by the defendants against a decision of the Subordinate Judge of Howrah confirming a decision of the Munsif. The suit out of which this appeal arises was brought by the plaintiffs for possession of certain land on establishment of their tenancy right therein. The plaintiffs' case was that the lands in suit appertained to the chakran lands of Defendant No. 3 which he held under a service tenure under a zemindar; that the lands were resumed by the landlord on the surrender by Defendant No. 3 and that they were leased by the landlord to the present plaintiffs. The plaintiffs say that failing to obtain possession of the land leased to them they were forced to commence these proceedings.

Two contentions were urged before us on behalf of the appellants. First of all they say that the lands were not chakran

lands but niskar lands of Defendant No. 3 and that they had acquired occupancy rights in these lands by cultivating them as raiyats for a period of over 70 years, and secondly, they contended that even if the lands were chakran lands and not niskar lands they had acquired right of occupancy by their possession for the necessary period. The findings of both Courts were that the lands were chakran and that the defendants had been in occupation thereof since the year 1851 but that no occupancy rights had been acquired having regard to the nature of the land. The appeal has been argued before us on behalf of the appellants on two grounds. First of all, it is stated that the decision that the lands were chakran and not niskar has been arrived at by the admission of inadmissible evidence that is, of statements contained in the documents of title of third parties and the second point is that occupancy rights can be acquired in these lands even if they are chakran lands. So far as the first point is concerned, clearly we think the documents Exhibits 2 A and 2B were inadmissible but we think that the oral evidence was clearly admissible apart from the documents themselves. It is urged, however, before us that it is impossible for us to say in second appeal how much weight was attached by the lower appellate Court to the inadmissible evidence and that in any case the matter should be referred back to that Court for consideration of the oral evidence excluding the documents complained of. But having regard to the view we take on the second point it is not necessary to definitely decide this contention.

So far as the second point is concerned the conclusion I have come to is that occupancy right can be acquired in chakran lands and that such rights have been acquired by Defendant No. 2 in the land in suit and consequently, the appeal must succeed on this ground. Under the provisions of S. 181 of the Bengal Tenancy Act occupancy rights could not have been acquired if such rights had accrued after the passing of the Act itself. But these rights were acquired long prior to 1885 and they are in my opinion, protected by the provisions of S. 19 of that Act. It was suggested that the provisions of S. 181 govern the provisions of S. 19 but the view I take is that the provisions of S. 181 relate to the prevention of the acquisition of occupancy rights during the continuation of the Act itself and that they do not affect the rights acquired as under the provisions of S. 6 of Act X of 1859. That section provides that

> every raiyat who has cultivated or held land for a period of 12 years has a right of occupancy in the land so cultivated or held by him,

and in my opinion, by virtue of that provision the appellants have acquired rights of occupancy in the land. It is contended before us on behalf of the respondent that the appellants and their predecessors-in interest were not raiyats but were in the position of under-raiyats under the holder of the chakran lands. But I confess that this argument does not appeal to me and it certainly was not given effect to in the two cases to which I shall presently refer which seem to me to govern the decision in this appeal. These two cases are *Sitikanta Roy* v. *Bipradas Charan* (1) where it was held by this Court that under circumstances that seem to me similar to those now before us rights of occupancy can be acquired under Act X of 1859 and were not taken away by the provisions of S. 181 of the Bengal Tenancy Act. The second case is that of *Ram Kumar Bhattacharya* v. *Ram Newaj Rajguru* (2) where it was held that rights of occupancy might be acquired by a tenant even in choukidari chakran lands under S. 6 of Act X of 1859. In the judgment in that case the argument that the tenants there were tenants at will and not in the position of raiyats was considered and discarded ; and accordingly, in my opinion, unless we are prepared to hold that these decisions are wrong and refer the matter to a Full Bench the appeal is concluded thereby. I am not prepared to say that these decisions are not correct and accordingly, in my opinion, the appeal is concluded thereby.

There is, however, another argument which was raised on behalf of the respondents and it is this that these two decisions relate to chowkidari chakran lands and that the same principles do not apply to chakran lands which are of a private and not of a public nature. But I feel difficulty in distinguishing between the rights acquired in respect of chakran lands which are of a private nature and those acquired in respect of chowkidari

(1) [1918] 27 C. L. J. 556=46 I. C. 485=22 C. W. N. 763.
(2) [1904] 31 Cal. 1021=8 C. W. N. 860.

lands which are of a public nature. We think, therefore that the principles of these two cases govern this appeal. We are, however, pressed by two further decisions of this Court. The first of these cases is that of *Jafarruddin Saha* v. *Kumar Jaminiballav Sen* (3) but I do not think that any reliance can be placed on that decision for the purposes of the appeal now before us. No particulars are given in the judgment itself and the report itself is defective in that they are not supplied in the statements of the case which should have accompanied the report. Whether the rights in that case were acquired after the passing of the Bengal Tenancy Act or before under Act X of 1859, I cannot gather from the report and so no reliance can be placed on the case for the purposes of overruling the two decisions to which we have referred.

Then comes the case of *Satyendra Nath Banerjee* v. *Krishnasakha Kar* (4) in which it would appear that Mr. Justice Mookerjee, who delivered the judgment of the Court has receded from the position which he took up in the case reported in *Ram Kumar* v. *Ram Newaj* (2) to which judgment he was a party. But here again the decision did not really turn on that point but on the question of limitation. Accordingly, we do not think that we can take that decision as really differing from the decision in *Ram Kumar* v. *Ram Newaj* (2).

For the reasons, therefore, which I have indicated I think that the appeal must succeed and the decree of the lower appellate Court set aside and the suit dismissed with costs in all Courts.

**Panton, J.**—I agree.

*Appeal allowed.*

(3) [1918] 23 C. W. N. 136=46 I. C. 341=28 C. L. J. 249.
(4) A. I. R. 1922 Cal. 193.

## A. I. R. 1927 Calcutta 48

CUMING AND PAGE, JJ.

*Jiban Naskar* and *another*—Defendants—Appellants.

v.

*Muralidhar* and *another*—Plaintiffs—Respondents.

Appeal No. 393 of 1924, Decided on 22nd April 1926, from the appellate decree of the 1st Sub-J., 24 Pergannas, Alipur, D/- 18th January 1924.

*Bengal Tenancy Act, S. 50—Non-payment of rent previous to suit does not affect presumption—Rate of rent remaining unchanged for 20 years is sufficient.*

It is not necessary to prove payment of rent at the same rate for 20 years under S. 50. It is sufficient if the defendants could show that the rent or rate of rent remained unchanged for 20 years previous to the date of the suit even though a single year's rent is not paid. [P 49 C 1]

*Sitaram Banerjee*—for Appellants.
*Nashim Ali*—for Respondents.

**Cuming, J.**—In the suit out of which this appeal has arisen the plaintiffs sued to recover arrears of rent of certain jama at a rental of Rs. 9-8-0 for the years 1324 to 1327 with damages. They also prayed for enhancement of rent on the grounds that there was an increase in area of the lands, that the existing rate of rent was below the prevailing rate and that there was a rise in the average local prices of staple food-crops. At the trial the plaintiffs only asked for enhancement on the ground of rise in the average local prices of staple food crops. The defence was that originally there were two jamas of Rs. 3-8-0 and Rs. 6 which were consolidated into one jama of Rs. 9-8-0, and these two jamas, out of which one jama was made had been in existence since before the time of the Permanent Settlement and, therefore, the rent was not liable to enhancement.

The first Court held that the plaintiffs were entitled to rent for the period in suit at the rate of Rs. 9-8-0 with damages at 25 per cent. and he rejected the claim for enhancement of rent. He held that the defendants were entitled to the presumption which arose under S. 50 of the Bengal Tenancy Act and this presumption had not been rebutted. In appeal the learned Subordinate Judge held that so far as regards one portion of the jama namely, the jama for Rs. 3-8-0 which comprised some two bighas and 5 cottahs of land the defendants had proved payment of unaltered rent for more than 20 years. Hence the presumption under S. 50 arose and this presumption had not been rebutted by the plaintiffs. With regard to the other jama, namely, the jama of Rs. 6 which comprised some 3 bighas and 10 cottahs of land he held that it was for the defendants to prove payment of fixed and unaltered rent for 20 years before the suit. The defendants had failed to prove that they had paid rent at the same rate for

20 years and, therefore, they were not entitled to the presumption under S. 50 of the Bengal Tenancy Act.

The learned vakil who has appeared for the defendants-appellants contends that the learned Judge in the Court below has approached the case from an entirely wrong point of view. It was not necessary to avail themselves of the presumption under S. 50 of the Bengal Tenancy Act to prove that they had paid rent at the same rate for 20 years. It was sufficient fot the purpose of availing themselves of the presumption to prove that the rate of rent had remained unaltered for 20 years before the date of the suit. The learned vakil contends, and I think quite rightly, that the learned Subordinate Judge made an error of law in asking the defendants to prove that they had paid rent at the same rate for 20 years before the suit. It is quite clear that the learned Judge has approached the case from an entirely wrong point of view. It is not necessary to prove payment of rent at the same rate for 20 years. It is sufficient if the defendants could show that the rent or rate of rent remained unchanged for 20 years previous to the date of the suit. It is quite possible that they might not have paid a single year's rent.

The decree of the learned Subordinate Judge must, therefore, be set aside and the case remanded to him to consider the case so far as regards the jama of Rs. 6 from this point of view. If he does find that the defendants have proved that the rent or rate of rent remained unchanged for 20 years he will then have to consider whether the plaintiffs have or have not succeeded in rebutting the presumption which would then arise. After he has determined this point he will then be in a position to determine whether the case is or is not to be remanded for a further finding to the trial Court as to whether there has or has not been a rise in the average local prices of the staple food crops and whether the rent is liable to enhancement on account of the rise in the average local prices. Costs will abide the final result.

**Page, J.**—I agree.

*Case remanded.*

---

1927 C/7 & 8

## A. I. R. 1927 Calcutta 49

SUHRAWARDY AND GRAHAM, JJ.

*Nanda Kumar Das*—Appellant.

v.

*Emdad Ali* and *others*—Respondents.

Appeal No. 1595 of 1924, Decided on 3rd June 1926, from the appellate decree of the Sub-J., 1st Court, Bakargunj, D/- 25th March 1924.

(a) *Landlord and tenant—Waste land is to be considered in possession of person having title thereto—Cutting hogla, wild grass, is not an act of possession or dispossession—Adverse possession—Words.*

Waste land is to be considered in the possession of the persons having title thereto and therefore the cutting of hogla, which is a wild grass, where it is not supposed to be the exclusive property of any one, is not an act of possession by any party. [P 50 C 1 & 2]

(b) *Practice—Court is entitled to draw inference inconsistent with the case of either party.*

A Judge is perfectly entitled as a Judge of fact to give due weight to the evidence adduced by the parties and to draw his own inference which may be inconsistent with the case of either party, for it is the duty of the Judge to sift the truth and not to be pinned to the evidence of a party to the case in order not to defeat the ends of justice. [P 50 C 2]

(c) *Evidence Act, S. 114—Determination of title to waste land—No one proving possession—Court can hold that the land is in possession of rightful owner.*

Under the record of rights the presumption attaches to the correctness of the entry therein. Under S. 114, in determining a question of fact the Court may presume the existence of certain things. The entry in the record of rights has only a probative value but the presumption which the Court draws under S. 114 of the Evidence Act is a presumption of the existence of certain facts, and in determining the title to waste land the Court is entitled to hold that so long as no one else can prove possessio and the property is incapable of possession it must be held to be in the possession of the rightful owner. [P 50 C 2]

*Abinash Chandra Ghose*—for Appellant.

*Gunada Charan Sen* and *Prosanta Bhusan Gupta*—for Respondents.

**Judgment.**—The Defendant No. 6 has preferred this appeal which is limited to Plots Nos. 655 and 656. It is argued on his behalf that the estimate of facts by the lower Court is not correct, that the Court has not given proper value to the presumption arising from the record of rights and that the suit is barred by limitation.

Admittedly the plaintiffs are the nimbhowladars within whose nim howla are included the disputed Plots Nos. 653 to

658. The defendants' case is that they are the holders of osat nim howla under the plaintiffs' nim howla and that the lands in suit are included within their nim osat howla. The lower appellate Court has found on an examination of the evidence and a consideration of the Ameen's map that these plots fall within the nim howla of the plaintiffs. On this finding the plaintiffs are entitled to a decree. But then the learned Subordinate Judge goes on to determine the question of limitation to find whether the plaintiffs' right in all these plots was barred. On an examination of the evidence of possession he comes to the conclusion that the plaintiffs' right to Plots Nos. 655 and 656 is not barred, the defendants having failed to prove possession beyond 12 years: with regard to the other plots the learned Judge found that the defendants had reclaimed those plots more than 12 years ago and therefore they acquired a limited interest adverse to the plaintiffs. In this view he has passed a decree partly in favour of the plaintiffs and partly in favour of the defendants. The Defendant No. 6 who is interested in Plots Nos.655 and 656 assails the findings of the lower Court and urges that they are based not on the facts of the case but upon certain assumptions by the learned Judge.

The learned Judge has found that all these plots were at one time jungly lands. At the time when the record of rights was prepared, namely, 1905, no tangible possession of these plots (655 and 656) was possible. The other plots were brought under cultivation before the preparation of the record of rights in which all these plots were entered as in the occupation of the defendants. The appellants, however, argue that it was the plaintiffs' case that they were in possession of these two plots by taking hogla from the jungle and as the plaintiffs assert acts of possession they are bound to prove such possession within 12 years of the suit and the presumption of law that waste land is to be considered in the possession of the persons having title thereto should not be raised in their favour. With regard to this the only act of possession alleged by the plaintiffs is the taking of hogla which also the defendants claimed to have done. Hogla is a wild grass and in that part of the cuontry is not supposed to be the exclusive property of anyone. The cutting of hogla therefore is not an act of possession or dispossession by any party. The learned Judge is perfectly entitled as a judge of fact to give due weight to the evidence adduced by the parties to draw his own inference which may be inconsistent with the case of either party for it is the duty of the Judge to sift the truth and not to be pinned to the evidence of a party to the case in order not to defeat the ends of justice. The learned Subordinate Judge therefore observes that no tangible possession of these plots was possible at the time of the preparation of the record of rights by which he means to say that it was jungle land which was not capable of possession in such a way as to amount to dispossession of the person having title thereto.

It is next argued that the learned Subordinate Judge has not given due effect to the presumption available to the defendant by virtue of the entry in the record of rights and is wrong in holding that that presumption is to be overridden by the legal presumption of possession. The argument is based upon a somewhat misconceived idea of the presumption arising from the record of rights and that arising under S. 114, Evidence Act. Under the record of rights the presumption attaches to the correctness of the entry therein. Under S. 114, in determining a question of fact the Court may presume the existence of certain things. The entry in the record of rights has only a probative value but the presumption which the Court draws under S. 114, Evidence Act, is a presumption of the existence of certain facts. There is therefore no clash of presumptions in a case of this kind; and in determining the title of the plaintiffs the Court is entitled to hold that so long as no one else can prove possession and the property is incapable of possession, it must be held to be in the possession of the rightful owner. The finding of the lower appellate Court being that the defendant reclaimed these plots within 12 years of suit, this point, as well as the point of limitation both fail.

There is a cross-objection filed on behalf of the plaintiffs-respondents. They claim a declaration from Court of their nim howla title to the plots in suit. It has been found by the lower appellate Court that the plaintiffs' nim howla

title is not denied and that the defendants, being the plaintiffs's tenants, have by adverse possession acquired a limited interest which I understand to be the interest of tenants as against their landlords (the plaintiffs) in Plots Nos. 657, 658, 653 and 654. The learned vakil who appears for the appellants does not seriously contest the plaintiffs' right to get the declaration prayed for by them. But he says that there are other parties interested in these plots and such a declaration could not be made in their absence. We think that the plaintiffs are entitled to the declaration asked for whatever its effect may be. Let the plaintiffs' nim howla right in all the properties in suit be therefore declared.

The next ground urged on behalf of the cross-objections is that there is the defendants' own evidence that the four plots in which their claim for khas possession has been dismissed were brought under cultivation within 12 years. A portion of the evidence is read to us but we are not in a position in second appeal to say that the evidence relates to these four plots and not to the other two plots 655 and 656 which have been decreed to the plaintiffs. This is a matter which should have been taken and urged in the lower appellate Court as it depends upon the application of the entire evidence on the record.

The result is that the appeal fails and the cross-objection succeeds in part. In the circumstances we make no order as to costs.

*Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 51

CUMING AND B. B. GHOSE, JJ.

*Kailash Chandra Gantail*—Appellant.

v.

*Meheruddi Sheikh* and *another*—Respondents.

Appeal No. 225 of 1925, Decided on 12th March 1926, from the appellate order of the Dist. J., 24 Pergannahs, D/- 12th January 1925.

***Bengal Tenancy Act, S. 158—Application under—Court can determine relationship of landlord and tenant.***

**In an application under S. 158 it is open to the Court to determine whether the relationship of landlord and tenant does exist between th parties.** [P 52 C 1

*S. C. Maity* and *Apurba Chandra Mukherjee*—for Appellant.

*Hira Lal Chakrabarti*—for Respondents.

**Cuming, J.**—This appeal arises out of an application by a tenant under S. 158 of the Bengal Tenancy Act asking the Court to determine the area of his tenancy. The landlord raised a number of objections among others that the application was not maintainable inasmuch as the relationship of landlord and tenant did not exist between the parties. The trial Court held that the area of the tenancy amounted only to some 14 bighas in the place of 18 bighas as mentioned in the defendant's pattah and to this extent he allowed the application. On appeal this finding of the Munsif was affirmed and the appeal was dismissed.

The landlord has appealed to this Court and his contention is that the Court had no jurisdiction to determine the area of the tenancy, because he had raised the defence that the relationship of landlord and tenant did not exist between him and the respondent. He contends that since it is contended that the relationship of landlord and tenant does not exist between the parties it is not open to the Court, to go into the matter any further or to determine whether the relationship of landlord and tenant does exist between the parties and after he has determined that it does not exist then to proceed to dispose of the application.

In support of his contention Mr. Maity has referred us to the case of *Peary Mohun Mukerji* v. *Ali Sheikh* (1). It cannot, however, be said that this decision is an authority for the proposition Mr. Maity has contended for. All that this case would seem to decide is that a decision as to whether the relationship of landlord and tenant did or did not exist between the parties in a proceeding under S. 158 of the Bengal Tenancy Act would not be res judicata in a subsequent regular suit. This is not the same as holding that a Court could not in an application under S. 158 determine whether the relationship of landlord and tenant did or did not exist between the parties. Looking at the wording of the section itself it would seem clear that it

(1) [1893] 20 Cal. 249.

is open in such proceeding to determine whether the relationship of landlord and tenant exists between the parties. Sub-clause (1) (b) sets forth among other matters that may be determined by the Court the name and description of the tenant thereon. This sub-clause, therefore, would go to show that the Court has to determine whether the relationship of landlord and tenant exists between the parties. For obviously if the Court can determine the name and description of the tenant it can determine whether the relationship of landlord and tenant does exist between the particular parties. I am, therefore, of opinion that Mr. Maity's contention has no substance.

The appeal must, therefore, fail and is dismissed with costs. Hearing-fee one gold mohur.

**Ghose, J.**—I agree.

*Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 52

B. B. GHOSE AND CAMMIADE, JJ.

*Jatindra Nath Bhattacharyya*—Plaintiff—Appellant.

v.

*Manindra Nath Bhattacharyya* and *others*—Defendants—Respondents.

Appeal No. 2023 of 1924, Decided on 14th July 1926, from the appellate decree of the 1st Sub-J., Midnapore, D/- 19th May 1924.

(*a*) *Civil P. C., Sch.* 2, *para.* 1—*Application for order of reference to arbitration—Same day other reference by parties as to matters not in dispute—Order of reference as to only matters in dispute by Court is not illegal.*

If the parties to the suit apply to the Court for an order of reference with regard to the matter in difference in the suit and on the same day make a reference to arbitration without the intervention of the Court with regard to other matters in dispute between the parties by a separate agreement, the order of reference made by the Court with regard to the subject-matter of the suit cannot be questioned on the ground of illegality or invalidity. If the parties in their application for reference to arbitration with regard to matters in difference in a suit put in other matters of difference but the Court makes a reference to the arbitrators only with regard to the matters in difference in the suit without any objection of the parties, such reference is not illegal.

Where the parties in addition to the petition filed in Court actually enter into a separate agreement to refer matters in dispute outside the subject-matter of the suit to the same arbitrators, and the arbitrators act upon that agreement and make two awards, one with regard to the matters in difference in the suit under the order of reference by the Court, and another not with reference to the subject matter of the suit on the strength of the agreement of the parties, and the award with regard to the other matters although on the record has not been acted upon in any way, the mere fact that other matters were referred to in the application for making the order of reference not in dispute does not vitiate the order as made by the Court: *A. I. R.* 1924 *Cal.* 567, *Expl.*; *A. I. R.* 1925 *P. C.* 293, *Dist.* [P. 54, C. 1]

(*b*) *Civil P. C., S.* 115—*Power to make order of reference attacked—High Court can revise the order—Civil P. C., Sch.* 2, *para.* 1.

Where the jurisdiction of the Court to make the order of reference is attacked, the High Court has power to revise the order in revisional jurisdiction. [P. 54, C. 2]

*J. Hazra* and *Apurba Charan Mukerjee*—for Appellant.

*Bankim Chandra Mukerjee, Rupendra Kumar Mitter* and *Santimoy Majumdar*—for Respondents.

**Judgment.**—This appeal arises out of a suit for possession of a small plot of land measuring about 15 cottahs.

The litigants are two brothers and after the filing of the suit there was a reference to arbitration. The arbitrators made an award and a decree followed upon that. There was an appeal against that decree on the ground that the reference itself was bad and no decree could follow upon that award. The Subordinate Judge upheld the decree of the Munsiff. The present appeal is by the plaintiff and his case is that the decree should be vacated on the ground that the reference to arbitrators was initially illegal and therefore the arbitrators had no jurisdiction to make an award.

The facts upon which this contention is put forward are these: The case was filed on the 27th April 1923. On the 28th April 1923 an application was filed in Court by the plaintiff and the defendants which was headed as an 'Agreement to refer'. In that document it was stated that

there are disputes between the parties in connexion with the land in the above suit as also other lands and to settle disputes with regard to the said suit as also other matters, we do hereby appoint Babu Mohendra Nath Maiti, Srinath Samanta and Basanta Kumar Sarkar, pleaders.

In the second paragraph the defendants undertook not to alter the character of the lands in suit until the settlement of the suit and in the third paragraph it was prayed that

orders might be issued upon the arbitrators to settle the present disputes among the plaintiffs and the defendants on the following matters.

Then followed several items of disputes. It is unnecessary to state anything further with regard to the provisions of this application just now. Upon that an order was made on the same day by the Munsiff to this effect :

Let the case be referred to the arbitrators Babu Mohendra Nath Maiti, Srinath Samanta and Basanta Kumar, Sarkar as prayed for by the parties.

The arbitrators made their award with reference to the suit on the 28th September 1923. On that very day they made another award with regard to matters in dispute, which were referred to in the petition of the 28th of April with regard to matters which were outside the matters in dispute in the suit. That award has not been the subject of any other proceeding in the Court below but it is on the record. Objections were made to the award by the plaintiff and on the 8th of October 1923 those objections were overruled by the Munsiff and a decree was made in accordance with the award dismissing the suit with costs. The point urged is that the application that was filed by the parties to the suit on the 28th of April 1923 referring to arbitration relates not only to matters in difference in dispute, in the suit but also to various other matters. The reference to arbitration by the Court was illegal and without jurisdiction and we have to decide this short point.

Reference has been made to the observations made in the case of *Ram Protap Chamria* v. *Durgaprasad Chamria* (1) by Mr. Justice Rankin where it is observed :

In my judgment, it is quite impossible that one and the same arbitration should be held as to matters within the jurisdiction of the Court and matters without the jurisdiction of the Court; between the parties to the suit and between them and other persons : under the Code provided by the Indian Arbitration Act and under the Code provided by the second schedule : under the superintendence and control of the Judge who has seisin of the suit and of the Judge disposing of business under the Indian Arbitration Act : partly upon an order of reference and partly under an agreement.

It is argued by the appellant that these observations mean that whenever there is an application for reference to arbitration in a suit which is pending in Court under the first paragraph of the second schedule of the Code of Civil Procedure, if it includes other matters which are not the subject-matter of difference in the suit itself, the whole reference is void although the Court might have made an order for reference with regard to the subject matter of the suit alone.

It is further argued that the observations of the Privy Council on appeal from the same case in *Ram Protap Chamaria* v. *Durga Prosad Chamaria* (2) with reference to the aforesaid observations of Mr. Justice Rankin do not take away from the binding force of those observations. Their Lordships observed after reciting a portion of the observations already cited :

Their Lordships desire to reserve their opinion upon the question whether there may not be exceptions to that comprehensive statement.

In our opinion the observations of Mr. Justice Rankin must be taken along with the facts of that case. In that case a reference was made by the parties to the suit as well as persons who were not parties to the suit and it referred to matters in difference in the suit as well as various other matters which concerned persons not parties to the suit, and the award of the arbitrators mixed up all the questions in controversy between the parties to the reference, and it was impossible to detach one set of the award from the other. This would be made clear from the observations of their Lordships of the Judicial Committee which run thus :

In their Lordships' judgment such an award is in no true sense one made in obedience to the order of May 23, 1922. While it would not be easy to segregate the findings with reference to the matters in question in the suit from those not so in question—the findings in which Amardevi was interested from those in which she was not, it is, their Lordships think, impossible to uphold an award in relation to a suit the conclusions of which were plainly coloured, if not dictated, by the view taken by the arbitrators of other questions between the parties or some of them to which the suit had no reference.

I ought to state here that the order of the Court of May 23, 1922, referred to above was an order referring all matters in difference in the suit between the parties to the suit as in the present case. The question, therefore, we have to see is whether the state of facts in the present case is the same as in the case of *Chamria* v. *Chamria* (1) so as to bring into operation the observations of Rankin, J., limited as they must be, with reference to the opinion of the Judicial Committee. In our opinion, Mr. Justice Rankin made those observations with reference to the

(1) A. I. R. 1924 Cal. 567

(2) A. I. R. 1925 P. C. 293=53 Cal. 258.

particular facts of the case. We do not think that Mr. Justice Rankin was of opinion that if the parties to the suit applied to the Court for an order of reference with regard to the matters in difference in the suit and on the same day made a reference to arbitration without the intervention of the Court with regard to other matters in dispute between the parties by a separate agreement, the order of reference made by the Court with regard to the subject matter of the suit can be questioned on the ground of illegality, or invalidity, and if the arbitrators made separate awards with regard to the different matters there is no reason why those awards being otherwise good should not be considered to be enforceable. To go a step further if the parties in their application for reference to arbitration with regard to matters in difference in a suit put in other matters of difference but the Court makes a reference to the arbitrators only with regard to the matters in difference in the suit without any objection of the parties, there is no reason to suppose that such reference should be considered to be illegal.

In the present case I ought to have stated that the parties in addition to the petition that they filed in Court actually entered into a separate agreement to refer matters in dispute outside the subject matter of the suit to the same arbitrators and the arbitrators acted upon that agreement which they describe as an Abichalnama in their award with regard to those matters. Therefore, the matter stands thus, that the arbitrators made two awards, one with regard to the matters in difference in the suit under the order of reference by the Court, and another which was not with reference to the subject matter of the suit on the strength of the Abichalnama or agreement of the parties. As I have already said the award with regard to the other matters although on the record has not been acted upon in any way. The Subordinate Judge points out that it will be open to the parties if they so desire to take steps with regard to that award under paragraphs 20 and 21 of the second schedule of the Code of Civil Procedure. Our conclusion, therefore, is that the mere fact that other matters were referred to in the application for making the order of reference does not vitiate the order as made by the Court Then with regard to the question whether the awards can be dealt with separately or the award which is now the subject matter of controversy in this case is so connected with the other award as it may be said to have been plainly coloured by the view taken by the arbitrators on the other questions which they decided by the other award. On going through this award it does not seem to us that it can be so held. There is a passage at the bottom of the award that the arbitrators have not directed the Defendant No. 1 to fill up certain excavations on another piece of land as that was allotted to the defendant in a separate award. That question of the filling up of the excavations was not the subject matter of the suit and had no connexion with it. The subject matter of the suit was with regard to one half share of 15 cottas of land only. On the grounds set forth above we do not think that the plaintiff can complain that the reference was invalid and without jurisdiction.

A preliminary objection was taken before us that there is no second appeal against the decree nor can this Court revise the decree under S. 115 of the Civil P. C. or under S. 107 of the Government of India Act. In the view we take, it is unnecessary to discuss the question in detail but it seems to us that where the jurisdiction of the Court to make the order of reference is attacked, this Court has power to revise the order in revisional jurisdiction and there is an application before us to that effect.

However as we take the view that on the merits the appeal fails, this appeal must be dismissed with costs. No other order on the application is necessary.

*Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 54

CUMING AND B. B. GHOSE, JJ.

*Hari Bhusan Halder*--Plaintiff—Appellant.

v.

*Sheikh Abdul* and *others*—Defendants—Respondents.

Appeals Nos. 159 and 160 of 1924, Decided on 11th March 1926, from the appellate decrees of the 4th Sub-J., 24-Parganas, D/- 5th October 1923.

***(a) Evidence Act, S. 115—Owner standing by and allowing improvement on his land is estopped, but where he objects to do so by a notice, he is not.***

**Where a person in bona fide belief that a certain property belongs to him spends money upon it and the true owner stands by and allows him to spend money and make improvements upon his land, the true owner is estopped from asserting his title to the land as against the person making improvements in such bona fide belief, but where the owner gives notice to the person making improvements to desist from building any structure, but does not take legal proceedings at once he is not estopped.**

[P 55, C 2 ; P 56, C 1]

*(b) Co-sharer—Partition.*

**Where a co-sharer finds that a lessee under another co-sharer is erecting buildings over the whole property, in spite of his objecting to do so, his only remedy is to sue for partition.**

[P 56, C 1]

*Bimala Charan Deb* and *Tarakeshwar Nath Mitra*—for Appellant.

*Jadu Nath Kanjilal*, *Nripendra Chandra Das*, *S. C. Maity* and *Appoorba Charan Mukherjee*—for Respondents.

**B. B. Ghose, J.**—These two appeals arise out of two suits for possession of 8 annas share of different plots of land by partition on the allegation that these lands belonged to the plaintiff and the pro forma defendant in equal shares ; that the pro forma defendant had granted leases of his 8-annas share in the lands in 1910 to the defendants in both these suits, that by virtue of these leases the defendants took possession of the entire lands. The plaintiff served upon them notice to quit his 8-annas share, but they did not pay any heed to that notice and wrongfully remained on the land.

The defendants raised various pleas which are not necessary to state in detail now. Several issues were raised in the trial Court and that Court dismissed the plaintiff's suit for khas possession, but only declared his title to 8-annas share and his right to recover rent from the defendants with regard to his 8-annas share on the basis of the leases granted by the pro forma defendant. The plaintiff appealed in both the cases against that decision of the Munsif and on appeal the questions which were principally argued were whether the defendants got settlements of the entire lands in suits or only the 8-annas share of the pro forma defendant and whether the plaintiff was entitled to have khas possession of his share in the land on partition. With regard to the first point, the Subordinate Judge observes that it was common ground of the parties that the plaintiff had 8-annas share in the land while the pro forma defendant had the other 8-annas share. He also came to the conclusion that by virtue of the pattas, Exs. A and B, the pro forma defendant made settlements in respect of his share of the land only. He comes to this conclusion from the fact that the pattas did not purport to grant settlements of the entire lands and that the pro forma defendant had obtained decrees for rent only for his share with regard to the lands in suit.

The Subordinate Judge further remarks that the pattas did not specifically mention the quantity of land in his share, nor do they mention the extent of his share. The Subordinate Judge next observes that after the settlement the defendants began to possess the entire lands as tenants and made substantial structure thereon and many improvements. The Subordinate Judge further says that it is in evidence that the plaintiff was fully aware of these and also that the plaintiff gave notice to the defendants in 1912 asking them not to make further buildings on the lands. But he held that the plaintiff not having taken any further steps against the defendants who went on making the buildings was not entitled to treat the defendants as trespassers on his share of the lands. On that finding he dismissed the suit for khas possession on partition. In taking this view it seems that the Subordinate Judge had a somewhat vague idea of applying the rule of estoppel as against the plaintiff. That rule is, however, that where a person in bona fide belief that a certain property belongs to him spends money upon it and the true owner stands by and allows him to spend the money and make improvements upon his land, the true owner is estopped from asserting his title to the land as against the person making improvements in such bona fide belief.

Here the circumstances do not call for the application of that rule of estoppel. The defendants cannot be said to have occupied the entire land in the bona fide belief that the whole had been let out to them. Nor can it be said that the plaintiff stood by and allowed the defendants to spend money on the land and make improvements. The finding is that in 1912 the plaintiff gave notice to the

defendants to desist from building any structure. The idea on which the Subordinate Judge seems to have acted was that the plaintiff should not only give notice, but do something more. But I cannot think what more the plaintiff was bound to do in addition to giving notice to the defendants, even if they had acted bona fide, that he had a right to the land and he objected to the defendants' making any further use of it. The plaintiff is not bound to rush to the Court if he does not find it convenient to do so at once. It is clear, therefore, that the defendants went on spending money on the land at their own risk and that cannot debar the plaintiff from asserting his legal right to his own property. In such a case as this it has been laid down in a long series of cases of the highest authority that the plaintiff's only remedy is to seek for a partition and that is the remedy which he has asked for and which has been, I think, wrongly denied to him by the Court below.

It has been urged by one of the learned counsel for one of the defendants that the lease was granted for the entire land by the pro forma defendant acting as a karta of the joint family consisting of the plaintiff and the pro forma defendant. But although there is such an allegation made in the written statement that was not persisted in and no evidence was adduced to show that there was any joint family or that the pro forma defendant was acting as a karta of the joint family even if we accept the argument that the leases cover the entire lands. This argument, therefore, is not sustainable.

It was argued by another counsel on behalf of the other defendant that the plaintiff's suit was barred by limitation, because it was open to the defendants to plead either that they were tenants on the land or in the alternative that they were trespassers, and if the plaintiff did not choose to accept the defendants as tenants they might raise the plea of adverse possession as against the plaintiff. But in this case such a plea does not appear to be open to the defendants, because their whole case throughout was that they were on the land as tenants having been induced by the co-sharer of the plaintiff, the pro forma defendant. Even if they were brought on the land before 1910when the leases were granted it would not make them trespassers holding adversely to the plaintiff as on their own showing they were holding as tenants of his co-sharer. Further, as the learned Subordinate Judge remarks that in the written statements the defendants did not deny the plaintiff's title, on the other hand the plaintiff's title to 8-annas share was admitted. Under the circumstances the argument with regard to the question of limitation cannot be given effect to.

The judgments and decrees of the Courts below in the two suits must, therefore, be set aside and the cases remanded to the trial Court to effect a partition according to the usual rules for making partitions.

The plaintiff is entitled to his costs in this Court and in the lower appellate Court. Costs of the trial Court will abide the final order of that Court.

**Cuming, J.**—I agree.

*Cases remanded.*

---

## A. I. R. 1927 Calcutta 56

PANTON AND GRAHAM, JJ.

*Saroj Ranjan Sinha* and *others*—Appellants.

v.

*Joy Durga Dassi*—Respondent.

Appeal No. 789 of 1924, Decided on 9th July 1926, from the appellate decree of the Dist. J., Nadia, D/- 22nd March 1924.

*(a) Contract Act, Ss. 70 and 69—Co-sharer passing arrears of rent in fraud of other co-sharers—Payment is not lawfully made—If it is made voluntarily and gratuitously plaintiff cannot get contribution.*

A payment of arrears of rent made by a co-sharer in fraud of the other co-sharers in order to induce the landlord to resettle the tenure with himself alone the payment is not lawfully made within the meaning of S. 70.

*Per Graham, J.*—And if it is found that it was gratuitous and voluntary the plaintiff cannot invoke the aid of Ss. 43, 69 and 70.

[P 57, C 1, 2]

*(b) Civil P. C., O. 2, R. 2 — Cause of action arising after determination of suit by trial Court and being different—Plaintiff is not entitled to a decree.*

Plaintiff cannot get a decree upon a cause of action which arises only after the suit had been

**determined by the trial Court and is totally different from that pleaded,** [P 57 C 2]

*Brojo Lal Chakrabarty* and *Santimoy Mozumdar*—for Appellants.

*Dwarka Nath Chakravarti, Sarat Chandra Basak, Girija Prosanna Sanyal* and *Indu Prokash Chatterjee*—for Respondent.

**Panton, J.**—This is an appeal by the defendants in a suit for contribution which was instituted on the 6th December, 1921. The parties are co-sharers in a patni taluq and the suit was in respect of a sum of Rs. 3,440 paid by the plaintiff to the landlord of the tenure on the 8th December 1918. On this date the rent of the tenure was in arrears and in the previous month the latter had been sold under the provision of Regulation VIII of 1819. The learned Subordinate Judge who tried the suit has found that this payment was not, as the plaintiff alleged, a payment of arrears of rent made on behalf of herself and the defendants but a payment made in fraud of the defendants in order to induce the landlord to resettle the tenure with herself alone. On this finding the plaintiff could not recover contribution, since the payment was not "lawfully" made within the meaning of S. 70 of the Contract Act; and the learned Subordinate Judge rightly dismissed the suit. This was on the 26th August 1922.

An appeal was taken to the District Judge. By the time that it was heard the sale of the patni tenure had been set aside and the landlord has sued the parties for arrears of its rent. In so doing he gave credit for the Rs. 3,440 just now referred to and other sums, claiming the balance of rent due. The suit was decreed some time in the end of 1922 on an admission by the present parties. Mention has been made by the learned advocate for the respondent of a petition of compromise put in by them but it is not upon the record. This transaction changed, in the opinion of the learned District Judge, "the aspect of the case altogether"; and on the footing that the landlord :

"gave credit for the said sum of Rs. 3,440 paid by Joy Durga and with the consent of all the parties a decree for the balance was passed"

he has allowed the appeal and given a decree to the plaintiff.

The transaction can however, have no bearing on the nature of the payment of the 8th December 1918, which was the cause of action upon which the suit was founded; and the findings of the trial Court as to that nature have not been disturbed. The learned Judge has, in effect, then, given the plaintiff a decree upon a cause of action which arose only after the suit had been determined and was totally different from that pleaded. I do not think that the circumstance justified such an unusual course; and for this reason we set aside the judgment and decree of the District Judge and restore that of the Subordinate Judge. The appellants will get their costs throughout.

**Graham, J.**—I agree. It was mentioned in the course of the argument on behalf of the plaintiff-respondent that the money was paid in compliance with a registered notice issued by the landlord to the tenants including the respondent Joy Durga. The trial Court found, however, that no such notice had been proved. Neither the postal receipts nor the acknowledgment receipts were produced. The Subordinate Judge further found that Joy Durga paid the rents to the proprietor not because they were demanded by a notice as alleged, but because the proprietor would not otherwise grant her settlement of the patni. The payment was made in circumstances practically amounting to a fraud on the co-sharer-defendants and in order to serve the plaintiffs' own interest only. The learned Subordinate Judge found therefore that it was gratuitous and voluntary and that the plaintiffs could not invoke the aid of Ss. 43, 69 and 70 of the Contract Act. These findings have not been displaced by the Court of appeal below, and upon those findings the suit must fail. The position cannot, I think, be affected by what took place long after the institution of the suit in connexion with the solenama and the decree based thereon.

*Appeal allowed.*

---

## A. I. R. 1927 Calcutta 57

GREAVES AND MUKERJI, JJ.

*Abdul Kader*—Decree-holder—Appellant.

v.

*Ambika Charan Bhuiya* and *others*—Judgment-debtors—Respondents.

Appeal No. 245 of 1925, Decided on 23rd March 1926, from the appellate order of the Addl. Dist. J., Howrah, D/- 23rd May 1925.

(a) *Civil P. C., S. 47—Question really relating to execution and arising between decree-holder and judgment-debtor is not taken out of S. 47 by the decrec-holder becoming the auction-purchaser.*

When a question which arises is really a question between the judgment-debtor and the decree-holder, and relates to execution of the decree, the mere fact that the decree-holder has become the auction-purchaser does not take the matter out of the purview of S. 47 : 31 *All.* 82 and *A. I. R.* 1926 *Cal.* 714 (*F.B.*) *Dist.* [P 60 C 1]

(b) *Limitation Act, Art.* 181—*Application under Civil P. C., S.* 47.

Application under S. 47 must be governed by the residuary article. [P 60 C 2]

(c) *Civil P. C., S.* 151—*Court cannot treat his previous order as nullity under S.* 151.

A Court has got no inherent jurisdiction to treat his previous order, not cancelled either by review or appeal, as a nullity. [P 60 C 2]

*Nasim Ali*—for Appellant.

*Mukunda Behari Mullick*—for Respondents.

**Judgment.**—This appeal is directed against the appellate order of the Additional District Judge of Howrah by which he set aside the order passed by the Court of first instance dismissing the application of the appellant under S. 47, Civil P. C., and O. 21, R. 90 of that Code and directed further investigation into matters which arose on that application in so far as it purported to be one under S. 47 of the Code. The decree in connexion with which the execution proceedings were started was passed in 1910. There were several execution proceedings with which we are not concerned at the present stage, but the sale in connexion with which the present application was filed took place on the 15th May 1923. The decree-holder purchased the property which had been put up to sale in execution of the decree. The sale was confirmed on the 25th June 1923. On the 9th June 1923 the judgment-debtors put in an application under O. 21, R. 90 for setting the sale aside. This application was dismissed for default on the 18th August 1923. The decree-holder auction-purchaser thereafter applied for delivery of possession and possession was delivered to him on the 5th January 1924. On the 23rd January 1924, another application was filed by the judgment-debtors purporting to be under S. 47, Civil P. C., and O. 21, R. 90 of that Code. In so far as it purported to be an application under O. 21, R. 90 it challenged the validity of the sale upon the ground of material irregularity and fraud. In so far as it was under S. 47, Civil P. C., it challenged the validity of the execution proceedings. It was stated in the first instance that the decree had been satisfied by payment out of Court and that the decree-holder, in contravention of the agreement entered into between himself and the judgment-debtors applied for execution of the decree.

The other ground was that the application for execution was barred by limitation and that the previous execution proceedings which were alleged to have been taken by the decree-holder were fictitious, and further more, that the decree-holder had fraudulently mentioned in his application for execution that he had in the meantime received a payment of Rs. 3 towards satisfaction of his decree. This application, as I have stated, was filed on the 23rd January 1924. On the 11th February 1924, the learned Munsif rejected the application. The order which he passed on that date shows that he was of opinion that the application under O. 21, R. 90 was not entertainable as the previous application filed on the 9th June 1923 had been dismissed for default and that the application in so far as it purported to come under S. 47 of the Code was not entertainable as the execution had already come to an end. This order was not challenged or sought to be set aside either by an application for review or by an appeal, and on the 29th February 1924, another application in precisely the same terms as the application of the 23rd January was filed and it also purported to be under S. 47 and O. 21, R. 90 of the Code. On the 20th September 1924, this application was dismissed by the learned Munsif he being of opinion that the execution proceedings having come to an end no application under S. 47 lay, that the decree-holder was the auction-purchaser and notwithstanding that that was so the application should be treated as raising points between the judgment-debtor on the one hand and the auction-purchaser on the other, and therefore, the application could not be treated as one under S. 47 and furthermore, that the application to set aside the sale was not maintainable by reason of the fact that the previous application for the same purpose had already been dealt with and rejected by the Court.

Against this order the judgment-debtors preferred an appeal and the learned

Additional District Judge was of opinion that the application to set aside the sale was not maintainable because of the rejection of the previous application for the same purpose, but in so far as the validity of the execution proceedings had been challenged on the ground of fraud and limitation the application was maintainable, because the view taken by the learned Munsif that no such application lay after the termination of the execution proceedings was not correct. He was further of opinion that although no appeal had been preferred against the order rejecting the previous application and passed on the 11th February 1924, and although no steps had been taken by the judgment-debtor to have that order reviewed or cancelled the learned Munsif when he entertained the fresh application of the 29th February 1924, must be taken to have exercised some inherent jurisdiction which lay in him and when he treated the order of rejection passed by him as a nullity the judgment-debtors were competent to proceed with the application. Against this order the present appeal has been preferred by the decree-holder.

It is clear. therefore, that what is before us now, is only that part of the application which relates to the validity of the execution proceedings and challenges the same on the ground of limitation and fraud. In support of this appeal several grounds have been urged on behalf of the appellant.

The first contention is to the effect that the application should not be treated as one coming under S. 47, Civil P. C. So far as this contention is concerned the appellant obviously is in some difficulty because if this contention is accepted it is clear that the appeal before us is incompetent. The contention, however, does not appear to be well-founded. It rests upon two grounds. It is said first of all that as the decree has already been satisfied and possession taken by the decree-holder as auction-purchaser the executing Court is functus officio and any application presented before that Court challenging the validity of the execution proceedings cannot be regarded as an application under S. 47 of the Code. In support of this proposition reliance has been placed upon a decision of this Court in the case of *Fakaruddin Mahomed Ahsan* v. *Official Trustee of Bengal* (1) There is in the judgment of that case at page 540 a dictum which may be construed as laying down a broad proposition to the effect that an application under S. 244 of the old Code must be made in the executing Court during the pendency of the execution proceedings. This dictum however, has not been accepted in its entirety in any of the more recent decisions, and in the case of *Nilratan Khasnabish* v. *Ram Rutton Chatterji* (2) the case in *Fakaruddin Mahomed Ahsan* v. *Official Trustee of Bengal* (1) has been distinguished upon the ground that the dictum to which I have referred is applicable to a case where as a result of contested proceedings a final order has been passed in the execution proceedings and after the execution proceedings are over a further attempt is made by the judgment-debtor by a separate application to re open those proceedings. This ground, therefore, upon which the contention is based does not appear to be supported by any authority.

The other ground upon which this contention is based is to the effect that the decree-holder having himself purchased at the auction the question which arises is to be treated as a question not between the judgment-debtor on the one hand and the decree-holder on the other, but between the judgment-debtor and the auction-purchaser. In support of this position reliance has been placed upon the Full Bench decision of the Allahabad High Court in *Bhagwati* v. *Banwari Lal* (3). On behalf of the respondents it has been urged that this position is not maintainable in view of the recent Full Bench decision of this Court in *Niran Ranjan Mukherjee* v. *Soudamini Dasi* (4). It is not necessary to refer to or discuss the judgments in these two cases in detail, for it seems to me that the present case cannot be taken to be governed by either of these two cases. In the Allahabad case as well as in the Full Bench case of this Court the question arose in this way. The decree-holder had purchased at the auction held in execution of his own decree. Questions arose which related to the delivery of possession in consequence of such pur-

(1) [1884] 10 Cal. 538.
(2) [1901] 5 C W. N. 627.
(3) [1909] 31 All. 82=6 A.L.J. 71=1 I.C. 416 =5 M.L.T. 185.
(4) A.I.R. 1926 Cal. 714 (F.B.).

chase, and it was contended that the questions relating to the delivery of possession were not questions which related to the execution, discharge or satisfaction of the decree, and, nextly, it was contended that those questions which related to delivery of possession as between the judgment-debtor on the one hand and the auction-purchaser on the other could not be regarded as questions arising between the parties to the suit because the decree-holder by making the purchase had lost his character as decree-holder and assumed a new character, namely, that of an auction-purchaser.

In the present case there can be no question that the matters which have to be considered upon the present application are matters relating to execution, discharge and satisfaction of the decree. They are undoubtedly matters which arise as between the judgment-debtor and the decree-holder, and the only question is whether because the decree-holder has become the auction-purchaser these questions should no longer be regarded as being between the judgment-debtor and the decree-holder. If anything, the present case seems to be somewhat like a case converse to the case dealt with in the aforesaid two cases. There is authority for the proposition that when the question which arises is really a question between the judgment-debtor and the decree-holder, even if a stranger has made the purchase and is affected by the determination thereof the question remains still one under S. 47 of the Code : see *Prosunno Kumar Sanyal* v. *Kasi Das Sanyal* (5) and *Ganapathy Mudaliar* v. *Krishnamachariar* (6). I am clearly of opinion that these questions relate to execution of the decree and they arise as between the judgment-debtor and the decree-holder, and the mere fact that the decree-holder has become the auction-purchaser does not take these matters out of the purview of S. 47 of the Code. The first contention, therefore, urged on behalf of the appellant fails.

The second contention is to the effect that the application on the face of it is barred by limitation. In so far as it purports to be an application under O. 21, R. 90 it is governed by Art. 166 of the Limitation Act. But that portion of the application has no longer to be considered. What we have to consider is the application in so far as it purports to come under S. 47. There is no period of limitation prescribed for such an application ; now it must be governed by the residuary article and it does not appear that the application is barred by limitation. The second ground urged on behalf of the appellant also cannot prevail.

The third ground seems to be of more substance. It is to the effect that the present application is barred by reason of the dismissal of the previous application on the 11th February 1924. The reason given by the learned Judge in his judgment so far as this matter is concerned as I have stated is that the learned Munsif who entertained this application exercised some inherent jurisdiction and in entertaining the application he should be taken to have regarded his own order of rejection previously passed as a nullity. It is said that the previous order was passed without hearing the applicant. There are no materials upon the record from which such a conclusion may be arrived at. But even if it be assumed that it was so, there was that order of rejection passed by the Court and unless and until that order was set aside either by an application for review or by appeal it is difficult to see how the Court could subsequently entertain a fresh application dealing with the same matter, and in such a case I am of opinion that it cannot be said that the Court has got any inherent jurisdiction to treat his previous order as a nullity.

I am, therefore, of opinion that the order passed by the District Judge should be reversed on this last ground to which I have referred. In my opinion, therefore, the appeal succeeds on this ground and the order of the learned District Judge should be set aside and that of the learned Munsif restored with costs.

**Greaves, J.**—I agree.

*Appeal allowed.*

(5) [1892] 19 Cal. 683=19 I.A. 166=6 Sar. 209 (P.C.).

(6) [1918] 41 Mad. 403=44 I.C. 855=45 I.A. 54 (P C.).

## A. I. R. 1927 Calcutta 61

DUVAL AND G. N. ROY, JJ.

*Rasul Khan*—Accused—Applicant.

v.

*Emperor*—Opposite Party.

Criminal Revision No. 571 of 1926, Decided on 29th July 1926, from the order of the S. J., 24-Pergannas, D/-3rd May 1926.

*Penal Code, S. 379—Accused acquitted because of incomplete evidence—Subject of theft should not be made over to him—Complainant retaining possession of the property cannot be required to execute bond till disposal of question of title.*

It is an ordinary rule of law that when an accused is acquitted of a charge of theft and the property found with him is not found to be the subject of theft he is entitled to recover that property, but where the property is found to be the subject of theft and an acquittal is due to incomplete evidence, the property will not be delivered to him.

There is no authority for holding that a criminal Court is competent to direct the complainant to execute a fresh bond till the disposal of the question of title to the property, which was the subject of theft, by a civil Court.

[P 62, C 1]

*Shorabji, Jahnabi Charan Das Gupta* and *Narendra Nath Chatterjee*—for Applicant.

*Dwijendra Krishna Dutt* — for the Crown.

**Duval, J.**—The facts out of which this Rule arises are as follows : The complainant is one Mathoo. His case is that he owned 4 buffaloes which apparently strayed away and were finally taken to the pound by some Goalas who found them grazing at the Alipore Cantonment. Subsequently those buffaloes not being claimed within ten days, were sold, it is stated, under the provisions in force in this military pound and they were purchased by the present petitioner. Subsequently the complainant recognized two of his buffaloes going along the Upper Circular Road. He then discovered that they were in the possession of the present petitioner as also the other buffaloes. He then brought the case. Nathoo and another person were put on their trial before the Sub-Deputy Magistrate of Sealdah, exercising first class powers and were convicted and sentenced to three months' rigorous imprisonment under S. 411, Indian Penal Code. It may be added that when the case was started the buffaloes were handed over to the complainant on security under the provisions of S. 516 (a) Criminal Procedure Code and the complainant engaged to produce them unless the order was set aside on appeal. The case came up on appeal before the Sessions Judge of Alipore and was heard on the 6th of April.

The learned Sessions Judge found that the evidence of the receiving of stolen property was not sufficient and he therefore acquitted the accused. But he came to a finding that the buffaloes in question were the original property of Mathoo; and he was also of opinion that there was something not quite straighforward which led to the sale at the Alipore pound. At the time of passing his judgment he passed no order as to what would be done with the buffaloes and it appears that consequently they were retained by the complainant who we are informed in this Court had subsequently sold them. This judgment as I have stated was passed on the 6th of April 1926. It next appears that on the 3rd of May an application was made to the Sessions Judge by the accused in which it was prayed that his purchased buffaloes may be delivered to him or in the alternative the complainant may bo directed to execute a bond till the disposal of the title to the said buffaloes, by a civil Court. On this the learned Sessions Judge after hearing counsel recorded the following order :

> I came to the conclusion that the buffaloes had actually been stolen, though the evidence against the petitioner was not complete. I, therefore, declined to interfere.

This order as I have stated was dated 3rd May, 1926. It was not, however, till the 16th June, that a petition was presented to this Court against that order and a Rule was issued on the grounds stated in the petition, these grounds being (1) that the buffaloes not having been found to be the subject of theft, and that the petitioner having been acquitted of the charge under Ss. 379 and 411 Indian Penal Code, and being bonafide in possession of the said buffaloes under his auction-purchase the said possession should be confirmed to him ; (2) that in absence of any satisfactory evidence to prove that the buffaloes belonged to the complainant, the Court below should have itself retained the custody of the buffaloes, or have madd over the custody to the petitioner, ane that the learned Sessions Judge has erred

inasmuch as he did not come to any finding on this matter; (3) that the Court below should have at least directed the complainant to execute a fresh bond till the disposal of the question of title to the buffaloes by a civil Court.

Now it is no doubt an ordinary rule of law that when an accused is acquitted of a charge of theft and the property found with him is not found to be the subject of theft he is entitled to recover that property. Now here as a matter of fact the findings of both the Courts which we must accept as findings of facts, are that these buffaloes were the property of the complainant. When they strayed away they somehow got into the Alipore pound and they were sold for Rs. 69 the price which appears to us to be most inadequate. The question then is whether the Sessions Judge has been unreasonable in refusing to hand them over to the accused. In view of his findings of fact and the special circumstance of this case specially as very great suspicion is found by him and by the Court below as to the bona fides of the proceedings at the Alipore cantonment pound, we cannot say that his order is unreasonable and under the special circumstances of this case therefore we do not think that we should interfere. There is also another reason and that is this: though no doubt an application to the Sessions Judge was made within the time allowed by the law and customs of limitation and an application in revision to this Court within the time within which this Court hears revisional matters there has been undoubtedly great delay with the consequence that the buffaloes have passed into others' hands and that is another reason why we should not exercise our revisional power in this matter. That disposes of the first two grounds. As to the third ground namely that the Court below should have directed the complainant to execute a fresh bond till the disposal of the question of title to the buffaloes, by a civil Court, we have not been shown any authority under the Code which would entitle us or the Court below to pass such an order. In the result the Rule is discharged.

**Roy, J.**—I agree.

*Rule discharged.*

---

## A. I. R. 1927 Calcutta 62

CUMING AND B. B. GHOSE, JJ.

*Akshya Kumar Gope* and *another*—Defendants—Appellants.

v.

*Sasanka Mohan Mukhopadhyya* and *others*—Plaintiffs—Respondents.

Appeal No. 2775 of 1923, Decided on 2nd March 1926, from the appellate decree of the 6th Sub-J., Dacca, D/- 21st July 1923.

*Bengal Estates Partition Act* (5 *of* 1897 *B. C.*), *S.* 99—*Lands held by proprietors in different parcels—S.* 99 *does not apply.*

Section 99 only applies where the estate is held in common tenancy and has no application where the lands are held in different parcels by the proprietors. [P 63, C 1]

*Sarat Chandra Basak* and *Suresh Chandra Talukdar*—for Appellants.

*Gunada Charan Sen* and *Bhupendra Chandra Guha*—for Respondents.

**B. B. Ghose, J.**—This appeal arises out of a suit for rent on account of a putni which was held by the defendants under the plaintiffs. The plaintiffs stated they have howla interest in four mouzas appertaining to a certain number of taluks, and the defendants' putni is under the howla. The defendants pleaded that under a partition between the zemindars of the taluks, held under the Estates Partition Act they have lost possession of lands they held under the putni in one of the mouzas called Khidirpara and they are entitled to abatement of rent on account of those lands being taken away from their possession. The plaintiffs alleged that by the partition neither they nor their lessees, the defendants, could be deprived of any land as in their case the provision of S. 99 of the Estates Partition Act was inapplicable; and they further pleaded that under the terms of the kabuliyat the defendants were not entitled to abatement of rent.

The Munsif made a decree for abatement of rent to the extent of Rs. 22. There were two appeals: one by the plaintiffs and the other by the defendants. The defendants alleged that they were not bound to pay interest on the arrears of rent according to the rate stipulated in the kabuliyat; and the plaintiffs appealed against the decree reducing the rate of rent stipulated in the kabuliyat. The Subordinate Judge

decreed the appeal preferred by the plaintiffs and dismissed that preferred by the defendants. He held that under the terms of the kabuliyat the defendants were not entitled to abatement of rent on any ground and he further held that S. 99 of the Estates Partition Act (V of 1897 B. C.) did not apply to the case and, therefore, the defendants could not have been lawfully deprived of any portion of the land by the partition made by the Collector. He also held that the defendants are bound to pay interest at the stipulated rate. In that view he decreed the plaintiffs' suit in full. On appeal by the defendants before us it is contended that the Subordinate Judge was wrong in holding that upon a true construction of the pottah the defendants are not entitled to claim any abatement for being deprived of a portion of the lands in their possession. The passage referred to by the Subordinate Judge runs thus :

You will not be able to claim reduction of the fixed rent at any time on any ground whatsoever. I and my heirs and representatives shall not be able to demand greater amount of rent than the fixed rent at any time on any ground whatsoever.

At the end of the pottah there is a provision for surrender of the lease. It seems to be quite clear that the parties stipulated that on no ground there should be any reduction or increase of rent ; and if the defendants felt any hardship it was open to surrender the lease. On the second ground it seems to have been found by the Subordinate Judge that by a private arrangement between the owners of the different estates in which the howla was situated each of the owners was in separate possession of different pieces of lands in different mouzas and the Subordinate Judge has held that the lands of the several mouzas were held in severalty. S. 99 of the Estates Partition Act only applies where the estate is held in common tenancy and has no application where the lands are held in different parcels by the proprietors. Under such circumstances the defendants could not have been lawfully deprived of their possession of any portions of the lands which were let out in putni to them by the plaintiffs. On these grounds the appeal must be dismissed with costs.

**Cuming, J.**—I agree.

*Appeal dismissed.*

## A. I. R. 1927 Calcutta 63

DUVAL AND GRAHAM, JJ.

*Hulas Chand Baid*— Accused—Appellant.

v.

*Emperor*—Opposite Party.

Criminal Appeal No. 325 of 1926, Decided on 13th August 1926, from the order of the Addl. Ch. Presy. Mag., Calcutta, D/- 27th May 1926.

*Criminal P. C., Ss. 235 and 238 (2 A)—Accused charged for substantive offence—He cannot be convicted of abetment without a separate charge.*

Where the accused was charged under S. 420 but convicted under S. 420 read with S. 114, Indian P. C.,

*Held* : that it was necessary to frame a charge for abetment to convict the accused under S. 420 read with S. 114. [P. 64, C. 2]

*Longford James, Debendra Narain Bhattacharjee, Rabindra Nath Chowdhury* and *Dhirendra Kumar Bose*—for Appellant.

*Kundkar*—for the Crown.

**Duval, J.**—In this case the accused was put on his trial under S. 420, Indian Penal Code, before the Additional Chief Presidency Magistrate and sentenced to one year's rigorous imprisonment.

The case against him is that he went to the complainant's gaddi on some business and subsequently he met the complainant with a Bhatia. The Bhatia then produced a hundred rupee note and said that he could prepare notes like that. On the following day, the Bhatia made a hundred rupee note in the presence of the complainant and the accused, and the complainant was satisfied that the Bhatia was a man who could double notes. Then an arrangement was come to under which the Bhatia, the complainant, and the accused were to get a share each in the profits of the doubled notes in a certain proportion, the complainant taking the biggest share, presumably because he was the man who was to supply genuine thousand rupee notes for the purpose. Then, on the next day, the 15th February, the complainant borrowed a thousand rupee note and went with the accused to the Bhatia, and the Bhatia made one forged note (apparently unnumbered) by some chemical process and gave 21 unfinished notes to the accused to keep. The complainant was then asked to bring 21 different thousand rupee notes, so

that these 21 unfinished notes could be completed by having the numbers reproduced on them from the genuine notes. The story then is that the complainant could only raise eight thousand rupee notes and that thereupon they met at the accused's gaddi in the evening. The Bhatia came there with some chemicals and various processes were performed and suddenly apparently the whole of the notes, genuine notes and other notes, got burnt. As a matter of fact, it appears that the eight thousand rupee notes somehow must have been extracted from the bundle as they were subsequently cashed in the Currency Office. The complainant, however, lost this money and the Bhatia disappeared. The complainant complained to the police and the accused has been put on his trial and sentenced as I have said. The conviction has been under S. 420 read with S. 114, Indian Penal Code.

Now the evidence against the present accused consists simply of the evidence of the complainant himself; and it is urged on accused's behalf that this is insufficient to warrant a conviction. For the appellant it is argued, to begin with, that the charge was under S. 420, Indian Penal Code, and that the provisions of S. 238, Code of Criminal Procedure, do not extend to justify a conviction without any charge being framed for abetment of an offence under S. 420 instead of S. 420 itself. For the Crown, it is urged, that in the present case the defect, if any, in the charge is immaterial, because the accused fully knew before the charge was framed the case he had got to meet; and it is also urged that there might equally well be a conviction under S. 420, Indian Penal Code. I am of opinion that it was necessary to frame a charge of abetment, if that was the charge on which the man was tried and convicted. But I do not base the decision I am about to give on that alone.

Now the defence was that the accused was equally as much hood-winked and swindled by the Bhatia as the complainant and that he cannot, therefore, be convicted as being an abettor of the Bhatia in this swindle. It is in evidence, and it is not denied, that towards note-doubling, the accused also produced two thousand rupee notes. But it is urged that he was the man who introduced the complainant to the Bhatia, and that when the complainant found that his eight thousand rupee notes had disappeared, the accused did not join with him in finding fault with the Bhatia, but he took him home and said that things were all right and that the money could be recovered. It is also urged that the whole of the evidence being that of the complainant, it is not sufficient to justify the conviction. The complainant is an accomplice in an attempt to swindle the Government and the public by the issue of forged notes and it would be unsafe to rely on his uncorroborated evidence as an accomplice as to what the Bhatia did and what the accused did. In this state of evidence, I am by no means convinced that it is sufficient to justify the conviction of the present accused. He, no doubt, introduced the Bhatia to the complainant, but beyond that there is nothing to show that both of them might not equally have been duped by the Bhatia. If that is the evidence, and if there is no direct evidence that the present accused was really in league with the Bhatia, or that he found out that this Bhatia could do the trick and so asked the complainant whom he knew to be a more moneyed man than himself to join in the swindle, this is not, in my opinion, sufficient to prove that the accused, who must have the benefit of doubt, if there is any, actually was a party with the Bhatia in trying to induce the complainant to part with his money.

In this view, I would allow the appeal and acquit the appellant. The appellant will also be discharged from his bail.

**Graham, J.**—I agree. As regards the legal objection that the accused could not be convicted of the abetment of the offence when there was a charge against him of a substantive offence under S. 420, Indian Penal Code, it seems to me, having regard to the provisions of S. 238, Code of Criminal Procedure, that this objection must he held to be well-founded. Sub-section 2A of this section was inserted by Act XVIII of 1923 and, having regard to the manner in which the section expressly makes mention of an attempt to commit an offence, while it is silent with regard to abetment of the offence, the inference, it appears to me, to be that, in the case of abetment, it is necessary that a charge should be framed.

On the merits, it is to be observed that the complainant, on his own showing, was an accomplice in a swindling transaction

That being so, title reliance can be placed upon his evidence. Furthermore, it cannot, I think, be said that the circumstances which have been proved in this case are inconsistent with the appellant having been duped as well as the complainant. In my judgment, the prosecution have failed to prove any facts which may be said to have established the guilt of the accused beyond all reasonable doubt.

I agree, threfore, that the appeal must be allowed.

*Appeal allowed.*

---

## A. I. R. 1927 Calcutta 65

B. B. GHOSE AND GRAHAM, JJ.

***Ashutosh Roy Chowdhury*** and *others*—**Defendants—Appellants.**

**v.**

***Mono Mohan Roy Chowdhury*** and *others*—Plaintiffs—Respondents.

Appeal No. 2691 of 1923, Decided on 29th March 1926, from the appellate decree of the Sub-J., 2nd Court, Faridpur, D/- 11th September 1923.

(a) *Limitation Act, S. 5—Period between judgment and signing of decree should be excluded.*

The period between date of the judgment and the date of signing the decree should be excluded in computing the period of limitation ; 13 *Cal.* 104, *Foll.*; *A. I. R.* 1922 *P. C.* 352, *Dist.*

[P 66 C 2]

(b) *Bengal Estates Partition Act, S. 119—Lessees from co-sharer claiming relief that their tenure should not be reduced by the act of partition authorities and they should be declared to be tenants under the co-sharers holding their tenancy under the partition is cognizable by civil Court.*

Where the case of the plaintiffs was that they did not desire to alter the boundary of the separated estate nor did they want that the allotment of the defendants should be reduced or that the acts of the partition authorities should be interfered with in any way, but all they wanted was that their tenure should not be held to be reduced by the action of the partition authorities, and that they should hold the disputed lands under the defendants as tenants.

*Held* : Civil Court's jurisdiction was not ousted. [P 67 C 1]

(c) *Co-sharers — Private partition—One co-sharer creating tenure of his lands—Subsequent partition by Collector will not affect the interests of tenure holder if he is a party to such partition—If tenure holder being a co-owner was a party to partition he cannot plead previous partition.*

Where there has been a previous formal amicable partition of an estate among the co-sharers, and if one of them creates a tenure comprising the lands of his share, a subsequent partition by the Collector with the consent of the co-owners will not affect the interest of the tenure holder who was no party to the partition proceedings. If, however, the tenure-holder is himself a co-owner and was a party to the partition proceedings he cannot be heard to say that there was a previous partition between the co-owners. Again, if a co-owner claims under a grant from all the co-owners with regard to some lands within the estate, his interest in those lands is not affected by the partition proceedings. [P 68 C 1]

(d) *Bengal Estates Partition Act, Ss. 99, 76, 77 and 78—One co-owner holding specific piece of land as a joint owner—Rights of other co-sharers are not affected—He cannot create a tenure on such lands to the prejudice of other co-sharers—Position is different when he holds such lands in severalty under an agreement from other co-sharers.*

A co-sharer may be in possession of a particular piece of land within the joint estate by virtue of his right as a joint owner but, by such possession the rights of the other co-owners in that piece of land are not necessarily affected. All co-owners continue as tenants in-common with regard to the land, unless the co-owner in possession acquires a separate right. Any person accepting an interest in that land from the co-sharer in possession of it must take it subject to the right of the others to enforce a partition and such incumbrancer cannot complain if the land is allotted to a co-sharer other than his grantor, and he is thereby deprived of his right to it. But the position is different if a co-owner holds a particular piece of land in severaity. A person is said to hold land in serveralty if he holds it in his own right only, without any other person being joined or connected with him in point of interest. With regard to co-owners in a joint estate, interest in severalty in a portion of the land within the joint estate in favour of one of the co-owners can only be created by a formal agreement referred to in Ss. 76, 77 and 78, by all the co-owners by which possession is given to one of them. [P 68 C 2]

*Jogesh Chandra Roy, Suresh Chandra Talukdar* and *Satindra Nath Roy Chowdhuri*—for Appellants.

*Broja Lal Chakravarti, Rupendra Kumar Mitra* and *Radha Binode Pal*—for Respondents.

**B. B. Ghose, J.**—The defendants are the appellants before us. The plaintiffs brought the suit out of which this appeal arises for declaration of their right as permanent tenure-holders to two plots of land described in schedules 'ga' and 'gha' of the plaint and for confirmation of possession or in the alternative for a decree for possession if it was found that they were out of possession. There were several other prayers which it is not necessary to state now. The facts on which they base their claim may be

shortly stated thus: There is a revenue paying Estate No. 955 known as Ramdeb Basu Choudhuri of which the plaintiffs, the defendants and several other persons were co-sharers. There was a private partition under which two sets of co-sharers held two plots of land separately and these were recorded in the Record of Rights as Cadastral Survey Plots Nos. 1020 and 1021. Those two sets of co-sharers created permanent tenures with regard to the two plots of land in favour of the plaintiff under which title the plaintiffs have been in possession of those lands. The disputed plots of land were part and parcel of the Cadastral Survey Plots Nos. 1020 and 1021. There was subsequently a partition of the estate under the Estates Partition Act (V of 1897, B. C.). There was a direction by the Board of Revenue that the Record of Rights should, as far as possible, be the basis of the partition. The greater part of the plots Nos. 1020 and 1021 have been allotted to the shares of the representatives of the lessors of the plaintiffs but the disputed portions have been fraudulently included in the portions allotted to the defendants and a cloud has thus been cast on the plaintiffs' title. The defendants contested the plaintiff's claim on various grounds. The trial Court dismissed the suit. On appeal by the plaintiffs the Subordinate Judge has decreed the suit declaring their title as claimed and directing that they should recover possession of the disputed land which shall remain a part and parcel of defendants' separate estate and the defendants will be entitled to get proportionate rent from the plaintiffs for these lands which will be ascertained in a properly framed suit.

The defendants raise various grounds of appeal against that decree, the first of which is that the appeal by the plaintiffs to the lower appellate Court was barred by limitation and that the Court acted wrongly in extending the period of limitation under S. 5 of the Limitation Act. This argument is based on the following facts. Judgment was delivered by the trial Court on the 9th of February 1922; decree was signed by the Judge on 5th of April 1922; the appeal was lodged on 10th of May 1922. If the period between the date of judgment and the date when the decree was signed is excluded along with the actual period necessary for the preparation of the copy of the decree there can be no question that the appeal was presented within the period of limitation. That the period between date of the judgment and the date of signing the decree should be excluded in computing the period of limitation has been settled so far as our Court is concerned by the Full Bench decision in *Bani Madhub Mitter* v. *Matungini Dassi* (1). Whatever argument may be based on the provisions of the Civil P. C. and the Limitation Act, we are bound by the decision in that case. But it is argued that that case is no longer law having regard to the decision of the Privy Council in *Pramatha Nath Roy* v. *Lee* (2) which affirmed the decision of this Court in *Pramatha Nath Roy* v. *Lee* (3). That decision was with regard to a case on appeal from a decision on the Original Side of this Court where the rule is that the decree or order is not drawn up without an application by the party and the conduct of the appellant was held to be negligent in that case. There is no such rule in the moffusil and the party has no control over the matter of signing of the decree by the presiding Judge.

The Full Bench case in *Bani Madhub Mitter* v. *Matungini Dassi* (1) was neither overruled nor disapproved by their Lordships of the Privy Council but seems to have been approved. (see page 1004 of 49 Cal., The next case cited *Kamruddin Hyder* v. *Mitter* (4) only followed the rule in *Pramatha Nath Roy's* case (2) and has no application to this case. The last case cited, *Harish Chandra Tewari* v. *Chandpur Co, Ltd.* (5), *Kamruddin Hyder* v. *Mitter* (4) with regard to an application for leave to appeal to the Privy Council in which it was held that the decision of the Full Bench in *Bani Madhub Mitter* v. *Matungini Dassi* (1) did not apply to such a case. The practice of excluding the period in question has been followed uniformly for at least 40 years and is still followed in the appellate side of this Court in accepting appeals from decrees of subordinate Courts. I do not therefore, think that the appeal presented to the lower appellate Court was out of time. Nor do I think that the

(1) [1886] 13 Cal. 104 (F. B.).
(2) A. I. R. 1922 P. C. 352=49 Cal. 999 (P C.).
(3) [1919] 23 C. W. N. 553=52 I. C. 582.
(4) A. I. R. 1925 Cal. 735=52 Cal. 342.
(5) [1912] 39 Cal. 766=15 I. C. 59.

Court below acted wrongly in extending the period of limitation under the circumstances if it was of opinion that the appeal was barred by limitation. This contention of the appellants fails.

The arguments on behalf of the appellants on the other questions were placed under the following heads: (1) the suit is barred under Art. 14 of the Limitation Act: (2) S. 119 of the Estates Partition Act bars a suit of this nature; (3) in order to disturb a partition of the estate all the former co-sharers of the estate should have been made parties; (4) the allotments having been made with the consent of all the co-sharers, the plaintiffs cannot seek for an alteration; (5) under S. 99 of the Estates Partition Act the plaintiffs have no right to these lands, but their remedy is against their own lessors. Before dealing with these questions it is necessary to state that the allegation of fraud made by the plaintiffs has been found against them by both the Courts below. The question of a private partition of the estate was attempted to be raised in the trial Court at a late stage, which was not allowed by that Court. A similar attempt was made in the lower appellate Court but without any result, and in this Court the case of a previous partition of the estate has not been urged at all, and in fact it was stated by the learned vakil for the respondents that the endeavour of the plaintiffs to prove such a partition was misconceived. The case for the plaintiffs-respondents, which was for the first time clearly stated before us by their learned vakil, is that they do not desire to alter the boundary of the separated estates nor do they want that the allotment of the defendants should be reduced or that the acts of the partition authorities should be interfered with in any way. All they want is that their tenure should not be held to be reduced by the action of the partition authorities, and that they should hold the disputed lands under the defendants as tenants. Or, in other words, they urge that the decree as made by the lower appellate Court should stand. As the confusing statement of the claim of the plaintiffs has now crystallised in this form, the short point which arises is whether the plaintiffs are entitled to the lands as tenure holders under the defendants. This may be considered from two points of view: first, whether S. 99 of the Estates Partition Act applies to this case; and secondly, if not, whether plaintiffs are entitled to hold the lands under the defendants having regard to the equitable principles applicable to cases of partition of joint estates.

Starting from this point of view it seems to me that the jurisdiction of the civil Court is not ousted under S. 119 of the Estates Partition Act, as the plaintiffs do not ask for any relief falling within that section. Nor do I think Art. 14 of the Limitation Act applies to this suit as it is not for establishment of a right for which any act or order of the Revenue Officer is required to be set aside. The order for partition was made in February 1915, possession was taken in May 1915, and the suit was brought on 14th April 1919. The suit is, therefore, not barred by limitation. It seems also to be clear that the relief claimed by the plaintiffs cannot fail on the ground that the other co-sharers in the estate were not made parties. The principal argument of the appellants is that plaintiffs being co-sharers in the estate, and as such parties to the partition proceedings, they cannot take up the position that there was a private partition, and so S. 99 of the Partition Act applies to the case. The learned vakil relies upon the case of *Sharat Chunder Burmon* v. *Hurgobindo Burmon* (6); *Hridoy Nath Shaha* v. *Mobobutnessa Bibee* (7). It is also urged that the equitable principle laid down in the case of *Bijnath Lall* v. *Ramoodeen Chowdry* (8) should be applied to this case with the result that the defendants would get the lands free from the incumbrance of the leases in favour of the plaintiffs created by the former co-sharers, leaving the plaintiffs to claim any relief they thought fit against their lessors. This principle has been applied in the case of partition under the Estates Partition Act in *Joy Sankar Gupta* v. *Bharat Chandra Bardhan* (9); *Tarini Kanta Majumdar* v. *Ishur Chandra Chakravarti* (10) and other cases. The respondents rely on the following cases in support of their contention that they are entitled to remain on the land. *Jug-*

(6) [1879] 4 Cal. 510.
(7) [1893] 20 Cal. 285.
(8) [1836] 1 I. A. 106 =21 W. R.233=2 Suther. 942=3 Sar. 333 (P. C.).
(9) [1899] 26 Cal. 434=3 C. W. N. 209.
(10) [1913] 21 C. L. J. 603=18 I. C. 240.

*gessur Dayal Singh* v. *Bissessur Pershad* (11); *Hridoy Nath Shaha's* case (7) already cited by the appellants; *Janki Nath* v. *Kali Narain Roy* (12); *Abdul Latif Meah* v. *Amanaddi Patwari* (13); and *Nogendra Mohan Roy* v. *Pyari Mohan Saha* (14). It would be an unprofitable task to give in detail the result of the analysis and examination of each of these cases. The principle I gather from the cases is this: where there has been a previous formal amicable partition of an estate among the co-sharers, and if one of them creates a tenure comprising the lands of his share, a subsequent partition by the Collector with the consent of the co-owners will not affect the interest of the tenure-holder who was no party to the partition proceedings. If, however, the tenure-holder is himself a co-owner and was a party to the partition proceedings he cannot be heard to say that there was a previous partition between the co-owners. Again, if a co-owner claims under a grant from all the co-owners with regard to some lands within the estate, his interest in those lands is not affected by the partition proceedings. In this case the plaintiffs being themselves co-owners cannot say that there had been a previous partition, nor have they been able to prove that there was such a partition. I must now dispose of the question arising under S. 99 of the Partition Act. That section provides that if a proprietor of an estate held in common tenancy has given his share or a portion thereof in patni, etc.....such tenure etc.,shall hold good as regards the lands, finally allotted to the share of such proprietor, and oniy as to such lands. Now, in this case the proprietors in question did not give their share or any portion of it on lease, assuming that the estate was held in common tenancy. What they did was to create a tenure on specific lands in the estate. This section does not apply to such an action and the illustrations to the section support this view. In my opinion, therefore, the argument based on S. 99 of the Act is of no avail to the appellants. But I think where a proprietor creates an incumbrance on a portion of the joint estate, in case of a partition the equitable rule laid down in *Byjnath Lall's* case (8) will come into operation, although S. 99 of the Act does not apply. A co-sharer may be in possession of a particular piece of land within the joint estate by virtue of his right as a joint owner, but by such possession the rights of the other co-owners in that piece of land are not necessarily affected. All co-owners continue as tenants in common with regard to the land, unless the co-owner in possession acquires a separate right. Any person accepting an interest in that land from the co-sharer in possession of it must take it subject to the right of the others to enforce a partition and such incumbrancer cannot complain if the land is allotted to a co-sharer other than his grantor, and he is thereby deprived of his right to it. But the position is different if a co-owner holds a particular piece of land in severalty. A person is said to hold land in severalty if he holds it in his own right only, without any other person being joined or connected with him in point of interest. With regard to co-owners in a joint estate, an interest in severalty in a portion of the land within the joint estate in favour of one of the co-owners can only be created by a formal agreement by all the co-owners by which possession is given to one of them. Such an agreement is referred to in Ss. 76, 77 and 78 of the Estates Partition Act.

The Subordinate Judge has held that the lands were in the exclusive possession of plaintiffs' lessors. That alone does not give them an exclusive right to those lands. Although I have held that S. 99 of the Act does not apply it seems to me that the plaintiffs cannot succeed in their suit unless they can prove that by some formal arrangement agreed to by all the co-sharers including the defendants or their predecessors, the lessors of the plaintiffs were given the exclusive right to the lands in question. If they can prove that, the equitable rule I have stated above does not come to the aid of the defendants, as they have by their own act authorized the plaintiffs' lessors to deal with the lands. As the Subordinate Judge does not appear to have considered the case from this point of view and did not come to the proper findings, so as to enable us to decide the question the decree of the lower ap-

(11) 12 C. L. R. 281.
(12) [1910] 37 Cal. 662=7 I. C. 881=15 C. W. N. 45.
(13) [1911] 15 C. W. N. 426=9 I. C. 539.
(14) [1916] 43 Cal. 103=21 C. L. J. 605=30 I. C. 420=20 C. W. N. 319.

pellate Court must be set aside and the case sent back to that Court to decide on the evidence on the record whether the plaintiffs have succeeded in proving that their lessors held the lands in their exclusive right as indicated above. If the fact is found in their favour a decree as made by the Subordinate Judge will be passed. The suit must fail if the finding is in the negative. As both parties made unfounded allegations and thereby unduly complicated the hearing in the Courts below they will bear their own costs in both the Courts. The appellants, however, will get the costs of this appeal from the respondents. The costs of further hearing will abide the final result.

**Graham, J.**—I agree.

*Appeal allowed.*

---

## A. I. R. 1927 Calcutta 69

CUMING AND PAGE, JJ.

*Manindra Nath Roy Choudhury* and *others*—Appellants.

v.

*Rasik Lal Pakhira*—Respondent.

Appeal No. 296 of 1923, Decided on 11th May 1926, from the order of the Dist. J., 24-Perganahs, Alipur, D/- 15th June 1923.

***Provincial Insolvency Act, S. 24—Court need not go into an elaborate enquiry as to validity of the debts.***

**The Court should not and need not go into an elaborate enquiry as to the validity of or otherwise of the debts. It is sufficient if the Court is satisfied that there are prima facie grounds for thinking that the debtor is unable to pay his debts.** [P 70, C 1]

*Manmatha Nath Roy* and *Surjya Kumar Aich*—for Appellants.

*Dwarka Nath Chakravarti* and *Jyotish Ch. Guha*—for Respondent.

**Cuming, J.**—This appeal arises out of an application by four persons constituting a firm of the name of Rajnarayan Rasik Lal Pakhira to be declared insolvent. There was also a petition by one of their creditors asking them to be declared insolvent. These applications were opposed by a number of creditors. The learned District Judge of Alipur held that the firm was entitled to be declared insolvent and he made the necessary order. Against this order some of the opposing creditors have appealed to this Court. The first point raised by Mr. Roy on behalf of the applicants is that the valuation of the mill which is one of the main assets of the debtors was made without any notice to the creditors and, therefore, cannot stand, and a fresh valuation should be made.

A reference to the judgment of the learned District Judge would show that the creditors were actually informed by the Receiver of the date on which the valuation was going to be made. No doubt in his order of the 23rd of May the learned District Judge stated that it was true that the Receiver had not given notice to the creditors. The learned District Judge, however, apparently subsequently found that his order of the 23rd May was passed on some misapprehension. Even if the creditors had not received any notice of the date when the expert was going to value the mill it is difficult to see what difference it would have made. The creditors did not suggest that they were experts in valuation of the mill property. What possible difference their presence or absence at the time when the valuation was made by the valuer could make it is difficult to conceive. However, in view of the finding of the learned Judge, this point fails.

The next objection urged by the appellant is that the valuation of the mill as made by the valuer is incorrect. The valuation was made by an expert apparently chosen by the Receiver out of a number of expert valuers whose names were suggested by one of the creditors. No objection was apparently taken to the appointment of this gentleman. This gentleman produced a long report which covers some four pages. No attempt has been made by the opposing creditors to cross-examine this gentleman to show that his conclusion or the data on which he based his conclusion were wrong. Nor did the opposing creditors as they could have done, send their own expert to value the mill and give evidence that the value of the mill was very different from the figure of Rs. 40,000 at which this gentleman had arrived. There is no substance whatever in this objection.

The appellants have next argued that the Court ought to have considered whether some of the amounts were really debts owned by the firm. If I

understand the appellants rightly they would seem to contend that at this stage of the case the learned District Judge should have gone into an elaborate enquiry as to the validity or otherwise of each of the debts which the insolvents alleged that they owed. This I think was never intended by the Act. Insolvency Act. S. 24 of the Provincial Insolvency Act provides as follows :

On the day fixed for the hearing of the petition, or on any subsequent day to which the hearing may be adjourned, the Court shall require proof of the following matters, namely : (a) that the creditor or the debtor, as the case may be, is entitled to present the petition : Provided that, where the debtor is the petitioner, he shall, for the purpose of proving his inability to pay his debts, be required to furnish only such proof as to satisfy the Court that there are prima facie grounds for believing the same and the Court, if and when so satisfied, shall not be bound to hear any further evidence thereon.

I may point out that this proviso is new and the object of it is quite obvious namely, that the Court should not and need not at this stage go into an elaborate enquiry as to the validity or otherwise of the debts. It is sufficient if the Court is satisfied that there are prima facie grounds for thinking that the debtor is unable to pay his debts. It is quite clear from the judgment of the learned District Judge that he was so satisfied ; and I am not prepared to say that he was wrong.

The appellants have next contended that the Court in considering whether the debtors were or were not able to pay their debts has not taken into consideration certain other properties belonging to the debtors, but has only taken into consideration the mill. I admit I do not see any reference in the judgment of the learned District Judge specifically to the other properties of the debtors. But, as a matter of fact that is really of no importance whatever. The debts alleged by the debtors were Rs. 1,09,000. Even adding to the amount of Rs. 40,000 (the valuation which has been put on the mill) the valuation put by the debtors on their other properties namely, Rs. 23,000, which valuation has not been challenged by the appellants the amount of assets still falls short of the amount of debts by considerably more than Rs. 500. The result is the appeal must fail and is dismissed with costs. Hearing-fee ten gold mohurs.

**Page, J.**—In my opinion there is no substance in any of the contentions raised on behalf of the appellants. I agree that the appeal should be dismissed.

*Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 70

MUKERJI AND G. N. ROY, JJ.

*Shahabuddin Ahmed*—Petitioner.

v.

*Abdul Kader* and *others*—Opposite Party.

Criminal Revision No. 313 of 1926, Decided on 13th August 1926, from the order of the Sub-Divl. Mag., Munshiganj, D/- 4th January 1926.

(a) *Criminal P. C., Ss.* 133 *and* 140 (2)—*Order for removal of obstruction cannot be cancelled because of non-service of notice—Act not done—Procedure to be followed is as under S.* 140 (2).

Non-service of notice in a proceeding under S. 133 is not a ground giving the Magistrate jurisdiction to cancel his previous order for removal of obstruction. The procedure to be followed is clearly laid down in S. 140, Sub-S. (2) if such act is not performed within the time fixed. [P 71, C 1, 2]

(b) *Criminal P. C., S.* 133—*It is unjust to recover costs from a party who is not served with notice.*

When the question arises from which party or parties the costs for the removal of the obstruction will have to be recovered, that question will have to be determined upon a considaration of the question as to the parties upon whom the notices in connexionwith the proceedings under S. 133 were served and it is unjust for the Magistrate to make an order for recovery of those costs from a party who was not actually served with any notice of the proceedings. [P 71, C 2]

*Suresh Chandra Taluqdar* and *Mahendra Kumar Ghose*—for Petitioner.

*Monnier* and *Syed Nousher Ali*—for Opposite Party.

**Judgment.**—This Rule has been issued to show cause why the order passed by the Sub-Divisional Magistrate of Munshiganj on the 4th January 1926 should not be set aside on Grounds Nos. 2 and 3 of the petition. It appears that proceedings under S. 133 of the Code of Criminal Procedure were drawn up on the 4th March 1925 by Mr. M. C. Ghose, the then Sub-Divisional Magistrate of Munshiganj ,against nine persons who were named in the said proceedings. The proceedings related to the removal of an obstruction from what was alleged to be a *halat*. Notices of these proceedings

were issued, and it appears from the report of the serving peon that they were served upon eight out of the nine persons. The report runs to this effect : Opposite parties Nos 1, 3, 4, 5, 7 and 8, although they were present at the time when the notices were tendered to them for service, did not give any receipt and upon that the said notices were served by affixing them on some conspicuous part of their dwelling house ; and as regards Opposite Parties Nos. 2 and 6 the report was to the effect that they were not present and that the notices were served on the persons who were in their joint family house. Whether his service was valid or not is a matter with which we are not concerned at the present moment.

It appears further that thereafter the learned Sub-Divisional Magistrate Mr. M. C. Ghose, on the 14th April 1925, apparently being of opinion that the service was sufficient, recorded the following order :

> Second party absent. Report shows notices personally served. Rule made absolute. Ask police to clear the obstruction.

On the 19th December 1925 one of the parties filed a petition before the Sub-Divisional Magistrate, Mr. R. B. Mukerji who had in the meantime succeeded Mr. Ghose alleging that the opposite party did not claim the plot of land on which the obstruction is alleged to have stood and that it was impossible to fill up the excavation and praying that orders might be passed on the first party to fill up the ditch at their own costs if they so desired. The learned Magistrate thereupon on the 4th January 1926 passed an order directing that the order previously passed as aforesaid for the removal of the obstruction should be withdrawn. This is the order which is complained of in this Rule. The ground upon which the Magistrate passed this order appears to have been that the ditch had been in existence for more than 20 years and that only one of the parties, namely, Abdul Kader who was a Sub-Inspector of the Bengal Police and was posted at Munshiganj had not evidently been served with any notice in connexion with the proceedings under S. 133. In our opinion this ground did not give any jurisdiction to the learned Magistrate to pass the order cancelling the order made on the 4th April 1925 to which we have already referred.

It has been contended on behalf of the opposite parties who have appeared in this Rule that none of them had been actually served with the notices that were issued in connexion with the proceeding and a number of affidavits have been filed in this Court in order to establish that fact. While it is not possible for us to arrive at a definite finding as to whether these notices were actually served or not upon all the opposite parties it is quite clear to us that the learned Sub-Divisional Magistrate himself has not yet gone into this question. We are, therefore, of opinion that the order directing the withdrawal of the previous order by which the obstruction was directed to be removed is a bad one and we accordingly set that order aside. The procedure to be followed now is clearly laid down in S. 140 of the Code of Criminal Procedure. Sub.S. (2) says that if such Act is not performed within the time fixed the Magistrate may cause it to be performed and may recover the costs of performing it either by the sale of any building goods or other property removed by his order or by the distress and sale of any other moveable property of such person within or without the local limits of such Magistrate's jurisdiction and that if such other property is without such limits the order shall authorize its attachment and sale when endorsed by the Magistrate within the local limits of whose jurisdiction the property to be attached is found. The order of the 4th of April 1925 is, in our opinion, a good and a valid order and the obstruction against which that order is directed will have to be removed. When the question will arise from which party or parties the costs for the removal of the said obstruction will have to be recovered that question will have to be determined upon a consideration of the question as to the parties upon whom the notices in connexion with the proceedings under S. 133 were served and it would obviously be unjust for the Magistrate to make an order for recovery of those costs from a party who was not actually served with any notice of the said proceedings.

For these reasons we are of opinion that the Rule should be made absolute, that the order directing the withdrawal of the previous order passed for the removal of the obstruction should be set

aside and that all further question that may arise in connexion with these proceedings will have to be dealt with in the light of the observation which we have made.

*Rule made obsolute.*

---

## A. I. R. 1927 Calcutta 72

CUMING AND PAGE, JJ.

*K. M. Bose & Co.*—Decree-holders—Appellants.

v.

*Allen Brothers* — Judgment-debtors—Respondents.

Appeal No. 314 of 1924, Decided on 27th April 1926, from the original order of the 2nd Sub-J., 24-Pergannas, D/- 30th April 1924.

(a) *Civil P. C., O. 24, Rules 1, 2 and 3—Rules do not apply to execution proceedings but to original suits.*

Order 24, Rules 1, 2 and 3, do not apply to proceedings in execution. Primarily they would seem to apply to original suits in which in order to save costs an opportunity is given to the defendant to deposit so much of the claim as he admits in Courts; and in such a case the plaintiff will not be allowed costs. [P. 73, C. 1]

(b) *Civil P. C., O. 24—Unconditional deposit is contemplated.*

The provisions of O. 24 contemplate an unconditional deposit of a sum of money in Court by defendant which sum of money is at the disposal of the decree-holder if he desires to withdraw it. [P. 73. C. 1]

*Kanaidhan Dutta*—for Appellant.

*Charu Chundra Biswas* and *Nirode Bandhu Roy*—for Respondents.

**Cuming, J.**—This appeal arises out of certain proceedings in execution. It would appear that the appellant brought a suit against the respondent for the balance due on account and on the 19th July 1921, obtained a decree for the amount of Rs. 14,547-9-8½. The judgment-debtor appealed to the High Court and Rs. 14,719-14-6 was deposited by the judgment-debtor under an order of this Court with the stipulation that the decree-holder might withdraw the amount on giving security or withdraw up to Rs. 3,000 without giving any security. This money was deposited on the 16th September 1921. On the 7th November 1921, the decree-holder, in conformity with the order of this Court, withdrew the sum of Rs. 3,000 which he was allowed to withdraw without giving any security. The appeal was decided by this Court on the 4th March 1924, the appeal being dismissed and the order of the lower Court upheld. Then, on the 13th May 1924, the appellant withdrew the balance that was in deposit, namely, Rs. 11,719-14-6, and on the 30th April 1924 the executing Court ordered that as the entire amount under the decree had been deposited in Court by the judgmen-debtor the execution case was dismissed in full satisfaction. The decree-holder applied for a review of this order inasmuch as the interest on the amount in deposit was not allowed to him. But his application was refused. The decree-holder had also put in an application for the execution of the decree to the extent of the costs allowed by the High Court and this was disallowed by the executing Court. The order passed was that

> the fresh petition of execution filed by the decree-holder cannot, therefore, be entertained in its present form, and is rejected.

Against both these orders the appellant has appealed to this Court and he contends that he is entitled to the interest on the decretal amount up to the date it was available to him, and further that he is entitled to execute the decree for costs of the appeal to the High Court. The judgment-debtor-respondent contends, on the other hand, that the decree-holder is not entitled to interest. His contention would seem to be that as he, the judjment-debtor, had deposited the money in Court the decree-holder is not entitled to interest on the sum which was deposited even though the deposit was not an unconditional one, but the withdrawal by the decree-holder was conditional on the decree-holders's furnishing security to a certain amount. In support of his contention he relies on O. 24, Rr. 1, 2 and 3. R. 1 of this order provides that :

> the defendant in any suit to recover a debt or damages may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim.

Rule 2 runs thus :

> Notice of the deposit shall be given through the Court by the defendant to the plaintiff, and the amount of the deposit shall (unless the Court otherwise directs) be paid to the plaintiff on his application ;

and R. 3 runs as follows :

> No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the

sum deposited is in full of the claim or falls short thereof.

The learned advocate for the judgment-debtors-respondents contends that in view of R. 3 the decree-holder is not entitled to any interest. In the first place I may say that I am not satisfied that O. 24, Rr. 1, 2 and 3, do apply to proceedings in execution. Primarily they would seem to appiy to original suits in which, in order to save costs, an opportunity is given to the defendant to deposit so much of the claim as he admits in Court, and in such a case the plaintiff will not be allowed costs. Even if we extend the principle of this order to execution proceedings still I do not think that they would help the judgment-debtor. The provisions of this order contemplate, I think an unconditional deposit of a sum of money in Court by the defendant which sum of money is at the disposal of the decree-holder if he desires to withdraw it. In the present case there was no such unconditional deposit of the money and the money deposited by the judgment-debtor was not unconditionally at the disposal of the decree-holder. He was under the necessity, if he desired to withdraw the amount, of furnishing security; in that view I do not think that the principles of O. 24, Rr. 1, 2 and 3, apply to the present case except so far as regards the sum of Rs. 3,000 which was at the disposal of the decree-holder and which he actually withdrew.

I am, therefore, of opinion that the decree-holder is entitled to interest on the whole amount up to the date when notice that it has been deposited was received by the decree-holder and on this sum less Rs. 3,000 up to the date when the money was at the disposal of the decree-holder. The parties have agreed that in the event of our holding as I have held above, that interest is due, that the following amounts are now due to the decree-holder; the balance due under the original decree Rs. 1,950. As this is interest it will not bear any further interest, further that the decree-holder is entitled to the costs awarded to him by the decree of the High Court, namely, Rs. 361-14-7, this last amount will bear interast at the rate of six per cent. per annum from the date of the decree of the High Court to the date of realization. Further the decree-holder will get the costs of the Rule, Rs. 52, but there will be no interest on the costs of the Rule.

The result is the appeal is decreed in the above terms. Execution proceedings will now proceed in the lower Court with these modifications. There will be no order as to the costs of this appeal. No order is necessary on the application.

**Page, J.**—I agree.

*Appeal decreed.*

---

## A. I. R. 1927 Calcutta 73

RANKIN AND G. N. ROY, JJ.

*Bhusan Chandra Hazrah*—Applicant.

v.

*Kanai Lal Addya* and *another*—Opposite Party.

Criminal Revision No. 399 of 1926, Decided on 16th July 1926, from the order of the Addl. S. J., Howrah, D/- 1st February 1926.

*Penal Code, Ss. 304 and 323—Death caused by kicking—Ultimate consequence should be considered.*

It is the ultimate consequences of the acts committed by the accused which will have to be taken into consideration in convicting him.

[P. 74, C. 1]

*A. C. Mukherjee* and *Satindra Nath Mukherjee* for *Syama Prosad Mukerjee*—for Petitioner.

*Khondkar*—for the Crown.

*B. C. Chatterjee* and *Probodh Chandra Chatterjee*—for Opposite Party.

**Roy, J.**—The accused in this case 7 in number pleaded guilty to a charge under the latter part of S. 304 read with S. 149, Indian Penal Code. The circumstances which led to the death of Hem Kumar Hazra are as follows: On the 16th April last he was called out of his bed by Chandra Kumar Pal to a tank filled up land where he was attacked by several people with fists and kicks and apparently the kicking was continued until he collapsed. He was carried home and he complained of great pain in the abdomen. Thereafter he was taken to the hospital where the Assistant Surgeon examined him and found a number of injuries. On the 18th April, Hem Kumar died of peritonitis and it appears that that was due to the internal injuries received on his abdomen on the night of the 16th April. When the case was

taken up before the learned Additional Sessions Judge of Howrah the accused pleaded guilty and the Judge accepted the plea and dealt with four of the accused namely Kanai, Bepin, Abani and Gopinath under S. 562 of the Code of Criminal Procedure ; and he inflicted a fine of Rs. 150 each on Chandra Kumar, Khirode and Surjya Kumar ; and he directed that the fines should be paid to the deceased's widow. It is against this decision that there is this application for enhancement of the sentence. We understand that the fines have been deposited but have not been accepted by the deceased's widow.

The present application is for the enhancement of the sentences of these accused persons. For the Crown it is acknowleged that the sentences are somewhat inadequate. In fact the Crown has joined with the petitioner in this case. The learned counsel appearing for the accused contends that the offence committed was really one under S. 323, I. P. C. He points to an earlier incident that happened that night. It appears that at 9-30 p.m. there was a quarrel between Panna Lal and the deceased. There was a scuffle and the deceased had also two falls. He seems thereafter to have gone to bed without any complaint about any hurt to himself. The learned counsel also points to the injuries simple enough as described by the Assistant Surgeon, and he contends that there was no serious offence committed. We have looked into the commitment record and we consider that the sentences passed on the accused are inadequate. No doubt the facts that there was an earlier occurrence, that the injuries at first were considered to be simple and that there was a counter case, probably influenced the Judge in giving a lenient sentence; but it is the ultimate consequences of the acts committed by the accused which will have to be taken into account. The earlier incident does not appear to us to have anything to do with the death of the deceased. There was a simple quarrel and the deceased thereafter went to bed and there was no complaint of any injury. On the other hand immediately after the assault by the accused the deceased complained of pain in his abdomen and he was taken to the hospital where peritonites developed; and according to the evidence of the Civil Surgeon the kicks and blows which he complained of are quite consistent with the injuries received. The Assistant Surgeon found the injuries to be simple on a cursory examination, but the injuries were internal and the man seems to have died as a result of such injuries.

In these circumstances we think that the sentence should be enhanced. The learned counsel contends that there are no circumstances before us on which we can reasonably deal with the accused. But the evidence before the committing Magistrate is before us and we may take it that when the accused pleaded guilty to the charge, they more or less accepted that evidence. The evidence discloses the different acts which the different accused took in the case and I think we ought to deal with the case on that basis.

The learned Sessions Judge has dealt with four of the accused under S. 562, Criminal Procedure Code. Three of these are mere boys aged 16 or 17 years. Gopinath one of the accused is described as being about 21 years old. This Gopinath was before the Sessions Judge and I take it that the Sessions Judge was satisfied that Gopinath was below 21 years of age. I do not like to interfere with the sentence passed in the case of these four accused, namely, Kanai, Bepin, Abani and Gopinath. Making every allowance possible in the case of the others, namely Chandra Kumar, Khirode Prosad and Surjya Kumar. I consider that the ends of justice will be met if a sentence of one year's rigorous imprisonment be inflicted on each of them under S. 304 Part II read with S. 149 Indian Penal Code, and it is ordered accordingly. The fines if paid will be refunded to the accused.

**Rankin, J.**—I would add in respect of the sentence of the accused that are dealt with under S. 562 Criminal Procedure Code that I consider that we are going a long way in dealing with this case in that fashion, and we do so having regard partly to the circumstance that the older men engaged in this case were in some cases relatives of theirs and that it is just possible that some of these young lads might have taken some part in the occurrence which did not amount to very much.

*Rule made absolute.*

## A. I. R. 1927 Calcutta 75

CUMING AND PAGE, JJ

*Umesh Chandra Das Gupta*—Plaintiff —Appellant.

v.

*Bipin Behary Pramanik* and *another*—Defendants—Respondents.

Appeal No. 423 of 1924, Decided on 27th April 1926, from the appellate decree of the Spl. J., Jessore, D/- 26th September 1923.

(a) *Bengal Tenancy Act, S. 50—One or series of tenancies or the land held under one or different landlords is immaterial.*

Whether there is one or a series of tenancies or whether the land is held under the same landlord or different landlords is immaterial. It is sufficient for the purpose of the section that the rent or rate of rent has been the same from the time of the Permanent Settlement.

[P 75 C 2 ; P 76 C 1]

(b) *Bengal Tenancy Act, S. 50 — Kabulyat, stating that if excess area is found to be in possession of tenant, he would pay higher rent, does not alter rate of rent.*

Where it is provided by a kabulyat that if the lands are measured and on measurement the tenant is found to be in possession of more land than what he is paying rent for he will pay rent for that excess land at the higher rate paid by the neighbouring tenants, the kabulyat does not alter, nor does it propose to alter the rent or rate of rent within S. 50. [P 75 C 2]

*Narendra Kumar Bose*, *Profulladhau Bose* and *Sukumar Roy*—for Appellant.

*Jadunath Kanjilal* and *Subodh Chandra Dutta*—for Respondents.

**Cuming, J.**—This appeal arises out of certain proceedings under S. 106 of the Bengal Tenancy Act. The landlord sued to enhance the rent of his tenant. His case was that the tenant was a settled raiyat and the rent was liable to enhancement. The main defence was that the tenant held the jama at a fixed rate of rent from the time of the Permanent Settlement and this rate was not liable to enhancement. There was a further contention of the defendant that Plot No. 135 was all high land and no part of it was water. The first Court allowed the application of the plaintiff. On appeal to the Special Judge the Special Judge found that the land was held at a fixed rate of rent and, therefore, was not liable to enhancement, and he varied the decision of the first Court to that extent.

The plaintiff has appealed to this Court. The learned advocate for the appellant first of all contends that if a person holds under a lease which is of later date than the Permanent Settlement then the presumption under S. 50 of the Bengal Tenancy Act does not apply. I cannot accede to this proposition. S. 50 provides that

> Where a tenure-holder or raiyat and his predecessors -in-interest have held at a rent or rate of rent which has not been changed from the time of the Premanent Settlement, the rent or rate of rent shall not be liable to be increased except on the ground of an alteration in the area of the tenure or holding.

It would not seem to be material so far as this section is concerned whether there is one or a series of tenancies. It is sufficient for the purpose of that section that the rent or rate of rent at which the tenure-holder or the raiyat has held has not been changed since the time of the Permanent Settlement. The learned advocate for the appellant, Mr. Bose, has contended that the presumption which the learned Judge has found to arise under S. 50, Cl. (2) that as the holding has been held at a uniform rate of rent for over 20 years before the date of the suit it has been held at that rate of rent since the time of the Permanent Settlement has been rebutted by the kabuliyat executed by the tenant in 1304. He would seem to contend that by this kabuliyat the raiyat undertook to pay rent at a different and higher rate of rent and hence there has been a new contract between the parties and this new contract rebuts the presumption which arises under S. 50 of the Bengal Tenancy Act.

A careful consideration, however, of this kabuliyat does not support the contention of Mr. Bose. It seems to me that what was intended by this kabuliyat is that if the lands are measured and on measurement the tenant is found to be in possession of more land than what he is now paying rent for he will pay rent for that excess land at the higher rate paid by the neighbouring tenants. The kabuliyat, therefore, does not alter, nor does it propose to alter the rent or rate of rent which was being paid for this holding.

The next argument put forward by the learned advocate would seem to be that at the time of the splitting up of this tenancy into one rupee and Rs. 2-8-0 jamas as has been found by the learned Speciai Judge a portion came to be held under a different landlord. Even if it did I admit I cannot see what difference it makes. S. 50 of the Tenancy Act is

entirely silent as to whether the land is held under the same landlord or different landlords. It is sufficient for the purpose of the section that it has been at the same rent or rate of rent from the time of the Permanent Settlement.

The result is that the appeal must fail and is dismissed with costs.

**Page, J.**—I agree.

*Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 76

SANDERSON, C. J., AND RANKIN, J.

*Kissen Gopal Karnani*—Appellant.

v.

*Suklal Karnani*—Respondent.

Appeal No. 4 of 1926, Decided on 16th April 1926, from the decree of Pearson, J., D/- 19th November 1925.

*Civil P.C., S. 151—Plaintiff adjudicated insolvent before hearing—Plaintiff absent at the hearing—Official Assignee not served—Dismissal of suit under O. 9, R. 8, is improper—Dismissal can be set aside in appeal—Provisions of O. 22, R. 8, should be applied—Civil P.C., O. 9, R. 8—Civil P.C., O. 22, R. 8.*

Where pending the hearing of the case the plaintiff is adjudicated insolvent and consequently he is not present at the hearing and the Court is informed that the plaintiff had become insolvent, the Court should call upon the Official Assignee to state whether he intends to continue the suit, and if the Official Assignee decides that he would continue the suit. it would then be necessary for the Court to make an under that he should give security for costs of the suit within a specified time. The provisions of O. 9, R. 8. do not apply to such a case and the dismissal of the suit for default is bad and the dismissal can be set aside in appeal, whether it be under S. 151 of the Civil P.C. or whether it be under the inherent jurisdiction of the Court.

In such a case it is necessary, before there can be a default on the part of any one that some steps should be taken to have the suit made a competent suit once again, that is, the Court should fix a time within which the Assignee may decide to continue the suit and to give security for the costs thereof. [P 77, C 2; P 78, C 1]

*S. N. Banerjee* and *H. C. Mozumdar*—for Appellant.

*S. C. Roy* and *S. C. Das*—for Respondent.

**Sanderson, C. J.**—This is an appeal by Kissen Gopal Karnani, the plaintiff in the suit, against a judgment of my learned brother Mr. Justice Pearson made on the 19th of November 1925.

The application in respect of which the judgment was delivered, was an application for an order that the suit might be restored and that the decree and order passed by Mr. Justice Pearson on the 12th November 1924 striking out the suit might be set aside in review or otherwise and thereafter the suit be proceeded with.

The suit was brought by the plaintiff to recover an alleged balance of salary and the plaintiff took out a summons under Chap. XIIIA of the Rules of this Court. Certain directions were given with regard to the filing of the written statement, as to the giving of discovery and directions were made that the case should be placed in the Daily List of the 9th May 1924.

On the 17th April 1924 the plaintiff was adjudicated insolvent at the instance of a person, who had obtained an ex parte decree against him in Bombay. On the 14th May 1924 it appears that the Defendant's attorney wrote to the Official Assignee asking whether the Official Assignee was desirous of being substituted in the place of the plaintiff and pointing out that in that case the Official Assignee would have to give security for costs.

It was stated that no answer was sent to that letter.

On the 19th June and on the 1st July 1924, the appellant's attorney wrote to the Official Assignee and it appears that to both these letters replies were sent by the Official Assignee asking the appellant to go and see the Official Assignee. The appellant has sworn that in answer to the two letters, which were sent by his attorney, the Official Assignee pointed out that he had not been called upon by the Court to be substituted in the place of the insolvent plaintiff, he would wait until he was called upon to do so.

The suit did not come into the Daily List until the 12th November 1924, although, as I have already said, an order had been made that it should be placed in the Daily List on the 9th May 1924.

On the 12th November the suit came on for hearing. The learned Judge was informed that the plaintiff had been adjudicated insolvent. No one appeared on behalf of the plaintiff and the suit was dismissed with costs.

On the 30th June 1925 the adjudication was annulled, the appellant having paid off the decree-holder who, it was stated, was the only creditor of the appellant. The annulment order was not

drawn up until the 4th August 1925. On the 17th August notice of this application was given to the Defendant. It was not heard until the 19th November 1925 when the learned Judge dismissed the application with costs.

In my judgment, when the suit was before my learned brother in the first instance, viz., in November 1924, and when the learned Judge was informed that the plaintiff had become insolvent, the Court should have called upon the Official Assignee to state whether he intended to continue the suit, and if the Official Assignee decided that he would continue the suit, it would then have been necessary for the Court to make an order that he should give security for costs of the suit within a specified time.

That was not done, and with much respect to the learned Judge, I am of opinion that the plaintiff's suit should not have been dismissed without such steps, as I have indicated, being taken.

If the learned Judge had been informed that the plaintiff's attorney had written to the Official Assignee asking him to proceed with the suit and that the Official Assignee's answer had been (as was alleged) to the effect that he did not propose to take any steps until he was called upon to do so by the Court, I am convinced that the learned Judge would not have dismissed the suit.

The only question in my judgment, in this appeal is whether this Court has jurisdiction to set right the mistake which, in my opinion, has been committed.

I am of opinion that this Court has jurisdiction, whether it be under S. 151 of the Code of Civil Procedure or whether it be under the inherent jurisdiction of the Court to make such order as may be necessary for the ends of justice.

In my judgment, therefore, the learned Judge's order of the 19th November 1925 and the decree dismissing the suit must be set aside. It follows that a further order is necessary, viz., that the suit do proceed in the ordinary cause.

The appeal is allowed with costs. The plaintiff is entitled to the costs of the proceedings before Mr. Justice Pearson on the 19th November 1925 and the order dismissing the suit is set aside.

**Rankin, J.**—I agree.

In this case the plaintiff having become insolvent, it is suggested that action was rightly taken under R. 8 of O. 9 of the Code of Civil Procedure. It is quite true that the suit had not abated, but it was a defective suit. The only plaintiff on the record being a plaintiff who could take no steps whatever the judgment against him was improper. O. 9, R. 8 provides as follows :

> Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing. the Court shall make an order that the suit be dismissed unless the defendant admits the claim . . . .

So, in any case to which R. 8 is applicable, the Court has no discretion but to dismiss the suit. It seems to me that R. 8 cannot be intended to apply in any case where there is known to be no person in the position of the plaintiff who has any right or duty to appear. If, therefore, the learned Judge's original order is supposed to have been made under Or. 9, R. 8, it was made under a complete misapprehension as to the position. It is said now that the only remedy of the appellant was either by himself or by the Official Assignee to come in time under Or. 9, R. 9 and ask that the suit might be restored. In my opinion that has no application to this case. In such a case it is necessary before there can be a default on the part of any one that some steps should be taken to have the suit made a competent suit once again. The provisions for doing that are contained in O. 22, R. 8 and I agree with the contention of the learned Counsel for the appellant and with the opinion of Mr. Justice Farran, in the case of *Lekhraj* v. *Shamlal* (1) that :

> what the section contemplates is that the Court should fix a time within which the Assignee may decide to continue the suit and to give security for the costs thereof.

In this case a letter had been written by the defendant's attorney to the Official Assignee asking him whether he would continue and mention that if he wanted to continue he would have to find security. That is an entirely different thing from an order made in the presence of the Official Assigne giving him a definite time within which to elect and state what security the Court would require him to furnish. When the Official Assignee has been heard on that and knows what is required, he can

(1) [1892] 16 Bom. 404.

then determine either to take up the suit or to leave the suit alone. But the Official Assignee in this case never was in that position. In my judgment the position is very much the same as the position in the case dealt with by the judgment delivered by Lord Shaw in the case of *Debi Buksh Singh* v. *Habib Shah* (2). It is quite wrong to apply O. 9, R. 8 to a party who has no longer any interest in the proceedings and who does not make default by staying away. I think, therefore, that by one way or another Mr. Justice Pearson had power to discharge his previous order, which, after all, was only an ex parte order, and I think that this Court on appeal from him has also power to set the matter right.

*Appeal allowed.*

(2) [1913] 35 All. 331=17 C. W. N. 829 (P. C.).

---

## A. I. R. 1927 Calcutta 78

RANKIN AND MUKERJI, JJ.

*Emperor*
v.
*Chandra Kumar De*—Accused.

Criminal Reference No. 24 of 1926, Decided on 5th August 1926, made by the 2nd Addl. S. J., Bakerganj, on 3rd May 1926.

*Penal Code, Ss. 182 and 420 — Rash act in identifying another before treasury officer is not punishable under S. 182 or S. 420.*

Person identifying before Treasury Officer another as the proper payee of a certain money, rashly and without taking care to ascertain as to the truth of his identity is not guilty under S. 182 or S. 420 where it is held that his intention was not dishonest. [P 78, C 2; P 79, C 1]

*Anil Chandra Roy Chaudhury*— for the Crown.

*Suresh Chandra Taluqdar, Jyotish Chandra Guha* and *Radhika Ranjan Guha*—for Accused.

**Rankin, J.**—In this case, the accused Chandra Kumar De who appears to be an old man of 80 years of age was tried before a Judge and jury on several charges. The first charge against him was really abetment of forgery and the second charge was really conspiracy to cheat. On those two charges, the jury acquitted the accused and the learned Judge who makes this reference agreed with the jury and held that their verdict was right. There were, however, two other charges against the accused: a charge under S. 182 Indian Penal Code, and another of cheating under S. 420, Indian Penal Code; and the learned Judge has made this reference because he considers that the accused ought to have been convicted upon those two counts.

Now, the facts very shortly are that some person in June 1925 made up his mind to obtain money by forgery from the local Treasury and to do it by forging civil Court deposit payment cheques. He took the names of various local worthies likely to be known in the Treasury office, he filled up certain blank forms, forged the signatures of the civil Court clerk and of the presiding officer there and presented these payment cheques to the local Treasury in the ordinary course, it appearing that he was a person entitled to draw money out of Court. The forgery was not detected; the documents appeared to be in order and the present accused does not come into the matter until we get to the stage at which the actual payments had to be made by the Poddar in the Treasury.

The person whose name had been forged as being the real payee could not, of course, be produced; but it appears that the Poddar was prepared to pay to some person nominated by the payee and to pay on getting proper identification by a person who was known to him. The accused who is a Mokhtear went and identified a particular person as being Jyotish Chunder Banerji the payee named in the cheques. What is now said is that he may or may not be a party to the swindle; but that, assuming that he is no party to the swindle, he still can be convicted and should be convicted under Ss. 182 and 420, Indian Penal Code. The only view of this matter that can reasonably be attributed to the jury is, first of all, that the Mokhtear made the identification rashly or reprehensibly from want of reasonable caution that a man came to him, told him a yarn, persuaded him that he was Jyotish Chunder Banerji and that accordingly he went to the Poddar and identified the man as such.

In a case of this sort one has to draw a rigid line between two positions. If one is going to consider whether the man was in the swindle—a person taking part in a conspiracy by forgery to get money from the Treasury, that is one position. The Judge and the jury, have negatived

that. If however, we have to look to the question under Ss. 182, and 420 Indian Penal Code, we are to do it on the basis that it cannot be imputed to him that he was in the swindle at all. Looking at it in that way, the question is what is the evidence, first of all, under S. 182, Indian Penal Code, that he has given to the Poddar information which he knows or believes to be false. The charge in this case perversed the section by saying as follows:" which you know or had reason to believe" and, in that respect, it is an entirely damnable charge. The evidence of the Poddar is to the effect that the statements actually made by the accused were two separate and distinct statements. One was that, when asked if he knew the payee Jyotish Chunder Banerji, he said that he knew him. The other was that he pointed out the man who drew the money as Jyotish Chunder Banerji, whom he knew.

The jury were, to my mind, right to reject the story of any such identification as that, splitting up the two questions whether the man was Jyotish Chandra Banerji and whether the accused knew Jyotish Chandra Banerji; but, assuming that such suggestion could be accepted on the evidence, it is also reasonably clear that the accused may well say that rashly or not, foolishly or not he did think that he knew Jyotish Chunder Banerji. He may be wrong; he had taken little pains to be right. But the question is whether he was honest. It has to be observed that, if he was not honest, it is very difficult to see how the Judge and the jury would acquit him of being in the swindle. As regards the charge under S. 420, Indian Penal Code, all that I can say is that, on this view of the facts of the case, I am at a loss to discover what S. 420 can have to do with this matter. For these reasons, it appears to me that this reference ought not to be accepted. The accused must, therefore, be acquitted and released. His bail bond will be discharged.

**Mukerji, J.**—I agree.

*Accused acquitted.*

---

## A. I. R. 1927 Calcutta 79

CUMING AND B. B. GHOSE, JJ.

*Durga Mohan Chakravarti*—Plaintiff—Appellant.

v.

*Ali Buksha Bepari* and *others*—Defendants—Respondents.

Appeal No. 208 of 1924, Decided on 12th March 1926, from the appellate decree of the Sub.-J., Faridpur, D/- 6th October 1923.

*Co-sharers—Suit for entire rent — Other co-sharers joined as pro forma defendants—Tenant cannot bject to plaintiff's getting decree.*

In a suit for the entire rent by a co-sharer on the grou id of an arrangement with the other co-sharers making the other co-sharers defendants in the suit, who do not contest the arrangement the tenant has no reason to complain if the plaintiff gets a decree for the entire rent as the co-sharers cannot sue the tenant again for the rent. [P. 80, C. 2]

*Girija Prasanna Sanyal* and *Promode Kumar Ghose*—for Appellant.

*Jogesh Chandra Roy* and *Bhupendra Kishore Bose*—for Respondents.

**B. B. Ghose, J.**—This appeal arises out of a suit for rent with regard to the land in dispute for the year 1328 B. S. The Defendant No. 1, who is the tenant, contested the claim and pleaded that the suit was not maintainable on the ground that the plaintiff was only entitled to 1/3rd share and his brother's sons, who have not been joined, are owners of the remaining 2/3rds share. He also pleaded payment. Defendants Nos. 2 to 4 are mother's sister's sons of the plaintiff. The property in question originally belonged to one Kristo Chandra Chakravarty who had two daughters : Kali Tara, the mother of the plaintiff ; and another daughter from whom the Defendants Nos. 2 to 4 were descended. The plaintiff had another brother who predeceased his mother. Plaintiff's mother died in the year 1328 and the plaintiff claims to be the 16-annas owner of the land in question by virtue of an arrangement between his mother and the Defendants Nos. 2 to 4 under which it is stated that his mother took the whole of this land in exchange of other lands given to Defendants Nos. 2 to 4, which arrangement was arrived at in order to avoid future dispute. Under that deed of partition this arrangement was agreed to between the plaintiff and his brother, who was then alive, on one

side and the Defendants Nos. 2 to 4 on the other. It was alleged that after the death of his mother plaintiff became the sole reversioner and by virtue of the previous arrangement with Defendants Nos. 2 to 4 he is entitled to the whole of the land in question.

The Munsif gave the plaintiff a decree on the finding that he was entitled to the property and the brother's sons of the plaintiff were not necessary parties. He disbelieved the plea of payment by the defendant and decreed the suit without damages but allowed full costs. The Defendant No. 1 appealed against that judgment and the Subordinate Judge has set it aside on the ground that the suit was not maintainable by the plaintiff. The view of the Subordinate Judge was that the brother's sons of the plaintiff whose title was set up by the Defendant No. 1 did not inherit any share of the property. But the suit should fail all the same because the plaintiff was not the sole landlord. The view which the Subordinate Judge took was that the plaintiff and the pro forma Defendants Nos. 2 to 4 were entitled to the entire property and, therefore, the plaintiff was not entitled to maintain the suit for the entire rent. With regard to the question of partition the Subordinate Judge stated that that deed could not be interpreted in the absence of the heirs of the plaintiff's brother.

The plaintiff appeals to this Court and it is contended on his behalf that on the findings of the Subordinate Judge he is entitled to a decree for rent. The Subordinate Judge has found that the persons whose title was set up by the Defendant No. 1, that is, the nephews of plaintiff, had no title and as the persons who, according to the finding of the Subordinate Judge, are co-sharers with the plaintiff are made parties as defendants in the suit, the suit for rent by the plaintiff for the entire amount should be held proper and according to law. It seems to me that this contention is sustainable. If the plaintiff and the pro forma defendants are entitled to the whole of the rent according to the finding of the Subordinate Judge and the plaintiff claims the whole on the allegation of an arrangement with the pro forma defendants which the pro forma defendants do not contest, it does not lie in the mouth of the tenant to say that he would not pay the entire rent to the plaintiff. If the plaintiff had sued for a share of the rent certainly the tenant might say that he was not bound to pay the rent in portions to different landlords. But as I have said that this is a suit for the entire rent making the other alleged co-sharers defendants in the suit those other persons who have been found to be co-sharers by the Subordinate Judge certainly cannot sue the tenant again for the rent of this period and, therefore, the tenant defendants had no reason to complain if the plaintiff got a decree for the entire rent.

It has been contended on behalf of the respondents that the deed of partition mentioned by the plaintiff was really a surrender of the interest of Kali Tara the plaintiff's mother in favour of the then reversionars and, therefore, the plaintiff as well as his brother, got an absolute interest by such surrender; but this is a view of the case which has never been put forward before this and it need not be decided in the present proceedings whether the deed of partition was really a deed of surrender of the life estate by the daughter of the last male owner, Kristo Chandra, or not. It is sufficient to say that on the findings of the Subordinate Judge that the plaintiff and the pro forma defendants were entitled to the whole of the property in question the plaintiff is entitled to maintain the suit as framed. The judgment and decree of the Subordinate Judge must, therefore, be set aside; but the Subordinate Judge has not decided the question whether the defendant had paid any rent to the plaintiff and it is, therefore, necessary that the appeal should be sent back to the Subordinate Judge for decision of this question, whether the plaintiff had received any portion of the rent claimed by him. The Subordinate Judge will dispose of the appeal finally after deciding that question. The plaintiff is entitled to the costs of this appeal. The costs of the lower appellate Court will abide the final result.

**Cuming, J.**—I agree.

*Case remanded.*

## A. I. R. 1927 Calcutta

B. B. GHOSE AND GRAHAM, JJ.

*Mt. Sushila Sundari Choudhurani*—Defendant—Appellant.

v.

*Tarak Chandra Roy Choudhuri* and *others*—Plaintiffs—Respondents.

Appeals Nos. 2784 to 2786 of 1923, Decided on 16th March 1926, from the appellate decrees of the 2nd Sub-J., Tipperah, D/- 6th August 1923.

(a) *Bengal Tenancy Act, Ss. 15 and 16—Omission to notify succession to a tenure makes the successor unable to recover rent payable by sub-tenants, but his interest is not affected in any other way—Landlord must either proceed against the recorded tenants or real tenants in occupation.*

The omission to notify succession to a permanent tenure has only the result that the person succeeding to the tenure shall not be entitled to recover by a suit or any other proceeding any rent payable to him by the subordinate tenants, but it does not affect his interest in the tenure in any other way. The landlord, however, is entitled to sell the tenure in execution of a rent decree against his recorded tenants: but if, one of the recorded tenants is dead, he cannot by omitting his name in a suit brought for the rent of the tenure affect the interest of the heirs of the deceased tenant. The landlord must do one of two things, He must proceed either against the recorded tenants or against the real tenants who are in actual occupation of the tenure : 3 *C. W. N.* 371, *Dist.* [P. 82 C, 1]

(b) *Civil P. C., S.* 100—*Whether certain persons are representatives is a question of fact.*

The question whether or not certain persons were held out as representatives of another tenant is a question of fact. [P 82 C 2]

*Brojo Lal Chakravarty* and *Upendra Kumar Roy*—for Appellant.

*Jadu Nath Kanjilal* and *Sasadhar Roy* (*Sr.*)—for Respondents.

**B. B. Ghose, J.**—These three appeals arise out of three suits for rent. The plaintiff sued for his 15 gandas share of the rent making the co-sharer landlords parties to the suits. The present appeals refer to a question between the contending landlords. Both the Courts below have passed decrees in favour of the plaintiff. The appeals to this Court are preferred by the pro forma Defendant No. 3 one of the co-sharer landlords.

The facts are these : A tenure was held by one Gour and certain other persons of whom it is only necessary to name Bhagwan. Gour had 1 anna 10 gandas share. On his death, he left a widow Shyama Sundari and two sons Tarak and Rajani. Each of the sons inherited 15 gandas share of the tenure. Rajani died leaving his mother as his heir. Tarak's 15 gandas share in the property was purchased in execution of a decree against him by a third person and with this share we are not now concerned. Shyama Sundari who inherited Rajani's share died and, after her death Tarak as the next reversioner of Rajani inherited Rajani's 15 gandas share and he is now the plaintiff suing for his share of the rent. The contesting defendants' case is this : The superior landlord the Maharaja of Tipperah brought a suit for rent against Bhagwan and the other tenants under him with regard to the tenure. In that suit, he obtained a decree and, in execution thereof, the tenure was sold. At that sale, the appellant purchased the tenure and her contention is that the interest which Tarak had in the property passed to her by virtue of the auction-purchase. In the rent suit by the Maharaja of Tipperah Shyama Sundari was made a party. The suit was brought on the basis of a record of rights made under the Bengal Tenancy Act, but Shyama Sundari was not a party to the proceedings in connexion with the record of rights. In the rent suit, she contended that she was not bound by the proceedings taken in the record of rights.

On her objection, her name was struck out from the category of defendants in the rent suit and the order of the Court was that the rent suit would proceed as if Shyama Sundari was not made a party. The question is whether under these circumstances the whole tenure passed including the interest of Tarak at the auction sale. It is contended on behalf of the appellant that on the death of Gour, his heirs were bound to notify their succession under S. 15 of the Bengal Tenancy Act and, when Shyama Sundari succeeded to the property as the heir of her son Rajani, she was also bound to notify her succession and as she had not done so, the landlord could proceed against the surviving tenants whose names were recorded in his sherista and sell the entire tenure ; or, in other words the omission to notify the succession under S. 15 would have this result that the landlord might consider that the only recorded tenants were the co-sharers of Gour and he might bring a suit and sell the entire tenure ignoring the name of

Gour. The answer to this contention plainly is that the omission to notify succession to a permanent tenure has only this result as provided by S. 16 of the Act, that the person succeeding to the tenure shall not be entitled to recover by a suit or any other proceedings any rent payable to him by the Subordinate tenants. The omission does not affect his interest in the tenure in any other way. The landlord, however, it may be conceded, is entitled to sell the tenure in execution of a rent decree against his recorded tenants; but, if one of the recorded tenants is dead, he cannot by omitting his name in a suit brought for the rent of the tenure affect the interest of the heirs of the deceased tenant. The landlord must do one of two things. He must proceed either against the recorded tenants or against the real tenants who are in actual occupation of the tenure.

It does not stand to principle that the right of a person should be affected by a decree obtained against third persons unless it is allowed by any law. No authority or enactment has been brought to our notice under which the right of an absent party can be so affected by a decree. It is true it was laid down in the case of *Khetter Mohan Pal* v. *Pran Kristo Kabiraj* (1) that it is the duty of a person succeeding to a permanent tenure to notify the landlord about his succession. But that observation was made in a suit for rent where it was contended that the suit was defective and should be dismissed because the heir of the deceased person had not been made a party. It has held in that case that the suit was not defective and it is quite in accordance with the principle laid down by a Full Bench of this Court. That case is an authority for the proposition that in execution of a decree obtained, the rights of the absent heirs of a deceased person should be affected. I think, therefore, on principle it must be held that the interest of Shyama Sundari did not pass by the sale in execution of a rent decree obtained by the superior landlord—the Maharaja of Tipperah.

It was contended as a last resort by Babu Brojo Lal Chakravarty who appeared for the defendant-appellant in these appeals that the fact that Shyama Sundari omitted to notify her succession to the landlord showed that she allowed her other co-sharers to represent her in the sherista of the landlord. The answer to that contention is that the question whether or not certain persons were held out as representatives of another tenant is a question of fact, and in these cases, there is no ground for supposing that Shyama Sundari allowed her co-sharers to represent her because she was not made a party to the rent suit and she objected that she was not bound by any proceeding under the record of rights which was taken in her absence. On that ground her name was removed from the category of defendants. The appeals, therefore, fail and are dismissed with costs.

**Graham, J.**—I agree.

*Appeals dismissed.*

(1) [1898] 3 C. W. N. 371.

---

## A. I. R. 1927 Calcutta 82

CUMING AND PAGE, JJ.

*Kunjolal Pal* and *another*—Plaintiffs —Appellants.

v,

*Idurali Sardar* and *others*—Defendants —Respondents.

Appeal No. 632 of 1924, Decided on 6th May 1926, from the appellate decree of the Sub-J., Nadia D/- 15th December 1923.

(a) *Civil P. C., O. 21, R. 90—Execution sale —Stranger cannot challenge on the ground of irregularity—Execution sale.*

It is not open to the third parties to raise the question of irregularity in the sale in execution of a decree. The only person who can raise the question is either the decree-holder or a person whose interest is affected by the sale and these persons can only raise the question under the provisions of O. 21, R. 90. [P 83 C 1]

(c) *Civil P. C., O. 21, R. 92—Certificate cure irregularities.*

The effect of the issue of the sale-certificate is to cure irregularities. [P 84 C 1]

*Rupendra Kumar Mitra* for *Bejon Kumar Mukherji*—for Appellants.

*Santosh Kumar Bose, Prabhat Chandra Dutt* and *Biraj Mohun Majumdar*—for Respondents.

**Cuming, J.**—This appeal arises out of a suit for partition brought by the plaintiffs in which they sought for the partition of a certain property on the allegation that they had purchased

10 annas odd gandas share in it. The property in question belonged to a Mahomedan family of whom the ancestor was one Hanif. The plaintiffs alleged that they had purchased the shares of two of the sons of Hanif, namely, Keshab and Sabdhan. So far as regards the share of Sabdhan their case was that they obtained a decree against Sabdhan in 1918. In execution of this decree Sabdhan's interest in the holding was sold and they themselves purchased it at the sale. This sale was duly confirmed on the 18th February 1919. With regard to Keshab's share, to which also this appeal relates, their case was that they purchased the share of Keshab from his heirs on the 19th September 1919. The defendants denied the plaintiffs' title. They denied that the plaintiffs had ever purchased the land. They further claimed that they were entitled to buy Sabdhan's share by virtue of pre-emption.

The first Court decreed the plaintiffs' suit to the extent of 7 annas 17-20/21 gandas. On appeal the plaintiffs' suit was entirely dismissed. The learned Subordinate Judge held that on account of certain irregularities the sale by which the plaintiffs purchased the property of Sabdhan is neither legal nor valid and that the plaintiffs had not acquired any title under it. So far as regards the share of Keshab the learned Subordinate Judge held that the document by which the plaintiffs purported to purchase the property from the heirs of Keshab was a collusive document and that the plaintiffs did not succeed in proving that they had purchased the share of Keshab.

In appeal Mr. Mitter has urged on behalf of the plaintiffs-appellants that it is not open to the defendants who are third parties to raise the question of irregluarity in the sale. He contends that the only person who could raise the question would be either the decree-holder or a person whose interest was affected by the sale, that these persons could only raise the question under the provisions of O. 21, R. 90, Civil P. C. This contention, I think, is correct. So far as regards the third party it is not open to them to challenge the validity of the sale. It is not contended for the respondents that the sale was void. The irregularities of which they complain were admittedly irregularities which might or might not render the sale voidable. But it would be voidable only at the instance of the judgment-debtor whose interests were affected by the sale and the judgment-debtor alone could get the sale set aside if he succeeded in proving that he had suffered substantial loss by reason of the irregularities. The irregularities, if there were any, were cured by the certificate of sale. To succeed in their defence the respondents must be able to set aside the sale. If they cannot set aside the sale the title of the plaintiffs is perfectly good title. I am, therefore, of opinion that it would not be open to the defendants to raise the defence that the sale would not be a valid one on account of irregularities; and so far as regards the property which the plaintiffs acquired from Sabdhan the appeal must succeed.

With regard to the property which that plaintiffs acquired by purchase from the heirs of Keshab the learned vakil who appeared for the appellants raised certain objections, but finally abandoned this part of the case. The result must be that the appeal partly fails. The plaintiffs are entitled to a declaration of their title to that portion of the property which belonged to Sabdhan, namely, 4 annas 19-20/21 gandas and that they are entitled to the possession of it on partition. Tha suit must be remanded to the trial Court in order to effect a partition in accordance with law. The parties will be entitled to their costs in all the Courts in proportion to their respective success.

**Page, J.**—I agree. The plaintiffs claim as co-sharers an interest in property which they purchased at an execution sale. At the time of the sale the defendants were not among the class of persons who were entitled to apply to set aside the sale under O. 21, R. 90. At that time they had no interest in the property and, therefore, they had no interest which could be affected by the sale. The plaintiffs in support of their claim produced the sale certificate. The defendants resisted their claim upon the ground that the sale was invalid and passed no title to the plaintiffs. The sale was impeached upon the ground of certain irregularities in the conduct thereof.

Now, the alleged irregularities if proved, would render the sale voidable: see *Tasadduk Rasul Kkan* v. *Ahmad*

*Husain* (1) and *Radha Krishna* v. *Bisheshwar Sahay* (2) at the instance of the person who could apply to set it aside under O. 21, R. 90. The defendants were not of that class of persons. The sale not having been set aside under O. 21, Rr. 89 to 91, the sale became absolute, and a sale certificate was granted to the plaintiffs under O. 21, R. 92. The effect of the issue of the sale-certificate was to cure any such irregularities as those under consideration : see *Balkrishna* v. *Masuma Bibi* (3). Thereafter, those persons who might have avoided the sale under O. 21, R. 90 were no longer competent to avoid it on the ground of irregularity in publishing or conducting the sale. It would seriously diminish the utility of sales held in execution of decrees if persons such as the defendants, who could not have applied to avoid the sale under O. 21, R. 90, and who acquired an interest in the property after the sale had become absolute and the sale-certificate had been issued, were entitled to challenge the validity of the sale merely on the ground of irregularity. In my opinion, they possess no such right. The defence, therefore, fails with respect to the plaintiffs' share in this property ; and I agree with the order that has been proposed.

*Appeal partly allowed.*

(1) [1894] 21 Cal. 66=22 I. A. 176=6 Sar. 324 (P.C.).
(2) A. I. R. 1922 P. C. 336=1 Pat. 733.
(3) [1883] 5 All. 142=9 I. A. 182=4 Sar. 398 (P.C.).

---

## * A. I. R. 1927 Calcutta 84

B. B. GHOSE AND GRAHAM, JJ.

*Muktamala Dasi*—Defendant 1—Appellant.

v.

*Ram Chandra De* and *others*—Plaintiffs—Respondents.

Appeal No. 1148 of 1924, Decided on 6th May 1926, from the appellate decree of the 1st Sub-J., Bakarganj, D/- 22nd February 1924.

* *Civil P.C., O. 9, R. 13—Suit to set aside ex-parte decree is not maintainable on the ground of false claim and perjured evidence—Fraud—Meaning of.*

Where a case has been decided, even if it was decided ex parte, the decree cannot be set aside merely upon the ground that the claim of the plaintiff in that case was false or that it was obtained by the aid of perjured evidence. Something more should be proved in support of the allegation of fraud in order to have the decree set aside on that ground. [P, 86, C. 1]

*Per Graham, J.*—In order to set aside a decree upon the ground of fraud. it must be shown that the fraud was practised in relation to the proceedings in Court, and the decree must be shown to have been procured by practising fraud of some sort upon the Court : *Case Law discussed.* [P. 86, C. 2]

*S. C. Roy Chowdhury* and *Santicumar Roy Chowdhury*—for Appellant.

*Suresh Chandra Talukdar* and *Kiron Mohan Sarkar*—for Respondents.

**B. B. Ghose, J.**—This is an appeal by the Defendant No. 1 against a judgment and decree of the Subordinate Judge reversing those of the Munsif. The plaintiff brought the suit to set aside a decree which was passed ex parte against him in Money Suit No. 200 of 1916 on the ground of fraud. In that case, the present plaintiff was the defendant. He was, it appears, served with proper summons ; but on the date of hearing, he failed to appear in Court and the result was that a decree was passed ex parte against him. The plaintiff alleges that the claim for rent against him in the previous suit was entirely false and the decree was obtained against him on perjured evidence. On these allegations, he went to trial. Several issues were framed in the trial Court of which the 5th issue was this :

Is the rent decree obtained by the Defendant No. 1 against the plaintiff fraudulent and one liable to be set aside ?

In a careful judgment, the Munsif considered all the reported cases on the question as to whether the plaintiff was entitled to maintain the present suit for setting aside the previous decree on the ground alleged and came to the conclusion that a fresh suit by the plaintiff for setting aside the prior decree on that ground was not maintainable. On the question of fact also, the Munsif came to a decision in favour of the defendant. On these findings, he dismissed the plaintiff's suit. The plaintiff appealed against that decree and the Subordinate Judge started his findings by observing.

The plaintiff can only succeed if he can prove that the defendant has practised fraud upon the Court in securing the decree complained of. To determine this, it is to be previously seen if the claim in that rent suit was false and it was so known to the plaintiff of that suit.

Then the Subordinate Judge discussed the evidence and, on the facts, he came to a conclusion contrary to that of the Munsif and concluded his judgment in this way :

> Plaintiff's (it should be defendant's) claim in the rent suit is thus false and she must have known it to be false. The decree in that suit was evidently obtained by practising fraud on the Court. The decree in the rent suit, in my opinion, cannot stand.

In that view, he decreed the appeal and allowed the plaintiff's suit. The defendant has appealed to this Court and the contention on her behalf is that the Subordinate Judge is wrong in his view that a suit for setting aside a previous decree is maintainable on the ground that it was obtained by false evidence, although the plaintiff in the previous suit might have known it to be false. In support of this contention, a number of cases have been cited by the learned advocate for the appellant. As there has been some conflict of decisions on this point, I think it is necessary to recapitulate them in some detail.

The first case which has been relied on by the appellant is the case of *Mahomed Golab* v *Mahomod Sulliman* (1). In that case, Sir Comer Petheram, C. J., in delivering the judgment of the Court, after referring to a number of decisions, observed as follows :

> The principle upon which these decisions rest is that where a decree has been obtained by a fraud practised upon the other side by which he was prevented from placing his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon him, and that the decree may be set aside by a Court of justice in a separate suit and not only by an application made in the suit in which the decree was passed to the Court by which it was passed, but I am not aware that ft has ever been suggested in any decided case, and, in my opinion, it is not the law that because a person against whom a decree has been passed alleges that it is wrong and that it was obtained by perjury committed by, or at the instance of, the other party, which is, of course, fraud of the worst kind, that he can obtain a re-hearing of the questions in dispute in a fresh action by merely changing the form in which he places it before the Court, and alleging in his plaint that the first decree was obtained by the perjury of the person in whose favour it was given. To so hold would be to allow defeated litigants to avoid the operation not only of the law which regulates appeals, but that of that which relates to res judicata as well.

This case was followed in several other subsequent cases to which I need not refer in detail. The first discordant note to this view was struck in the case of *Lakshmi Charan Sahu* v. *Nur Ali* (2). That case was very peculiar in its facts which would support the decree. It is unnecessary to give in detail the decision in that case on the facts found because that has been dealt with in subsequent cases at considerable length. This case was followed in the case of *Kedar Nath Das* v. *Hemanta Kumari Devi* (3). This question was again debated in the case of *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (4) to which one of the learned Judges who decided the case of *Lakshmi Charan Sahu* v. *Nur Ali* (2) referred to above was a party. In that case, Sir Lawrence Jenkins, C. J., in delivering his judgment referred to some of the cases which were cited in the judgment of Sir Comer Petheram in the case of *Mahomed Gulab* v. *Mahomed Sulliman* (1) and he obeerved :

> There is, however, no suggestion that the decree in the previous suit was fictitious, or that the plaintiffs in this suit were prevented by contrivance from placing before the Court in the former suit any material relevant to the issue, nor has there been any subsequent discovery of evidence that goes to show fraud, or that the Court was misled in the former suit. In effect, when analysed, the judgment of the lower appellate Court is no more than a re-trial of the merits of the original suit and a determination that the Judge who decided that suit was mistaken.

In that view, the Court affirmed the decision of Chapman, J., who set aside the decision of the lower appellate Court which held that the decree previously obtained by the defendant in that case was bad as it was obtained by perjured evidence. Subsequent to this, there was another case, namely, the case of *Nalinikanta Mukherji* v. *Hari Nikari* (5) in which the decision of Sir Comer Petheram was followed. There have been other cases also taking the same view. In the case of *Sarat Kumari Debi* v. *Mecher Mollah* (6) a Division Bench of this Court to which one of us was a party followed the decision of Sir Comer Petheram and the same thing has been done in the case reported as *Baikuntha Chandra Dhupi* v. *Prahlad Chandra Dhupi* (7).

(1) [1894] 21 Cal. 612.

(2) [1911] 38 Cal. 936=11 I. C. 626=15 C. W. N. 1010.
(3) [1914] 18 C. W. N. 447=22 I. C. 709.
(4) [1914] 41 Cal. 990=19 C. L. J. 457=23 I. C. 337=18 C.W.N. 681.
(5) A. I. R. 1925 Cal. 663.
(6) [1925] 29 C. W. N. 51 Notes.
(7) A. I. R. 1926 Cal. 426.

The decisions of this Court appear to have consistently laid down the principle that where a case has been decided, even if it was decided ex parte, the decree cannot be set aside merely upon the ground that the claim of the plaintiff in that case was false or that it was obtained by the aid of perjured evidence, and that something more should be proved in support of the allegation of fraud in order to have the decree set aside on that ground. In the present case, as I have already pointed out, nothing has been found by the Subordinate Judge except that the claim of the plaintiff in that suit was false and that she knew that it was false. In order to find that the claim was false, the Subordinate Judge in the present case has really decided the matter as if he was sitting on appeal against the previous judgment of the Court. This, as has been pointed out by Sir Comer Petheram as well as by Sir Lawrence Jenkins in the cases decided by them as referred to above, the lower appellate Court was not entitled to do. It is, however, contended on behalf of the respondent that there being a conflict of decisions on the point as set forth above, this matter should be referred to a Full Bench and he further argues that there should be an enumeration of the grounds on which a plaintiff can maintain a suit for setting aside a previous decree on the allegation of fraud.

As all the recent cases which I have already cited have followed the previous decision of Sir Comer Petheram in the case reported as *Mahomed Golab* v. *Mahomed Sulliman* (1). I do not think that it is at all necessary to refer this question for the decision of a Full Bench. It is also not possible to define the grounds upon which fraud can be found for which a plaintiff may be entitled to bring a suit for setting aside a decree. The only thing that can be definitely laid down is that the mere allegation that a previous decree had been obtained upon perjured evidence is not a ground on which a previous decree can be impeached. If this is allowed there would be nothing to prevent the unsuccessful defendant from bringing another suit for setting aside the second decree on the same ground. And this may go on without end. This appeal should, therefore, be allowed and the plaintiff's suit dismissed with costs in all Courts.

**Graham, J.**—I entirely agree and I desire to add only a few words. The question as to what constitutes fraud upon which a decree can be set aside has formed the subject-matter of numerous decisions in this and other Courts. The general trend of those decisions appears to be that, in order to set aside a decree upon such a ground, it must be shown that the fraud was practised in relation to the proceedings in Court, and the decree must be shown to have been procured by practising fraud of some sort upon the Court. One fact appears to emerge clearly from the decisions and that is that a decree cannot be set aside merely upon the ground that it has been obtained by perjured evidence. Now, in the present case, the ground upon which it was sought to set aside the previous decree was that it had been obtained by means of perjured evidence misleading the Court. It is manifest, that, if such a ground were recognized as a ground for setting aside a decree, there would be no end to litigation. It is unfortunately notorious that decrees are obtained not infrequently upon perjured evidence and if they are to be allowed to be assailed and set aside upon that ground, there can be no finality. In my opinion, the suit was clearly not maintainable. I agree, therefore, that it should be dismissed with costs.

*Appeal allowed.*

---

## A. I. R. 1927 Calcutta 86

CUMING AND B. B. GHOSE, JJ.

*Harendra Kumar Bose* and *another*—Appellants.

v.

*Khemada Kinkar Ray* and *others*—Respondents.

Appeal No. 2436 of 1923, Decided on 16th December 1925, from the appellate decree of the Sub-J., 6th Court, Dacca, D/- 20th July 1923.

(a) *Bengal Tenancy Act, S. 26—Death of occupancy raiyat leaving heir—Suit for khas possession under S. 26 fails—Court need not decide who is the preferential heir.*

A suit for khas possession based on the provisions of S. 26 should fail as soon as it is found that the occupancy raiyat died leaving an heir and it is not necessary for the Court to decide who is preferential heir and base its decision upon the same. [P. 87, C. 2]

*(b) Practice—Appellate Court cannot make out a new case—Landlord and tenant—Abandonment.*

**It is not open to an appellate Court to make a new case for the plaintiff and decree the appeal on the ground of abandonment which was never pleaded nor was any evidence gone into on that question.** [P 87, C 2]

*Jyoti Prasad Sarbadhikary* and *Profulla Chandra Nag*—for Appellants.

*Amarendra Nath Bose* and *Jatinath Ghose*—for Respondents.

**B. B. Ghose, J.**—This appeal by Defendants Nos. 5 and 6 arises out of a suit for recovery of khas possessson of ⅔rds share of certain land on the allegation that one Mukta Sundari was an occupancy raiyat and that she had died without leaving any issue. The plaintiff was the owner of ⅔rds share of the land and Defendants Nos. 5 and 6 were the owners with regard to the remaining share. The suit was based on the provisions of S. 26 of the Bengal Tenancy Act on the ground that the occupancy raiyat had died without leaving any heir. The defence of Defendants Nos. 5 and 6 was that they were the heirs of the occupancy raiyat and the plaintiff was not entitled to khas possession. In the course of the trial in the first Court it was contended that Defendants 5 and 6 were not her heirs under the Hindu Law, but there were some distant kinsmen or heirs who were the preferential heirs. The learned Munsiff held that whether the Defendants Nos. 5 and 6 were her heirs or her distant kinsmen need not be decided. He held that so long as there were heirs of Mukta Sundari existing the plaintiff as landlord had no right of re-entry. In that view he only declared that Mukta Sundari had no permanent or heritable right to the land in suit, a right which was pleaded by the defendants, but dismissed the plaintiff's suit for khas possession.

On appeal by the plaintiff the Subordinate Judge found that Mukta Sundari did not die without leaving any heirs. But he held that this property was clearly an Ayautuk Stridhan of the lady and as such Defendants Nos. 5 and 6 who were said to be her brother's grandsons were not preferential heirs, but the preferential heirs would be her husband's relatives. He further found that these husband's relatives were not in occupation of the land and there was non-payment of rent and that these two facts coupled together amounted to an abandonment of the holding by the legal heirs In that view he passed a decree for khas possession in favour of the plaintiff to the extent of his ⅔rds share.

On appeal by Defendants Nos. 5 and 6 it is contended on their behalf that it was not open to the Subordinate Judge on appeal to make a new case for the plaintiff and decree the appeal on the ground of abandonment which was never pleaded nor was any evidence gone into on that question. It is also urged that the defendants are always entitled to plead the right of a third party in order to defeat the plaintiff's claim. It is contended on behalf of the respondents that on the finding that the holding has been abandoned by the real tenants who are the legal heirs of Mukta Sundari, the judgment of the lower appellate Court should be supported.

It seems to me that the Subordinate Judge was entirely wrong in deciding the case on the question of abandonment. The Munsiff was quite right in his decision that as soon as it was found that Mukta Sundari had died leaving an heir the suit of the plaintiff should fail and it was not necessary for him to decide who would be the preferential heirs whether Defendants Nos. 5 and 6 or some third persons. The decision of the Subordinate Judge is, therefore, entirely erroneous and must be set aside.

The appeal is, therefore, allowed and the decree of the Munsiff restored with costs in this Court and in the lower appellate Court.

**Cuming, J.**—I agree.

*Appeal allowed.*

---

## A. I. R. 1927 Calcutta 87

SUHRAWARDY AND GRAHAM, JJ.

*Rakhalraj Banerjee*—Plaintiff—Petitioner.

v.

*Ranjan Bagtani*—Opposite Party.

Civil Rule No. 1194 of 1925, Decided on 18th May 1926, against an order of the Munsif, 1st Court, Jangipore (Murshidabad), D/- 14th July 1925.

*Civil P. C., O. 7, R. 10—Return of plaint cannot be made on the ground that it would be more advantageous to one of the parties to do so.*

**If a suit can be instituted in more Courts than one and is instituted in one of such Courts**

the defendant may apply under S. 22 to have the suit transferred to another Court; but the Court in which the suit is instituted has no power to return the plaint for presentation to the proper Court on the ground that it would be more advantageous to the defendant to have the suit tried in that Court. The plaint can be returned only on the ground of want of jurisdiction.

[P 88 C 1, 2]

*Rupendra Kumar Mitter* and *Durga Cahran Roy*—for Petitioner.

**Judgment.**—This Rule arises out of an application made by the plaintiff under S. 25 of the Provincial Small Cause Courts Act and is directed against an order of the Munsif of Jungipore returning a plaint to the plaintiff petitioner for presentation in the proper Court in the District of Santhal Perganas. The facts briefly stated are these: The defendant executed a hand-note in favour of the plaintiff in the District of Santhal Perganas where he resides. The plaintiff instituted the present suit for the money due on the hand-note in the Court of the Munsif of Jangipur in the District of Murshidabad exercising Small Cause powers on the allegation that there was an oral agreement between the parties to re-pay the loan at Raghunathgunge in the District of Murshidabad and within the jurisdiction of the Jundipore Court. The learned Munsif, on the objection taken by the defendant in his written statement that the proper Court where the suit should have been instituted was the Court in the Santhal Perganas District, returned the plaint to the plaintiff for presentation in that Court. The ground upon which the plaint has been returned is that the defendant would get the benefit of the law of damdupat if the suit is tried in Santhal Perganas and that he would be deprived of that advantage if it is tried in the District of Murshidabad. The learned Munsif made the following observations:

Although a part of the cause of action might have arisen within the jurisdiction of this Court yet this suit ought to be tried in the proper Court of the District of Santhal Perganas where he cause of action principa lly arose.

Now under S. 20 of the Civil P. C. the Court within whose jurisdiction the cause of action wholly or in part arises is a Court where the suit can be instituted. If the suit can be instituted in more Courts than one and is instituted in one of such Courts, the defendant may apply under S. 22 to have the suit transferred to another Court. Such application, however, has to be made under S. 23 of the Code to the appellate Court to which both the Courts are subordinate or to the High Court in case the two Courts are under different appellate Courts, but under the same High Court or where the two Courts are subordinate to two different High Courts to the High Court within whose jurisdiction the Court in which the suit is instituted is situated. The power given to the Court in which the suit is instituted to return a plaint is contained in O. 7, R. 10, Civil P. C., where it is laid down that the plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted. The section means that, if the Court in which the suit is instituted discovers at any stage of the suit that it has no jurisdiction but that another Court has jurisdiction to try it, it shall return the plaint to the plaintiff for presentation in the proper Court. In the present case the Munsif does not say that he has no jurisdiction to try the suit and, on the allegation of the plaintiff, if he succeeds in proving it, the Munsif would certainly have jurisdiction to try it. The stage, therefore, when the Court discovers that it has no jurisdiction to try the suit, but some other Court has, has not yet arrived. If, on account of some advantage to one of the parties it is thought desirable that the case should be tried in the Santhal Perganas it is this High Court, as the two Courts in which the suit might be instituted are subordinate to two different High Courts, which is alone competent to order the transfer and not the trial Court.

It is clear, therefore, that the Munsif who returned the plaint for presentation to the Court of Santhal Perganas on the ground that it would be more advantageous to the defendant to have the suit tried in that Court, had no jurisdiction to pass the order and return the plaint. This Rule is accordingly made absolute. The order of the Munsif dated the 14th July 1925, returning the plaint to the plaintiff for presentation to the proper Court in the District of Santhal Perganas is set aside and he is directed to proceed with the suit according to law. As no one appears on the other side, no order is made as to costs.

*Rule made absolute.*

## * A. I. R. 1927 Calcutta 89

CUMING AND PAGE, JJ.

*Abdul Alim*—Judgment-debtor 1—Appellant.

v.

*Abdul Hafez* and *others* — Decree-holders—Respondents.

Appeal No. 116 of 1924, Decided on 26th April 1926, from the original order of the Sub-J., 2nd Court, Mymensingh, D/- 17th May 1923.

* *Limitation Act, Art.* 182 (2)--*Time for applying for execution runs from date of appellate decree when there is appeal even against a portion of the trial Court's decree.*

When a decree is appealed against even though the appellant appeals against only a portion of the decree, the whole decree of the first Court is superseded by or becomes merged in the decree of the appellate Court, and there is no part of the first Court's decree that remains to be executed. There is only one decree to be executed and that is the decree of the appellate Court. Hence time for applying for execution runs from the date of the appellate Court's decree : 25 *Cal.* 594 (*F. B.*), *Foll.*; 2 *C. L. R.* 471 ; 14 *Cal.* 26 ; 19 *C. W. N.* 287 and 20 *C. W. N.* 686, *Diss. from.* [P 90, C 1]

*Girja Prosonna Roy Choudhuri*—for Appellant.

*Ramendra Chandra Roy*—for Respondents.

**Cuming, J.**—This appeal which is by the judgment-debtor arises out of certain execution proceedings. The facts are these: The plaintiff brought a suit for the recovery of certain properties which were described in four schedules. He obtained a decree on 31st March 1908, so far as regards the properties in Schedule IV. His claim for the properties in Schedules I, II, III was dismissed. Against that portion of the decree by which his claim was dismissed, he appealed first to this Court and then to the Privy Council. He was equally unsuccessful in both Courts. The order of the Privy Council dismissing his appeal is dated 22nd January 1920.

There was no appeal by either party regarding the Schedule IV properties. The decree-holder then on 8th December 1922, applied for execution of the decree so far as Schedule IV properties were concerned. The judgment-debtor objected that the decree could not be executed now as it was barred by limitation. He contended that limitation began to run from the date of the decree in the suit in 31st March 1908, by the trial Court. The decree-holder contended that limitation ran from 22nd January 1920, the date when his appeal was finally disposed of by the Privy Council. The decree-holder's contention found favour with the executing Court and hence this appeal by the judgment-debtor. The judgment-debtor contends that so far as the decree regarding the lands covered by Schedule IV are concerned there was no appeal. The decree of 1908 may be split up into several parts, viz., the part in favour of the plaintiff and the part in favour of the defendant. The appeal was only as regards that part of the decree in favour of the defendant and so that with regard to that part of the decree in his favour it was never imperilled by the appeal regarding the other part. Hence time ran from the date of the original decree. The decree-holder, on the other hand, contends that it is not possible to split up a decree into different parts and that when a decree is appealed against it makes no difference whether it is the whole or only part of the decree that is challenged. Time runs from the date of the final decree.

The point is one which has given rise to a considerable conflict of authorities although the words of the article itself seem sufficiently clear and would admit of only one interpretation. The words used in Art. 182 (2) are :

> Where there has been an appeal, the date of the final decree or order of the appellate Court, or the withdrawal of the appeal.

Read by themselves these words would seem to mean that once there was an appeal time ran from the date of the decision in the appeal and there is no suggestion that it would be material as te whether all or only some of the parties appealed or whether the whole or only part of the decree was challenged. It is difficult to my mind with great respect to the learned Judges who have held otherwise, to ascribe any other meaning to them. The expression "decree" means the formal expression of an adjudication which so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit.

Clearly, therefore, a decree may contain the decision of a number of matters in controversy, but it does not seem that the decision on each matter in controversy is a separate decree and that there are really a number of decrees contained

as it has been described by one learned Judge in one sheet of paper. It seems clear to me that there is only one decree and not a number of decrees. When a party appeals against a decree or a part of a decree he files a copy of the whole decree. No doubt possibly he does not object to the decree in toto and may only desire to have it varied in some portions. Still even if he appeals against any part of the decree the decree is appealed against. He may only be asking that the decree should be altered in some particulars and not all. It seems to me, therefore, that the appellate Court deals with the decree as a whole. It has always been held that after appeal the only decree that can be executed is the decree of the appellate Court whether it reverses, modifies or confirms the decree of the lower Court. See the case of *Shohrat Singh* v. *Bridgman* (1). That decree is, I think, the only decree in the suit.

To hold otherwise would give rise to a possible contingency of there being three or possibly four decrees in the same suit capable of execution, viz., that of the Court of first instance as regards one part of the claim, that of the first appellate Court with regard to another part of the claim, that of the High Court with regard to another part, and possibly that of the Privy Council with regard to a further part.

It seems to me that when a decree is appealed against even though the appellant appeals against only a portion of the decree, the whole decree of the first Court is superseded by or becomes merged in the decree of the appellate Court and there is no part of the first Court's decree that remains to be executed. No part of the decree of the first Court can be held to be in separate existence after an appeal in the suit has been decided. The conclusion to which I come is that there is only one decree to be executed and that is the decree of the appellate Court. Hence time runs from the date of the appellate Court's decree and the present application for execution is not time barred. It has been contended that this will be hard and inequitable in the present case as it will mean that the defendant must disgorge some 17 years' mesne profits. I cannot see that it is. The defendant-appellant knew that by that portion of the decree against which he had not appealed the plaintiff's right to Schedule IV land had been decreed and the defendant remained on in possession at his peril. He could at once have given up the land.

It only remains now for me to consider whether there is any decision of this Court by which I am bound and which takes a contrary view. There are, as I have already stated, numerous conflicting decisions on this point some in this Court and some in other High Courts. They have all been cited before us, discussed, distinguished or relied on. I have listened to and read these authorities with the respect they are entitled to but it would be taking up this Court's time unneessarily to deal with them separately.

It is sufficient for my purpose to refer only to the case of *Gopal Chunder Manna* v. *Gosain Das Kalay* (2). That was a decision of the Full Bench of this Court. The judgment was delivered by the learned Chief Justice, Sir Francis Maclean. The Full Bench took the view that I have taken, and in dealing with the case the learned Chief Justice remarked :

> For myself I prefer the reasoning and the conclusion of the two learned Judges [see the case of *Mashiat-un-nissa* v. *Rani* (3)] who were in the minority in that case, and to read the language of sub-S. (2) of Art. 179 (now Art. 182) of the Second Schedule to the Limitation Act according to the ordinary signification of the words used. That article says that, where there has been an appeal, the date of the final decree or order of the appellate Court shall be taken to be the time from which the period is to begin to run. There is no such qualification in the article as is suggested by the majority of the Judges in the Allahabad case, [*Mashiat-un-nissa* v. *Rani* (3)], and which must be read into the article in order to support their view; nor is there anything to lead me to suppose that any such qualification or modification was intended by the Legislature. The language of the article is reasonably clear, and, in my opinion, the safer course is to construe it according to the ordinary meaning of the word used.

This decision is in accordance with the view I have taken and it is, moreover, a decision by which I am bound.

In these circumstances it would serve no useful purpose to discuss the numerous other decisions on the point. The result is that the appeal is dismissed with costs. Hearing-fee : five gold mohurs.

**Page, J.**—The decision of this appeal depends upon the meaning and effect of

(1) [1882] 4 All. 376=(1882) A.W.N. 68 (F.B.).

(2) [1898] 25 Cal. 594=2 C. W. N. 556 (F.B.).

(3) [1890] 13 All. 1=(1890) A.W.N. 207 (F.B.).

Sch. I, Art. 182 (2) of the Limitation Act (9 of 1908). On the 11th April 1906, Syeda Amatul Fatima, the predecessor-in-title of the respondents, as the heir of Izzatannessa Bibi instituted a suit against the appellant and his wife to recover possession of certain immovable property set out in Schedules I to IV of the plaint, and certain moveable in Schedule V thereof. She alleged that the properties in Schedules I—III were the subject of a wakfnama of 27th Chaitra 1309, under which Izzatannessa purported to make the properties wakf, and she prayed that the wakfnama might be declared void. The appellant and his wife contended that the whole of the properties were wakf, and that the appellant was duly in possession as mutwalli. On the 31st March 1908, the Subordinate Judge of Mymensingh passed a decree inter alia that

> the plaintiff do recover possession from Defendant No. 1 of the properties described in Schedule IV together with mesne profits ; Rs. 1,350 as the value of Izzatannessa's share in the other moveable properties mentioned in Schedule V (excepting ornaments), but her claim in respect of the other properties which she claims as the heir of Izzatannessa be dismissed on the ground that Izzatannessa Bibi has made a valid wakf of the same ; that the Defendant No. 1 do pay to the plaintiff Rs. 1,350, the value of the moveable properties, and Rs. 479-12-6, the proportionate costs due to plaintiff ; in all, Rs. 1829-12-6 ; and the plaintiff do pay to the said Defendant No. 1 Rs. 1,812-8-6, the proportionate costs due to him; and that the Defendant No. 2 do bear her own costs.

The defendants did not prefer an appeal against the said decree, but the plaintiff appealed upon the ground that the wakfnama was invalid and void. The appeal was dismissed by the High Court on 25th June 1912, and by the Privy Council on 22nd January 1920.

On the 8th December 1922, the heirs of the plaintiff applied for execution of the decree of the 31st March 1908. The appellant, then the judgment-debtor, filed an objection upon the ground that the decree could not be executed 16 years after it was passed, and that the plaintiff's application for execution was barred by limitation. The appellants' objection was overruled, and from the order disallowing the objection this appeal has been brought. Under Art. 182 it is provided that an application for the execution of a decree or order of any civil Court must be made within three years from

> (1) the date of the decree or order, or (2) (where there has been an appeal) the date of the final decree or order of the appellate Court ; or the withdrawal of the appeal.

Now, with respect to the immovable properties in Sch. IV and the moveables in Sch. V there has been no appeal, and the decision of the appellate Courts in respect of the properties in Sch. I—III (which alone were the subject-matter of the appeals) could not in any circumstances or in any way affect the right of the plaintiff to obtain possession of the parties in Schs. IV and V which was finally determined by the decree passed on 31st March 1908. That part of the decree, therefore, which related to Schs. IV and V was in no way "imperilled" by the appeals which were preferred. Moreover, there can be no doubt that the plaintiff, notwithstanding the appeal, would have been entitled forthwith to execute the decree in respect of the properties in Schs. IV and V : *Hukum Chand Boid* v. *Pirthichand Lal Chowdhury* (4). Why should the plaintiff, it is urged, in these circumstances be entitled to hold his hand, and to execute the decree in respect of these properties long after the period has expired within which he would have been entitled to execute it if no appeal had been preferred, merely because he has appealed against the decree in respect of other properties which are not connected with these properties, and when his right to recover possession of the properties in Schs. IV and V is in no way dependent upon, and could not be affected by the result of the appeal ? The answer, I think, is that the fixing of a period of limitation must always be a matter arbitrary and experimental, and

> a rule of law that in any case in which there has been an appeal from a decree, limitation shall begin to run from the date of the decree on appeal irrespective of whether the decree was appealed from in whole or in part, may not be altogether scientific ; but it is simple, certain and intelligible, and I think it is the rule which the Legislature intended to lay down.

[per White, C. J., in *Kristnama Chariar* v. *Mangammal* (5).] Such a rule does not work any real hardship upon the judgment-debtor, for it is open to him to safisfy that portion of the decree against which there is no appeal without waiting for the Court to compel him to

(4) [1919] 46 Cal. 670=50 I. C. 444=46 I. A. 52 (P.C.).
(5) [1903] 26 Mad. 91 (F. B.).

obey the decree by issuing process in execution. Apart from the confusion which would result if limitation were to be reckoned from different starting points in respect of the execution of different parts of the same decree in my opinion, no warrant for such a construction can be found in the language which the Legislature has employed to define " decree " in S. 2 (2) of the Civil P. C., 1908, or to fix the period of limitation in Art. 182 (2). Under S. 2 (2) 'decree' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to "

> all or any of the matters in controversy in the suit,

and I respectfully agree with Bhashyam Ayyangar, J., when he observed that

> When an appeal is preferred from a decree of a Court of first instance, the suit is continued in the Court of appeal and re-heard either in whole or in part, according as the whole suit is litigated again in the Court of appeal or only a part of it. The final decree in the appeal will thus be the final decree in the suit, whether that be one confirming, varying or reversing the decree of the Court of first instance. The mere fact that a matter is litigated both in the Court of first instance and again, though only in part, in the Court of appeal, cannot convert or split the suit into two and there can be only one final decree in that suit, viz., the decree of the Court of appeal. There cannot be two final decrees in such a suit, one by the Court of first instance and the other by the Court of appeal. *Kristnama Chariar* v. *Mangammal* (5).

The language used in Art. 182 (2) is equally clear, and, in my opinion, upon the true construction of the terms of this article limitation runs from the date of the final decree of the appellate Court where there has been an appeal, irrespective of the question whether the appeal relates to the whole decree or not, This is the interpretation which has been given to Art. 182 (2) by the Calcutta High Court in *Gungamoyee Dassee* v. *Shib Sunker Bhuttacharjee* (6), *Harkant Sen* v. *Biraj Mohan Roy* (7), *Gopal Chunder Mannar* v. *Gosain Das Kalay* (2), *Mahomed Mehdi Bella* v. *Mohini Kanta Saha Chowdhry* (8) and *Satish Chandra Chaudhuri* v. *Girish Chandra Chakravarty* (9), by the Madras High Court in *Kristnama Chariar* v. *Mangammal* (5); *Peria Kovil Ramanuja Periya Jeeyangar* v. *Lakshmi Doss* (10); and *Vydinatha Iyer* v. *Subramanian Pattar* (11); by the Bombay High Couro in *Abdul Rahiman* v. *Moidin Saiba* (12) and *Shiv Ram* v. *Sakha Ram* (13), and by the Patna High Court in *Somar Singh* v. *Premdei* (14). The same construction of Art. 179 (2) [now 182 (2)] was adopted by two of the Judges of the Allahabad High Court in *Mashiat-un-nissa* v. *Rani* (3), and the view expressed by these learned Judges was accepted by the Full Bench of the Calcutta High Court in *Gopal Chunder's* case (2), while Edge, C. J., who took a different view in that case, subsequently appears to have accepted the construction of Art. 182 (2) which I venture to believe is the true one when sitting with Banerji, J., in *Badi-un-nissa* v. *Shams-ud-din* (15).

It must be admitted that in certain Calcutta cases: *Hur Proshad Roy* v. *Enayet Hossein* (16); *Raghunath Pershad* v. *Abdul Hye* (17); *Christiana Benshawn* v. *Benarsi Prosad* (18); and *Kartic Chandra Mondal* v. *Nilmani Mondal* (19); and in Madras in *Muthu* v. *Chellappa* (20) a different construction has been placed upon Art. 182 (2). In these cases the learned Judges appeared to have been of opinion that the question whether an application for execution was barred by limitation under Art. 182 (2)

> depended upon the question whether the appeal which was relied on to save it did or did not imperil the whole decree: per Coke, J., in *Christiana Benshawn* v. *Benarsi Prosad* (18).

and in effect their Lordships construed the words

> Where there has been an appeal

to mean

> where there has been an appeal which relates to the whole subject matter of the decree and the whole and not a part of the decree only has been imperilled.

and held that it was the duty of the Court in each case to

> see whether the original decree was really one decree or an incorporation of several decrees. and whether the appeal imperilled the whole decree or not: per Coxe J., *Christiana Sen's* case (18).

But *Muthu* v. *Chellappa* (20) was overruled by the Full Bench of the

(6) 3 C. L. R. 430.
(7) [1896] 23 Cal. 876.
(8) [1907] 34 Cal. 874=7 C. L. J. 305.
(9) [1920] 47 Cal. 813=60 I. C. 915.
(10) [1907] 30 Mad. 1=16 M. L. J. 393.
(11) [1911] 36 Mad. 104=21 M. L. J. 546=10 I. C. 552=(1911) 2 M. W. N. 93.
(12) [1818] 22 Bom. 500.
(13) [1909] 33 Bom. 39=1 I. C. 459=10 Bom. L. R. 939.
(14) A. I. R, 1925 Patna 40=3 Pat. 327.
(15) [1895] 17 All. 103=(1895) A. W. N. 20.
(16) 2 C. L. R. 471.
(17) [1887] 14 Cal. 26.
(18) [1914] 19 C. W. N. 287=22 I. C. 685.
(19) [1916] 20 C. W. N. 686=32 I. C. 931.
(20) [1889] 12 Mad. 479.

Madras High Court in *Kristnama Chariar* v. *Mangammal* (5) and *Hur Proshad Roy* v. *Enayet Hossein* (16) and *Raghunath Pershad* v. *Abdul Hye* (17) were dissented from, if not overruled, by the Full Bench of the Calcutta High Court in *Gopal Chunder's* case (2). With all due respect for the learned Judges who decided them these two cases and *Christiana Benshawn* v. *Benarsi Prosad* (18) and *Kartic Chandra Mondal* v. *Nilmani Mondal* (19), in my opinion, are inconsistent with the decision of the Full Bench in *Gopal Chunder's* case (2), and I am unable to follow them, or to accept the interpretation which in those cases was given to the terms of Art. 182 (2).

For these reasons, in my opinion, the appeal should be dismissed.

*Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 93

CUMING AND PAGE, JJ.

*Paresh Chandra Sen Gupta*—Defendant 1—Appellant.

v.

*Jogendra Nath Roy Chowdhury* and *another*—Plaintiff & Defendant No. 2—Respondents.

Appeal No.455 of 1924, Decided on 28th April 1926, from the appellate decree of the Addl. Sub-J., Khulna, D/-26th September 1923.

(a) *Criminal P. C., S. 165—General search of stolen property is not authorized—General search—Meaning of.*

Section 165 does not give any authority for the general search of the stolen property but only for specified stolen articles. [P 94 C 2]

A general search means a search not in respect of specific documents or things which the officer considered were necessary or desirable for the purpose of the investigation in hand but a roving enquiry for the purpose of discovering documents or things which might involve persons in criminal liability. [P 95 C 1]

(b) *Criminal P. C., S. 165—Police Officer searching for articles for which a list is given to him—Search is not illegal.*

Where a Police Officer searches a house for stolen articles for which a particular list is given to him, he is making a search for specific article and his action is not illegal. [P 94 C 2]

(c) *Decree—Separate cause of action against each defendant—Joint decree cannot be passed.*

*Per Page, J.*—It is not competent for the Court to pass a joint decree against two defendants with respect to each of whom there is a different cause of action. [P 95 C 1]

(d) *Criminal P. C., Ss. 165 and 94—Search for specific articles in the house of a person accused of crime can be made.*

*Per Page, J.*—A Police Officer is entitled to search even for specific documents or things in the house of a person accused of a crime : 38 *Cal.* 304, *Diss. from.* [P 95 C 1]

*Braja Lal Chakravarti, Gunada Charan Sen, Romes Chandra Sen* and *Susil Kumar Bose* for *Prokas Ch. Majumdar*—for Appellant.

*Sarat Chandra Roy Chowdhury* and *Santi Kumar Roy Chowdhury*—for Respondents.

**Cuming, J.**—The facts of the case out of which this appeal has arisen are as follows : The present appellant before us who was Defendant No. 1 in the trial Court was a Sub-Inspector of police attached to the Satkhira Police Station. Defendant No. 2 in the case was a collecting punchayet of the village and a neighbour of the plaintiff. The plaintiff alleged that he was on bad terms with the Defendant No. 2. There was a theft in the house of Defendant No. 2. Defendant No. 2 sent the chowkidar of the village to the thana to give information. He supplied with this information a list of articles which, he alleged, had been stolen from his house. The chowkidar when giving the information at the thana did not name any specific person as being suspected to have been concerned in the theft. Defendant No. 1, the present appellant before us,. was deputed by the superior officer to investigate the case. He arrived at the village some time at 5 or 6 in the evening. On receiving certain information from Defendant No. 2 that he suspected the plaintiff of having committed the theft, the house of the plaintiff was searched in order to discover the stolen property. Nothing was found. As the result of this the plaintiff has brought this case against these two persons claiming Rs. 400 as damages made up as follows : Rs. 100 as damages for the articles lost and damage done to his articles during the search and Rs. 300 apparently on account of mental and bodily pain that he had suffered on account of the illegal search and loss of reputation. His case would seem to be that Defendant No. 2 maliciously and without any reason or cause instigated Defendant No. 1 to search his house and that Defendant No.1 illegally searched his house.

The trial Court found that the search made by Defendant No. 1 was not illegal. He, however, found that Defendant No. 2 had acted maliciously in informing Defendant No. 1 that it was likely that the stolen articles would be found in the plaintiff's house and he awarded the plaintiff Rs. 50 as damages against Defendant No. 2. So far as Defendant No. 1 was concerned he dismissed the suit with costs. Against this order the plaintiff appealed to the District Court. The District Court held that Defendant No. 2 acted maliciously in telling the police that he suspected that the stolen articles would be found in the plaintiff's house and that he had no justification whatever for making the statement to the police. So far as regards Defendant No. 1 he held that the search that this defendant had made was a general search for stolen articles and it was not authorized under S. 165, Criminal P. C.; under the circumstances he decreed the suit for Rs. 300 against both the defendants; he further ordered that the sum decreed would be realized from Defendant No. 2 in the first instance and failing that from Defendant No. 1.

Against this order Defendant No. 1, the Sub-Inspector of police, has appealed. He contends that the case against him and for which he has been called on to pay damages is that the search as made by him was illegal. He argues that he searched the plaintiff's house under the provisions of S. 165, Criminal P. C. Defendant No. 2 had mentioned specific articles which were alleged to have been stolen and it was for the discovery of these articles that he searched the house of the plaintiff. This he contends is justified under S. 165.

Mr. Roy Chowdhury who has appeared for the respondent contends that S. 165 does not give any authority for the search of the stolen property but only for specific stolen articles. Even admitting that the contention is correct the plaintiff-respondent has no case. It is quite clear from the facts that the Sub-Inspector, the appellant, went and searched the house of the plaintiff for certain specific articles, namely, the articles which had been stolen from the Defendant No. 2's house and a list of which had been given to the police. Obviously these articles were specific stolen articles. By "specific" I presume, although the word does not find any place in S. 165 are meant articles that are specified such as for instance one pair of boot, one coat or two cups etc. The learned Subordinate Judge in dealing with this case states that S. 165, Criminal P. C., does not authorize what he describes as a general search for stolen property and with that contention I am prepared to agree. I think the learned Subordinate Judge has misunderstood what is meant by the expression "general search for stolen property." If, for instance, the police go and search the house of a well-known budmash with the hope of finding stolen property in that man's house, not the property of a case which the police might have been investigating or for any specific article that would be described as a general search for stolen property; in other words where the police searches a house for stolen articles generally and not for specific articles mentioned by a complainant as having been stolen from him. In this case as I have already stated a definite list of articles stolen had been given to the police and the Sub-Inspector obviously searched the house for these identical articles or in other words he was searching for specific articles. In this view of the case it is quite clear that the Sub-Inspecter was acting perfectly legally under S. 165, Criminal P. C., when he made the search he did.

The appeal must, therefore, succeed and the plaintiff's case so far as regards Defendant No. 1 must be dismissed. The appellant is entitled to his costs in all the Courts.

**Page, J.**—I agree. In this case the learned Judge in the lower appellate Court does not seem fully to have appreciated the issue which arose for decision. Two persons were impleaded as defendants, the cause of action against the first defendant being that he had illegally entered upon the plaintiff's premises for the purpose of carrying out a search, and thereby had committed trespass. The cause of action against the second defendant was that he had maliciously induced the first defendant to commit the trespass. Nevertheless the learned Subordinate Judge passed an order in which, inter alia, he held that

the suit will be decreed for Rs. 300, against both defendants. As observed above the Defendant No. 1 is a junior Sub-Inspector of police, and it appears that he was led by overzealousness and by Defendant No. 2. I, therefore,

order the sum decreed will be realized from Defendant No. 2 and failing that from Deft. No. 1.

Such an order, of course, cannot be supported in law. It was not competent for the Court to pass a joint decree against two defendants with respect to each of whom there was a different cause of action. Much less was the learned Subordinate Judge justified in decreeing that the sum which the defendants were ordered jointly to pay should be realized first against one defendant, and failing satisfaction from him against the other. We are only concerned on this appeal with the decree in so far as it ordered that the first defendant should pay damages and costs.

Mr. Roy Chowdhury on behalf of the plaintiff has contended that the plaintiff was entitled on damages against the first defendant because the search which he made at the premises of the person against whom the information had been lodged was illegal on two greunds, the first being that the Sub-Inspector of Police proceeded to carry out a general search for the stolen property and not a search as authorized under Ss. 94 and 165 Criminal P. C. As my learned brother has pointed out a general search means a search not in respect of specific documents or things which the officer considered were necessary or desirable for the purpose of the investigation in hand, but a roving enquiry for the purpose of discovering documents or things which might involve persons in criminal liability. The things for which the Sub-Inspector carried out the search in question in these proceedings, however, were, specific articles set out in a list in the possession of the police, and in respect of which information had been given to the police by the complainant. Assuming that these articles were "things" within the meaning of Ss. 94 and 165, Criminal P. C. Mr. Roy Chowdhury endeavoured to support the decree passed in favour of the plaintiff upon the further ground that a Police Officer is not entitled to search even for specific documents or things in the house of a person accused of a crime, and in support of his contention he cited *Bajrangi Gope* v. *Emperor* (1), in which case Holmwood and Sharfuddin, JJ., held that

> it is clear that S. 94 does not refer to stolen articles or to any incriminating document or thing in the possession of an accused person.

These observations cannot now be regarded as correctly stating the law: see *Prankhang* v. *Emperor* (2), *Bisser Misser* v. *Emperor* (3). See also *Mahomed Jackariah* v. *Ahmed Mahomed* (4) and *Emperor* v. *Brikhbhan Singh* (5). In my opinion, in carrying out the search in the circumstances disclosed by the evidence in this case the Sub-Inspector of Police was not acting illegally, and the cause of action against him has not been made out. I agree that the appeal should be allowed.

*Appeal allowed.*

(1) [1911] 38 Cal. 804=13 C. L. J. 639=9 I. C. 64=15 C. W. N. 843.

(2) [1912] 16 C. W. N. 1078=17 I. C. 76=13 Cr. L. J. 764.

(3) [1914] 41 Cal. 261=20 I. C. 229=17 C. W. N. 1209.

(4) [1888] 15 Cal. 109.

(5) [1916] 38 All. 14=31 I.C. 995=13 A.L.J. 979.

---

## A. I. R. 1927 Calcutta 95

C. C. GHOSE AND DUVAL, JJ.

*Sheikh Samir*—Petitioner.

v.

*Sajidar Rahman*—Opposite Party.

Criminal Revision No. 125 of 1926, Decided on 25th February 1926.

*Criminal P. C., S. 195—Complaint to police by A against B, dropped—B laying complaint under S. 211, Penal Code, against A—B again charged by A and tried but acquitted—A cannot be proceeded against under S. 211, Penal Code, without Magistrate's complaint.*

A made a complaint to the police that B snatched away currency notes which was filed. Subsequently B filed a complaint against A under S. 211, Penal Code, and thereupon A laid a complaint against B and B was charged under Ss. 420 and 403. Allegations made in both the cases were the same. B was acquitted and thereupon he applied for the case against A to be proceeded with.

*Held*: that prosecution of A under S. 211 was not sustainable without complaint by the Magistrate who tried the case of A against B: 44 *Cal.* 650, *Rel. on.* [P 96 C 1]

*P. C. Chatterjee*—for Petitioner.

*M. Chatterjee* and *B. M. Roy*—for Opposite Party.

**Judgment.**—In this matter what has happened is this. The accused, Sajidar Rahman, made a complaint before the Deputy Commissioner of Police on the 18th February 1925, charging the petitioner and others with having, on the 16th February 1925, in front of the Registration Office on the north side of the Government House, snatched away two Government currency notes for

Rs. 1,000 each. The police submitted a report on the 2nd March 1925, but the accused, Sajidar Rahman, not having been found in Calcutta, the Deputy Commissioner of Police ordered, on the 2nd April 1925, that the petition should be filed. On the 9th April the petitioner filed a complaint against the accused, Sajidar Rahman, under S. 211, I. P. C., for having falsely and maliciously filed the said complaint before the Deputy Commissioner of Police. The Chief Presidency Magistrate issued process against Sajidar Rahman on the 4th May 1925. Thereupon Sajidar Rahman appeared and laid a complaint against the petitioner, on the 10th June 1925, and the petitioner was charged with offences under Ss. 420 and 403 of the Indian Penal Code. Both the cases were transferred to Mr. H. K. De, Presidency Magistrate, for trial.

Mr. De, after taking evidence in the case against the petitioner acquitted him, under S. 258 of the Criminal P. C., on the 14th December 1925. The petitioner thereupon applied to the Magistrate that the case by him against the accused should be proceeded with. Mr. De, however, held that the case by the petitioner against the accused should not be proceeded with, having regard to what he had found in the counter case, and he thereupon discharged the accused, Sajidar Rahman, under S. 253, Cr. P. C.

It appears to us that the allegations in the two cases were more or less the same, and, therefore, no prosecution under S. 211, I. P. C., is sustainable without complaint being first made by the Court which tried the case of the accused against the petitioner: see in this connexion *Brown* v. *Ananda Lal Mullick* (1). On that short ground we are of opinion that this Rule fails, and we accordingly discharge it.

*Rule discharged.*

(1) [1916] 44 Cal. 650=20 C. W. N. 1347=36 I. C. 857=25 C. L. J. 59.

---

## A. I. R. 1927 Calcutta 96

GREAVES AND B. B. GHOSE, JJ.

*Nitai Pada Das* and *others*—Defendants—Appellants.

v.

*Sarat Kumari Dasi* and *another*—Plaintiff and Defendant—Respondents.

Appeal No. 1054 of 1923, Decided on 11th June 1925.

*Bengal Tenancy Act* (8 *of* 1885), *S.* 182—*Provisions regarding homestead of under-raiyat are same as raiyat.*

According to the provisions of S. 182, the provisions regulating the homestead, of an under-raiyat would be the provisions which regulate the raiyati as to ejectment from the homestead : 21 *C. L. J.* 475, *Foll.* [P 96 C 2]

*U. Chakravarty*—for Appellants.

*B. Mukherjee*—for Respondents.

**Greaves, J.**—This is an appeal by the defendants from a decision of the Subordinate Judge of Nadia, reversing a decision of the Additional Munsif of Chuadanga.

The suit was brought by the plaintiff to eject the defendants from certain homestead lands. It has been found that the defendants are raiyats of the village and that they held their homestead otherwise than as a part of their holding as raiyats. The whole of the homestead is held under persons who are themselves raiyats and, consequently the position of the defendants as regards the homestead is that they are under-raiyats. The first Court dismissed the suit but the second Court has decreed it for the reasons stated in the judgment of that Court.

The facts of this case are identical with the facts in the case of *Krishna Kanta Ghose* v. *Jadu Kasya* (1). It was there held that according to the provisions of S. 182 the provisions regulating the homestead, would be the provisions which regulate the raiyati. This decision, to which I myself was a party, seems to me in accordance with the natural meaning of the words of S. 182 and on further consideration I am not prepared to say that the decision is wrong. This being so the present case is concluded by the case of *Krishna Kanta Ghose* v. *Jadu Kasya* (1) to which I have just referred.

In the result, the appeal succeeds and we restore the decision of the Munsif and the appellants will be entitled to the costs incurred in this Court and in both the lower Courts. No other question arises in the appeal.

**B. B. Ghose, J.**—I agree.

*Appeal allowed.*

(1) [1915] 19 C. W. N. 914=28 I. C. 839=21 C. L. J. 475.

## A. I. R. 1927 Calcutta 97

CUMING AND CHAKRAVARTI JJ.

*Mohendra Nath Roy* and *others*—Plaintiffs—Appellants.

v.

*Nabadwip Chandra Nandy* and *others*—Defendants—Respondents.

Appeal No. 1792 of 1922, Decided on 30th June 1925, from the Appellate decree of the Sub-J., 1st Court Midnapur, D/- 7th April 1922.

(a) *Civil P. C., S. 11—Parties.*

Plaintiffs sued for a declaration that the defendants had no right of easement. The defendants were the representative tenants of the village, the villagers of which claimed the right of easement. The proprietors of the village were not parties to the suit. The defence which was based upon a grant alleged to have been made by the proprietors of the village was upheld.

*Held*: that suit by plaintiffs against the proprietors of the village for a declaration of their niskar rights and for confirmation of their possession in that right was not barred by the previous suit. [P 98 C 1]

(b) *Adverse possession—Public exercise of easement does not destroy title.*

The proprietor of a piece of land over which the members of the public, exercise a right of easement does not lose his right to the land as proprietor of the land on account of the occasional user for the purpose of exercising the right of easement. [P 98 C 2]

(c) *Possession—Title.*

Where land is covered with water, possession is determined by title. [P 98, C 2]

*Dwarka Nath Mitra* and *Bhupendra Nath Ghose*—for Appellants.

*Sarat Chandra Basak, Apurba Charan Mukerji, Santosh Kumar Pal* and *Tarakeswar Nath Mitra*—for Respondents.

**Chakravarti, J.**—In the suit out of which this appeal arises the plaintiffs sued for a declaration that the lands in suit appertained to a niskar which they possessed in the village Banki. The facts of the case shortly stated are these: The plaintiffs apparently had a niskar in the village Banki comprising 41 and odd bighas of land covered by a sanad in the name of their ancestor Shahib Ram. The lands in suit really form the site of what is called a garkhai. The plaintiffs further stated that in the year 1903 the villagers of Banki and of other neighbouring villages complained against obstruction put by the plaintiffs on the water of that garkhai and the criminal Court took proceedings under S. 133, Criminal P. C. which resulted in an order against the plaintiffs. The plaintiffs then brought a suit in the year 1904 for a declaration that the property was their niskar and that the defendants had no right of easement as claimed by them and as had been established in the proceedings under S. 133 Criminal P. C. The plaintiffs in that suit impleaded some of the representative tenants of the villages of which villagers claimed the right of easement in question. The proprietors of the village Banki who are the defendants in the present suit were not parties in that suit. Nor did they form members of the class which claimed the right of easement in the proceedings under S. 133 Criminal P. C. Now that suit was finally dismissed by the appellate Court on the 21st May 1906 by which the plaintiffs' claim to stop the villagers from claiming the easement which they had established in the criminal proceedings under S. 133 was disallowed. Therefore the result of that suit was that the villagers of Banki and the neighbouring villages were declared entitled to exercise the right of easement which they claimed when they asked for the removal of the obstruction put up by the plaintiffs. In the year 1919 the record of rights was published in which the lands together with the garkhai were recorded as appertaining to the mal lands of the village Banki. The plaintiffs brought the present suit basing their cause of action from the date of the final publication of the record of rights.

In the present case which is against the proprietors of Banki the plaintiffs ask for a declaration of their niskar right and also for confirmation of their possession in that right. The defendants, the proprietors of Banki claimed the lands, as recorded, as appertaining to their mehal Banki and also pleaded res judicata and limitation. The Court of first instance found all the issues in favour of the plaintiffs and made a decree in their favour. On appeal, however, by the defendants the lower appellate Court has found that the plaintiffs have established that the lands in dispute were the niskar lands of the plaintiffs appertaining to the niskar of 41 and odd bighas of land which they claimed under the sanad to which I have already relerred. The lower appellate Court affirmed the decree of the first Court with regard to Plot No. 2 but dismissed the plaintiffs' suit as

regards Plot No. 1 on two grounds, namely that of res judicata and that of limitation.

The learned advocate who appears in support of this appeal by the plaintiffs contends that the decision of the previous suit instituted in 1904 which terminated by the judgment of the appellate Court dated the 21st May 1906 does not form a bar of res judicata.

The next ground that he takes is that the finding of the lower appellate Court that the suit was barred by limitation is erroneous. I think these contentions are well founded. Now as to the question of res judicata it appears to us that the judgment in the suit of 1904 is no bar to the present claim of the plaintiff for these reasons—that the suit was instituted by the plaintiffs primarily for a declaration that the defendant in that suit had not the right of easement claimed upon the property then in question. The parties to that suit were the villagers who claimed the right of easement upon this property. The landlords of the village Banki, were not parties. Nor did they in any sense claim the right which the defendants in that suit claimed. In fact the defendants in that suit alleged that the right of easement which they claimed was based upon a grant made by the proprietors of the village Banki. Therefore it appears from the circumstances that the title which the defendants in that suit set up was not any title in themselves but title in the zemindars of the village Banki, who were no parties to that suit. Really that suit was dismissed on the ground that it was established to the satisfaction of the Court that the villagers were entitled to the right of easement claimed by them. From the facts which I have already stated it is quite clear that there was no determination of any question of title to this property as between the plaintiffs and the others claiming the proprietary right in the village Banki in their zemindari right. The decision in that suit, therefore, cannot operate as res judicata on the question as to whether the property appertains to the plaintiffs or to the proprietors of the village Banki.

As to the second question it appears to us that the property in question is a piece of land covered with water. The user which the defendants in that suit set up was the occasional user of the water in the exercise of their right of easement. The learned Subordinate Judge found that the plaintiffs also possessed the land as did the other members of the public. But the other members of the public exercised ouly the right of easement and nothing more. The proprietor of a piece of land over which the members of the public exercise a right of easement does not lose his right to the land as proprietor of the land on account of the occasional user for the purpose of exercising the right of easement. Considering the nature of the property and the nature of the user possible of such property we think the findings of the learned Subordinate Judge do not amount to any finding that the plaintiffs who are the owners of the property were excluded from the user of the land in their proprietary right. In a case like this the possession of the parties would really be determined by the question of title. As I have already stated the land in suit is covered with water. That being so we think the finding of the learned Subordinate Judge is not sufficient for the purpose of holding that the plaintiff's suit was barred by limitation. For these reasons we think the judgment and decree of the learned Subordinate Judge ought to be set aside and the judgment and decree of the Court of first instance ought to be restored with costs of this appeal and of the appeal before the Subordinate Judge.

**Cuming, J.**—I agree.

*Appeal allowed,*

---

## * A. I. R. 1927 Calcutta 98

C. C. GHOSE AND DUVAL, JJ.

*Nasaruddin Khan*—Petitioner.

v.

*Emperor*—Opposite Party.

Civil Revision No. 1 of 1926, Decided on 12th March 1926, against the order of the Dist., J., Mymensing, D/- 11th November 1925.

* *Criminal P. C., S. 476—Civil Court making camplaint—Appeal lies to civil appellate Court and is governed by provisions of Civil P. C. and not of Criminal P. C.*

Where it is a civil Court which has made an order making or filing a complaint under S. 476 of the Criminal P. C., the appeal against such an order must lie to and be heard by the authority

or tribunal to which such civil Court is subordinate, i.e., to an appellate Court exercising civil appellate jurisdiction and therefore the procedure governing an appeal of this description is one which is to be sought for within the four corners of the Civil P. C. [P. 100, C. 1]

*Monnier* and *Jahnabi Charan Das Gupta*—for Petitioner.

*K. N. Chaudhuri* and *Kali Kinkar Chakravarti*—for Opposite Party.

**Judgment.**—This is a Rule calling upon the District Magistrate of Mymensingh to show cause why the orders of the District Judge of Mymensingh, dated the 28th October 1925, and 11th November 1925, should not be set aside or such other or further order made as to this Court may seem fit and proper on the ground that the District Judge had no jurisdiction whatever to dismiss the appeal of the petitioners, under S. 423 of the Code of Criminal Procedure, without looking into the record and considering the same. In order to understand the precise significance of the ground taken in this Rule, it will be necessary to set out briefly the facts giving rise to the appeal, the dismissal of which has led to the present application being made to us. The facts are as follows :

It appears that the Additional Munsif, Sadar, in the district of Mymensingh, decreed a suit in ejectment brought by Raja Jagat Kishore Acharya Chowdhry, against the petitioners. Thereafter, the learned Munsif, at the instance of the plaintiff, filed a complaint before the Magistrate against the said petitioners—Nasaruddin Khan and Madan Sheikh—or having committed certain offences punishable under Ss. 193, 465, 467 and 471 of the I. P. C. This complaint was one which was made under S. 476 of the Criminal P. C. Thereafter, an appeal was filed before the District Judge against the order of the Munsif making or filing the said complaint. It was registered as Miscellaneous Appeal 280 of 1924. The appeal was admitted by the District Judge on the 24th September 1924, and it came on for hearing, after service of notice on the respondents, and after the record had been called for, before the District Judge on the 5th December 1924, when, it appears, the pleader for the appellants, after arguing the appeal for some time, stated that he could not proceed further with the appeal on that date as he was engaged otherwise and as the arguments would take some time.

The hearing of the appeal was adjourned, and it appears that the matter did not come on again before the District Judge till the 22nd December 1924, when it was thought desirable that the appeal, which the appellants, that is, Nasaruddin Khan and Madan Sheikh, had filed against the decree of the Munsif in the said suit, should be heard along with the appeal against the order of the Munsif filing or making the complaint under the provisions of S. 476 of the Criminal P. C. The hearing of this appeal, that is to say, the appeal against the order of the Munsif filing or making the complaint, was accordingly adjourned. It next came on for hearing on 28th October 1925, before the District Judge, when the pleaders for the appellants were absent and the pleader for the respondent was present. The District Judge, after looking into the record, found that the hearing by the Magistrate of the complaint made by the Munsif had been delayed for more than a year ; he came to the conclusion that no further time could be allowed, and he thereupon dismissed the appeal.

An application for revival of the appeal was filed, and that came on for hearing before the District Judge on 11th November 1925. The District Judge, after hearing the parties, was of opinion that he was unable to re-admit the appeal, and he, accordingly, affirmed the order which had been previously made by him and rejected the application for rivival of the appeal. Against the two last-mentioned orders the present petition was filed and the present Rule obtained.

Mr. Chaudhuri, who appears for the Crown, argues that by the terms of S. 476B, the appeal against the order of the Munsif filing or making the complaint under S. 476 of the Criminal P.C., lay to the Court to which the Court making the order or filing the complaint was subordinate within the meaning of S. 195 (3) ; in other words, Mr. Chaudhuri's contention is that the appeal from the order of the Munsif making or filing the complaint lay to the District Judge, and the appeal was one which was governed by the provisions of the Code of Civil Procedure, and not by the Code of Criminal Procedure. Mr. Monnier, who appears in support of the Rule,

argues that the appeal is one which is allowed by and under a section of the Code of Criminal Procedure, namely, section 476B, and that there is nothing whatsoever in the Code of Criminal Procedure negativing the contention that the appeal is governed by the provisions of the Code of Criminal Procedure. In the second place, he argues that the Code of Civil Procedure has no application, and that, having regard to Chapter 31 of the Code of Criminal Procedure, it must follow that the appeal is one governed by the provisions of the Code of Criminal Procedure and, if that is so, then, under S. 423 of the Criminal P. C., the learned Judge who disposed of the appeal was in error in disposing of the same without considering the matters on the record in the appeal.

These being the respective contentions of the parties, it is now our duty to examine the same. No doubt the appeal in this case is one which is given by S. 476B of the Criminal P. C., but the very words used in S. 476B of the Criminal P. C. indicate with sufficient clearness that the Court to which the appeal lies is one to which the Court making or filing the complaint is subordinate ; in other words, if it is a civil Court which has made an order under S. 476 of the Criminal P. C., the appeal against such an order must lie to and be heard by the authority or tribunal to which such civil Court is subordinate. It follows, therefore, that the original order, having been made by a Munsif in a civil suit, the appeal against an order by the Munsif under S. 476 of the Criminal P. C. lay to the District Judge to whom the Munsif was subordinate. Therefore, it would follow that, although the appeal itself is one which is allowed by the Code of Criminal Procedure, the appeal must be heard by the District Judge to whom the Munsif is subordinate, i. e., by an appellate Court exercising civil appellate jurisdiction. It follows, therefore, that the procedure governing an appeal of this description is one which is to be sought for within the four corners of the Code of Civil Procedure. It follows also that the provisions of the Code of Civil Procedure being applicable to an appeal of this nature, the District Judge was in our opinion fully competent in making the orders which he did on the two dates referred to above.

The relative provisions governing appeals in matters of this description are to be found in O. 41 of the Code of Civil Procedure. It was a part-heard appeal. The appeal was admitted in September 1924. It came on for hearing for the first time in December 1924. It stood over from time to time till it was reached on the 22nd June 1925. It stood over for a further period, and was not reached till the 28th December 1925, when as stated above, the learned pleaders who had been engaged to appear in support of the appeal were found to be absent. Under these circumstances, the District Judge was in our opinion fully entitled to consider that the appeal had been abandoned by and on behalf of the appellants. Under these circumstances, we do not see that the District Judge has been guilty of any illegality or of any material irregularity within the meaning of S. 115 of the Civil P. C., nor does it seem to us that there has been anything done by the District Judge to which exception can be taken, and in respect of which our powers of superintendence under the provisions of S. 107 of the Government of India Act can be invoked.

The result, therefore, is that there is absolutely no substance in the present Rule, and it must be discharged.

*Rule discharged.*

---

## A. I. R. 1927 Calcutta 100

GREAVES AND B. B. GHOSE, JJ.

*Benoy Krishna Gain* and *another*—Plaintiffs—Appellants.

v.

*Fanindra Nath Roy Choudhuri* and *others*—Defendants—Respondents.

Appeal No. 1207 of 1923, Decided on 18th June 1925, from the appellate decree of the 2nd Addl. Dist. J., 24 Parganas, D/- 24th January 1923.

*Lease—Construction—Lease for a term providing clause for renewal—Mortgage by lessee—Clause for renewal not assigned to mortgagee—Mortgagee cannot claim renewal.*

A lease for a term of years contained a renewal clause which entitled the lessee after the expiry of the original term to a renewal of the lease for a further period or to a new lease on certain terms. The lessee mortgaged his interest

in the property and empowered the mortgagee to sublet the property during the term of the mortgage as the mortgagor himself might have done and also to do all acts by using the name of the mortgagor without reference to him.

*Held*: that the mortgagee was not an assignee of the term for the renewal of the lease and that as there was no privity of contract between him and the lessor, he was not entitled to demand a renewal of the lease. [P. 102, C. 1]

*Braja Lal Chakraburty* and *Bcopendra Coomar Mitter*—for Appellants.

*Sarat Chandra Basak, Bankim Chandra Mukherjee, Sanat Kumar Chatterji* and *Narendra Nath Dalal*—for Respondents.

**Greaves, J.**—This is an appeal by the plaintiffs against a decision of the Additional District Judge of the 24-Parganas reversing a decision of the Subordinate Judge of the Second Court of that place.

The suit out of which this appeal arises is a suit to recover possession from a tenant whose lease has expired. There were four defendants in the suit, Defendant No. 1 being the lessee of the land who became insolvent in the year 1917. Defendant No. 2 is the Receiver appointed in the insolvency. Defendant No. 3 is a mortgagee in possession from the lessee and Defendant No. 4 is a sublessee under the mortgagee. Defendants Nos. 1 and 2 have taken no part in the suit and the contest has been between the plaintiffs on the one side and the Defendants Nos. 3 and 4 on the other. The lease is dated the 23rd October 1906. It was granted by three persons Brojeswari, Kebal Krishna and Narayan Chandra who purported to be shebaits of a certain deity. Subsequently, there was a suit for partition brought by Narayan who alleged that the property was secular. It was held in that suit (No. 51 of 1906) that the property was secular but was charged with performance of the deb sheba of the idol and that the property was liable to be partitioned. On the partition, the land which was subject to the lease fell to the share of Kebal Krishna and his interest has subsequently been transferred to the present plaintiffs. The lessee, on the 10th August 1909, mortgaged the property to Defendant No. 3. The lease was for a period of five years from the 23rd October 1906, but under the provisions of Cl. (8) of the lease it was to be renewed for a further period of five years on the same terms and conditions. Accordingly, the lease expired on the 22nd October 1916. But the contention put forward by the mortgagee is that by virtue of the provisions of Cl. (13) of the lease it is either renewable for a further period or that the lessee is entitled to a new lease on the expiry of the old one on the terms set out in Cl. (13) of the lease and that is the real contest between the parties. The difficulty, however, in the way of the mortgagee is that he is not an assignee of the term created by the lease and, accordingly, there is no privity of contract between him and the lessor. Accordingly, he is prima facie not entitled to enforce the so-called covenant for renewal which is contained in Cl. (13) of the lease. It has, however, been argued before us on behalf of the mortgagee that by virtue of the terms of the mortgage itself he is in a position to enforce renewal of the lease under the provisions of Cl. (13) thereof. I confess that I have found great difficulty in following the argument of the learned advocate upon this point and it certainly did not carry conviction to me. It appears to me that the only way under which the argument could be put is that by virtue of Cl. (3) of the mortgage to which we have been referred the mortgagee was constituted the agent or attorney of the lessee so as to obtain either renewal of the lease or a new lease under the provisions of Cl. (13). It is, accordingly, necessary to examine the provisions of Cl. (13) of the lease and also the provisions of Cl. (3) of the mortgage.

Now Cl. (13) provides amongst other things that the lessee is bound to deliver over possession of the land to the lessor after the expiry of the terms fixed thereby. Then comes a further proviso in Cl. (13) that if the lessee undertakes to pay rent according to the rates and on the terms and conditions under which adjoining lands are held he is to remain in possession of the lands included in the kabuliyat and shall be bound to execute a kabuliyat on those terms. This is a somewhat vague provision; no doubt it may be possible to ascertain the rent of adjoining lands so that this may be fixed but the period of the new lease is somewhat difficult to gather from the terms of Cl. (13), and whether it would have been possible to ascertain the prevailing rate and term under which the

adjoining lands were let is a matter upon which I feel considerable doubt. But it is not necessary, I think. to pursue this question further.

I now turn to Cl. (3) of the mortgage upon which the mortgagee mainly relies. We have read this clause several times and it has been read to us both in part and as a whole more than once, and the conclusion I have come to is that all that is meant by Cl. (3) of the mortgage is that it empowers the mortgagee to let out or rather sublet the land during the time he was in possession as the mortgagor himself might have done. Reliance was placed on the concluding words of the clause which provide that the mortgagee shall be entitled to do all acts by using the name of the mortgagor and without reference of him and it was said that by virtue of these words the mortgagee was now entitled to call for a renewal of the lease under the provisions of Cl. (13) or for a new lease under the provisions of that clause. But, as I have already stated, I think that upon the true construction of Cl. (3) nothing of the kind is intended by the parties and all that Cl. (3) means is that the mortgagee is to be entitled fo sublet the land so long as he remains in possession. It is impossible, therefore, I think, to hold that upon the construction of Cl. (3) of the mortgage the mortgagee is an agent or attorney of the lessee to demand from the landlords renewal of the lease or a new lease under the provisions of Cl. (13). If, this is so, then, clearly the mortgagee has no right to renew; for, as I have already stated, the mortgage itself leaves the property in the mortgagor and there is only a charge in favour of the mortgagee, that is to say, there is no assignment of the lease which would entitle the mortgagee to the benefits of the covenants contained in the lease which would run, so far as Cl. (13) is concerned, with the land in equity if not in law.

The result, therefore, is, in my opinion that the judgment of the first Court was right and the judgment of the appellate Court is wrong. But there are one or two points that were placed before us to which it is necessary that I should deal. One of them was the suggestion that the property was debutter property of the idol and we were referred to the conveyance of the plaintiffs and to the recitals therein as establishing the debutter nature of the property. Both the Courts have found that the property is secular, and in view of the decision on this point in the previous suit, whether that decision is right or wrong, we must accept for the purposes of this suit that this is secular and not debutter property.

In the result, therefore, the appeal succeeds and the plaintiffs will be entitled to the decree for ejectment which they seek. The question of mesne profits will be decided subsequently in accordance with the provisions of O, 20, R. 12 of the Civil P. C. Plantiffs will be entitled to mesne profits for a period of three years prior to the date of suit and thereafter until possession is given, or for a period of three years whichever is the shortest. The plaintiffs will be entitled to the costs in all Courts from Defendants Nos. 3 and 4. Defendant No. 3 will be entitled to remove the gaddi and the godowns within a month from the arrival of the record in the lower Court.

The cross-objection is dismissed.

**Ghose, J.**—I agree.

*Appeal allowed.*

---

## * A. I. R. 1927 Calcutta 102

GREAVES AND MUKERJI, JJ.

*Gobinda Chandra Pal* and *others*—Defendants—Appellants.

v.

*Pulin Behari Bannerjee* and *others*—Plaintiffs—Respondents.

Appeal No. 2674 of 1923, Decided on 14th May 1926, from the appellate decree of the Dist. J., Bankura, D/- 4th August 1923.

(a) *Evidence Act, S. 68—Section is mandatory—Examination of the only surviving attesting witness cannot be dispensed with on the ground of his becoming hostile—Mere issuing of summons and warrants is not sufficient—All processes under O. 16. R. 10, Civil P. C., must be exhausted.*

The provisions of S. 68 are mandatory and they are not controlled by S. 90.

The mere fact that the only surviving attesting witness is considered hostile by the party does not relieve him from the duty of examining him as a witness. Nor is it enough that summonses and warrants had been issued upon the witness and the witness had failed to appear, but the processes of the Court such as are mentioned

in O. 16, R. 10, Civil P. C., have all got to be exhausted : 1 *P. L. J.* 369, *Foll.* [P. 104, C. 1, 2]

✲ (*b*) *Evidence Act, S. 90—Presumption must be cautiously applied.—In proper cases presumption may be relied on, and whether the document forms foundation of party's title or it is sought to be used as evidence is immaterial.*

The presumption contained in S. 90 has always got to be applied with a good deal of caution. Regardless of the question as to whether the document in question forms the foundation of the party's right or whether it was sought to be used as a piece of evidence the Court may, in a proper case, rely upon the presumption contained in S. 90 ; 11 *Cal.* 539 and 29 *Cal.* 740, *Foll.* [P. 105, C. 1, & 2]

*Surendra Nath Ghosal* — for Appellants.

*Bijan Kumar Mukherjee* for *Panchanon Ghose*—for Respondents.

**Mukerji, J.**—This appeal arises out of a suit for sale based on a simple mortgage bond. The bond was executed by Defendants Nos. 1 to 6 or their predecessors in favour of the plaintiff's father on the 21st June 1885. It was an instalment mortgage-bond by which the executants promised to pay 191 maps of paddy at the rate of 7 maps per annum from the years 1293 to 1316 B. S. and the balance of 5 maps in the year 1317 B. S. The bond stipulated that in default of the payment of any one instalment the mortgagee would be entitled forthwith to realize the whole of the paddy then remaining due with interest at a certain rate. Subsequent to the execution of this bond and on the 7th June 1901, the mortgagors executed another mortgage-bond in respect of the same mortgaged properties in favour of the plaintiffs' mother. The plaintiffs' mother instituted a suit on the basis of this latter bond, obtained a decree and in execution of the decree the mortgaged properties were put up to sale and purchased by the Defendant No. 7. The plaintiffs' case is that the instalments due for 1316 and 1317 were not paid and in the present suit the plaintiffs sought to enforce the mortgage by sale of the mortgaged properties for the said dues. The suit has been decreed by both the Courts below and the Defendants Nos. 1 to 5 and 7 have preferred the present appeal.

The first contention urged on behalf of the appellants is to the effect that the plaintiffs are estopped from enforcing their mortgage in the present suit because this mortgage was not set out in the suit instituted by the plaintiffs' mother against the mortgagors. It is said that the plaintiffs' father conducted the suit on behalf of the plaintiffs' mother, and by reason of the provisions of O. 34, R. 12, Civil P. C., it was incumbent upon the plaintiffs' mother in that suit to set out the mortgage upon which the present suit has been instituted, and that inasmuch as this mortgage was not set out in that suit the plaintiffs are estopped from putting forward their present claim. The finding of the Courts below is to the effect that the plaintiffs' mother was not the benamidar of the plaintiffs' father. That was a suit in which the plaintiffs' father was not a party. It was not obligatory upon the plaintiffs' mother in that suit to have set out this mortgage. Unless it could be shown on behalf of the appellants that there was a duty in the plaintiffs' mother to have set out this mortgage either herself or through her agent who looked after the proceedings in that suit on her behalf the question of estoppel does not really arise.

A further argument was sought to be advanced with regard to this matter based on the lines upon which para 7 of the written statement of the defendants was worded, namely, it was alleged that by reason of the conduct of the plaintiffs' father in connexion with the suit to which I have referred the Defendant No. 7 was misled into purchasing the properties ; in other words, that plaintiffs' father who though not a party to those proceedings was actually doing everything therein on behalf of his wife and he did not mention either in the proceedings or in the sale porclamation that there was this prior mortgage, and by reason of his conduct in this respect the Defendant No. 7 was misled and he purchased under the idea that there was no such mortgage. This line of defence though foreshadowed in the written statement does not appear to have been developed in any of the Courts below and indeed there was no materials upon the record upon which the appellants can urge this contention.

The second ground urged is to the effect that the deed upon which the suit has been instituted has not been legally proved. This contention is based upon the provisions of S. 68 and S. 90 of the

Evidence Act. It is urged on behalf of the appellants that the provisions of S. 68, which are mandatory, have been overlooked and the provisions of S. 90 have been misapplied. The bond in question bears the signatures of nine attesting witnesses all of whom, upon the findings of the Courts below, are dead with the exception of one, namely, one Baikunta Nath Saha. It was alleged on behalf of the plaintiffs that this witness who was alive was hostile to them, and it appears from the findings of the learned Munsif that an attempt was made on behalf of the plaintiffs to produce the witness before the Court but that attempt had failed. The learned Judge does not appear to have recorded any finding with regard to the endeavours alleged to have been made by the plaintiffs to secure the attendance of this witness. He has, however, observed that the witness was hostile to the plaintiffs. The Courts below in this state of the circumstances relied upon the presumption contained in S. 90 of the Evidence Act and has held that the document being more than 30 years old it should be presumed that it was duly executed by the executant and duly attested by the attesting witnesses.

So far as the contention based upon S. 68 of the Evidence Act is concerned reference has been made to a decision of this Court in the case of *Shib Chandra Singha* v. *Gour Chandra Paul* (1). This decision, however, is of no assistance to the appellants inasmuch as all that has been said therein is that the section is imperative and it is not only applicable to cases where the attested instrument is the ground of action but also to cases where it is used in evidence for collateral purposes. No question arises in the present case as to whether the document may be used for collateral purposes or not. The wording of S. 68, however, is very clear and the provisions of the section seem to be mandatory. The section does not appear to be controlled by S. 90 of the Evidence Act at all. The mere fact that the only surviving attesting witness is considered hostile by the party does not relieve him from the duty of examining him as a witness and this has been held in the case of *Tula Singh* v. *Gopal Singh* (2). Nor is it enough that summonses and warrants had been issued upon the witness and the witness had failed to appear ; and it has been so held by this Court in the case of *Piyari Sundari Dasi* v. *Radha Krishna Datta* (3). Merely taking out summons and warrants is not enough to comply with the provisions of S. 68 but the processes of the Court such as are mentioned in O. 16, R. 10, Civil P. C., have all got to be exhausted. Upon the findings of the learned Judge to which I have referred it does not appear that such processes were exhausted in the present case, and prima facie it would appear that on this ground the appellants are entitled to a remand. An affidavit has been put forward before us on behalf of the respondents in which it has been stated that the said witness Baikuntha Nath Saha is now dead. The appellants urge that no notice of this affidavit was given to them and, therefore, they are not in a position to contradict the statement contained in that affidavit. As matters stand, therefore, the appellants seem to me entitled to remand. But in view of the opinion which I am about to express upon the other grounds that have been urged in support of this appeal I do not think that any useful purpose will be served by making an order for remand.

As regards the contention based upon S. 90 of the Evidence Act the argument in substance is that the presumption contained in that section should not be given effect to in a case where the document is the basis of the title of the party who has sought to use it in evidence. In support of this contention reliance has been placed upon the decision of this Court in the case of *Shyam Lal Ghose* v. *Rameswari Basu* (4). In the judgment of this Court in that case in which the question arose as to whether a Will can be proved by means of the presumption under S. 90 of the Evidence Act it was thus said :

> If the rule were applicable to a Probate Court it would not be necessary to prove Wills, executed 30 years before the death of the testator ... We are unable to hold, therefore, that the rule applies to proof of a Will in the probate Court. Besides, S. 90 of the Evidence Act merely says, that in the case of a document 30 years old the Court may raise presumptions mentioned in it,

1 A. I. R. 1922 Cal. 160.

(2) [1917] 1 P. L. J. 369=38 I. C. 604=2 Pat. L. W. 353.
(3) [1922] 27 C, W. N. 60 (Notes).
(4) [1916] 23 C. L. J. 82=33 I. C. 273.

not that it must do so. Where the genuineness of the document is for any reason doubtful it is open to the Court to reject it, however ancient it may be.

The observation of the learned Judges in that case to the effect that the rule does not apply to proof of Will in a Probate Court, in my opinion, laid down more a rule of expediency than a hard and fast rule of law. The presumption contained in S. 90 of the Evidence Act, no doubt, has always got to be applied with a good deal of caution; but I am unable, in a case in which the presumption legitimately arises under that section, to hold that merely because it is a Will or a document upon which the title of the party rests it is not open to the Court to apply that presumption provided, of course, that the case is a fit and proper one for the application of the presumption. No authority has been cited before us which goes the length of asserting this proposition that this presumption is not applicable to the case of a document which forms the foundation of the party's title. On the other hand there are numerous cases in the books in which the presumption has been applied to cases of such documents. In the case of *Shafiq-un-nissa* v. *Shaban Ali Khan* (5) the Judicial Committee had occasion to consider the provisions of S. 90 of the Evidence Act and their Lordships then pointed out that "what is meant by the Court may presume a document to be genuine" is shown by S. 4 of the Act which is in these terms:

> Whenever it is provided by this Act that the Court may presume a fact it may either record such fact as proved, unless and until it is disproved or may call for proof of it.

In several decisions of this Court amongst which reference may be made to the cases of *Trailokia Nath Nundi* v. *Shurno Churn Goni* (6) and *Govinda Hozra* v. *Protap Narain Mukhopadhya* (7) this presumption has been applied to documents upon which the title of one or other of the parties rested and it would be pertinent to quote the observations of Mr. Justice Hill in the last of those two cases. He observed thus in that case:

> If there are reasonable grounds for suspecting its genuineness, and the party relying upon it fails to satisfy the Court of its due execution there is an end of it. But if no such grounds exist and it satisfies the conditions prescribed by S. 90 of the Indian Evidence Act, then proof of execution is dispensed with and it is to be dealt with on the same footing as any other genuine instrument ..... When the genuineness of a document purporting to be an ancient document is put in issue, it appears to have been sometimes thought that any presumption in its favour is thereby excluded. But this would be to deprive the party producing it of the benefit of the presumption precisely in the circumstances in which he most stands in need of its aid.

I am, therefore, of opinion that regardless of the question as to whether the document in question forms the foundation of the party's right or whether it was sought to be used as a piece of evidence the Court may, in a proper case rely upon the presumption contained in S. 90 of the evidence Act. Having regard to the facts of the present case to which I have already referred it cannot be said that the Courts below were wrong in relying upon the said presumption.

The third and fourth grounds urged on behalf of the appellants may be taken up together, for they are really contentions which have been put forward on behalf of the Defendant No. 7. It has been said that a proper issue should have been framed as to whether Defendant No. 7 was the benamidar for the other defendants, that the Court below was wrong in excluding evidence which had been adduced on behalf of Defendant No. 7 in order to prove that he was not the benamidar; and that the said Defendant No. 7 had acquired a title by the adverse possession in respect of the mortgaged properties which would be sufficient to enable him to resist the plaintiffs' claim. I am of opinion that the question as to whether the Defendant No. 7 is the benamidar for the other defendants is a question of very minor importance in the present case. I do not see that any attempt was made on behalf of the Defendant No. 7 at the time when the issues were framed to raise a distinct issue on this question and having regard to the findings of the learned Judge to the effect that it was an admitted fact that notwithstanding the purchase by the Defendant No. 7 the other defendants are still in possession of the mortgaged properties. I am unable to find that there is any valid ground of complaint on the part of Defendant No. 7 in the present appeal.

The next ground relates to the question of limitation. It is based upon the supposition that Art. 75 of the Limi-

(5) [1904] 26 All 581=31 I. A. 217=8 Sar. 674 (P. C.).
(6) [1885] 11 Cal. 539.
(7) [1902] 29 Cal. 740.

tation Act applies to the case and that the plaintiffs must take recourse to S. 20 of the Limitation Act to save limitation. For the plaintiffs, in my opinion, it is not necessary to rely at all upon S. 20. If they can show that the instalments that were overdue had been really paid by the defendants and accepted by them and that there was waiver by such payment they are perfectly competent to sue for recovery of the instalments due for the years 1316 and 1317. This payment may be proved in the same way as any other fact to be proved in the case. In this the plaintiffs have succeeded according to the findings of the learned Judge. The learned Judge has observed in his judgment that

> There is no good reason to discredit the evidence of payment of overdue instalments. I accept the evidence of payments and hold that both parties waived the default.

Independently, therefore, of the provisions of S. 20 of the Limitation Act and the endorsements of payments which are to be found on the back of the document the payments of the overdue instalments and the receipts thereof by the plaintiffs have been proved in the case. This contention also of the appellants, therefore, fails.

The last contention urged is to the effect that by reason of the provisions of the Usurious Loans Act it should be held that the transaction was one which should not be given effect to by the Court. This argument overlooks the provisions of S. 2 of the Act which makes that Act inapplicable to the transaction in question.

The result then is that the appellants are not entitled to succeed upon any of their contentions excepting the one based upon S. 68 of the Act to which I have referred. Now the position is this. If the case goes back and if the witness who has not been examined is still alive he will be examined in this case. If he gives evidence against the plaintiffs the Court will be entitled to rely upon S. 90 of the Evidence Act because the plaintiffs' case all along has been that the witness is hostile. If he deposes in favour of the plaintiffs the plaintiffs' case will gain additional strength. The result, therefore, would be that no difference would arise by reason of the examination of the said witness if he is alive. In the result, therefore, in my opinion, the appeal fails and must be dismissed with costs.

**Greaves, J.**—I agree.

*Appeal dismissed.*

---

## * A. I. R. 1927 Calcutta 106

SUHRAWARDY AND PAGE, JJ.

*Mohan Singh Chowdhuri* and *others*—Plaintiffs—Appellants.

v.

*Panchanan Sadhukhan* and *others*—Defendants—Respondents.

Appeal No. 2718 of 1923, Decided on 1st April 1926, from the appellate decree of the Addl. Dist. J., Hooghly. D/- 16th May 1923.

* *Civil P. C., S. 47 and O. 21—"All questions arising between the parties" in S. 47 means questions relating to or affecting parties—Question whether the sale passed any interest in the property should be decided in execution—Questions that ought to have been raised in execution cannot be raised even in defence.*

The words "all questions arising between the parties to the suit" in S. 47 do not mean all questions which were actually raised in the execution proceedings. The words mean that the questions must be such as would relate to or affect the rights of parties to the suit. [P 109 C 1]

The intention underlying S. 47 and O. 21 is that all questions arising between the parties to the suit or their representatives in interest relating to the execution, discharge or satisfaction of the decree should be determined in the proceedings in which the decree was passed. If a party to the suit or his representatives desire to raise an issue which falls within S 47, such as whether the sale ought to be set aside on the ground of irregularity or fraud as provided in O. 21, R. 90, or whether the property sold was liable to attachment in execution of the decree, they must do so in the course of the execution proceedings as provided in the Code and not otherwise. A stranger auction-purchaser after the sale has become absolute and a sale certificate has been granted, ought not to be left in doubt as to whether the parties or their representatives intend in the future to attack the sale in further or other proceedings. [P 108 C 1]

In like manner the parties or their representatives are also precluded from raising such issues, as ought to have been raised in the execution proceedings, by way of defence in any proceedings other than those for which provision is made in the Code : *(Case Law referred to.)* [P 108 C. 2]

*Barnashi Basi Mukerjee*—for Appellants.

*Braja Lal Chakravarti*, *Apurba Charan Mukerjee* and *Durga Charan Roy Chowdhury*—for Respondents.

**Page, J.**—This appeal raises an interesting question of practice. The plaintiffs-appellants are members of a Hindu family governed by the Mitakshara law. Ram Singh Chowdhuri died some time before 1888, leaving him surviving a widow Rup Kumari and an only son Mohan Singh Chowdhuri, since deceased. The male plaintiffs are the adult sons of Mohan Singh, and the two minor sons are represented by the plaintiff Rani Kumari their mother and natural guardian. In 1888 as the result of a partition suit a certain tank which is the subject matter of these proceedings remained the joint property of the members of the family, but was divided into specified shares of which the plaintiffs received a 4/5th share and Rup Kumari 1/5th share. In 1898 Sib Gopal Banerji obtained a personal decree for money lent against Rup Kumari. In 1904 Rup Kumari died. In 1905 proceedings in execution of this decree were taken by Sib Gopal, the decree-holder, and in the course of these proceedings the plaintiffs were brought on the record as the legal representatives of Rup Kumari. On the 14th February 1906 Rup Kumari's 1/5th share of the tank was sold in execution of the decree, and was purchased by Gokul Das Khetry, who is a defendant-respondent in the present appeal. The other defendants-respondents are the heirs and legal representatives of Rasik Lal Sadhukhan who was the tenant of the tank. On the 10th July 1906 Rani Kumari applied under O. 21, R. 90, for an order setting aside the sale on the ground of irregularity in publishing the sale proclamation, but the application was rejected, and an appeal from the order was dismissed.

On the 14th May 1919 the present suit was instituted, and the plaintiffs prayed for a declaration that Gokul Das Khetry did not obtain any interest in the tank by purchasing Rup Kumari's 1/5th share therein at the execution sale inasmuch as Rup Kumari possessed only a life interest in the tank, and that at the time of the sale that interest had come to an end. As against the other defendants the plaintiffs claimed arrears of rent. The trial Court dismissed the suit in its entirety, but the lower appellate Court allowed the plaintiffs' claim to the extent of 4/5ths of the rent in arrear, and in other respects dismissed the appeal. As regards the plaintiffs' prayer for a declaration that no estate or interest in the said tank passed to defendant Gokul Das Khetry on the sale it was urged on behalf of the defendants-respondents that this cause of action is res judicata, and is also barred by reason of S. 47 of the Civil P. C. In my opinion the claim is not barred by res judicata as it was not necessary or material for the determination of the previous suit that the Court should have decided the question in issue in the present suit. I am clearly of opinion, however, that the plaintiffs' cause of action except in respect of the claim for rent in arrear is barred by reason of S. 47 of the Code. Under S. 47 (1) it is provided that all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit.

Now it is not open to doubt or controversy that the plaintiffs who were brought upon the record after the decree was passed as the heirs and legal representatives of Rup Kumari were the representatives of Rup Kumari within S. 47, or that the question whether any interest in the tank passed on the sale was a question relating to the execution, discharge or satisfaction of the decree. *Kailash Chandra Tarapdar* v. *Gopal Chandra Poddar* (1). It is equally clear that the plaintiffs had an opportunity of raising this question in the execution proceedings, but refrained from so doing. In these circumstances, I am of opinion that the plaintiffs' suit except as to the claim for arrears of rent is barred by reason of S. 47 of the Code. I respectfully agree with the Full Bench of the Allahabad High Court in thinking that:

> If there are questions of this nature, and which properly arise between the parties or their representatives they must be determined by order of the Court executing the decree, and not by separate suit; and the provision disallowing a separate suit to determine these questions applies not only to prohibit a suit between parties and their representatives but also a suit by a party or his representatives against an auction-purchaser in execution of the decree, the object of which is to determine a question which properly arises between parties or their representatives and relates to the execution, discharge or satisfaction of the decree. If the question be of this nature, it is one which by S. 244 (now S. 47) must be determined by order of the Court executing the

(1) A. I. R. 1926 Cal. 798 (F. B.).

decree and not by separate suit; and it is immaterial whether the party did or did not raise it prior to the auction sale at the time of execution. If he did not, he lost the remedy which the Legislature has provided.

See *Basti Ram* v. *Fattu* (2); also *Punchanun* v. *Rabia* (3), *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal* (4), *Dwarka Nath Pal* v. *Tarini Sankar Ray* (5), *Ganapathy Mudaliar* v. *Krishnamachariar* (6), *Khitish Chandra Banerjee* v. *Thako Mani Debi* (7), *Seth Chand Mal* v. *Durga Dei* (8), *Gokul Sing* v. *Kisan Singh* (9), *Nadamuni* v. *Veerabhadra Pillai* (10). The appellants contend, however, that as their claim in the present suit is brought against a stranger-auction-purahaser, who is neither a party to the suit nor the representative of a party, S. 47 can have no application to the present proceedings. The answer to that contention is that the Legislature by enacting S. 47 and O. 21 of the Code intended and provided that all questions arising between the parties to the suit or their representatives in interest relating to the execution, discharge or satisfaction of the decree should be determined in the proceedings in which the decree was passed. If a party to the suit or his representatives desire to raise an issue which falls within S. 47, such as whether the sale ought to be set aside on the ground of irregularity or fraud as provided in O. 21, R. 90, or whether the property sold was liable to attachment in execution of the decree, they must do so in the course of the execution proceedings as provided in the Code and not otherwise. A stranger-auction-purchaser, after the sale has become absolute and a sale certificate has been granted, ought not to be left in doubt as to whether the parties or their representatives intend in the future to attack the sale in further or other proceedings.

If a party to the suit or his representatives in interest refrain from raising a question which falls within the ambit of S. 47 and elect to stand by and do nothing while property alleged to belong to the judgment-debtor is attached and sold in execution of the decree, such persons are not to be permitted thereafter to canvass such questions in other proceedings, or to harass the auction-purchaser by launching a separate suit against him in which the sale is attacked upon some ground which could and ought to have been raised in the execution proceedings and which falls within S. 47 of the Code. In like manner the parties or their representatives are also precluded from raising such issues by way of defence in any proceedings other than those for which provision is made in the Code: see *Gokul Singh* v. *Kisan Singh* (9), *Mayan Lal* v. *Doshi Mulji* (11), and *Amir Rai* v. *Basdeo Singh* (12) upon which the learned pleaders for the appellants relied do not support the appellants' contention, for in each of those cases the judgment-debtors applied to the Court to set aside the sale under S. 310A of the Code of 1882 (now O. 21, R. 89), and thus the question to be determined upon the application arose solely between the judgment-debtor and the auction purchaser, for it matters not to the decree-holder whether he receives payment of the sum due to him under the decree from the judgment-debtor or from the auction-purchaser. For these reasons, in my opinion, the plaintiffs' claim to the declaration for which they pray is barred by S. 47. Further, the Court is not entitled now to treat the present suit as an application under S. 47, for such an application would be barred by limitation: *Lalman Das* v. *Jagannath Singh* (13); *Satish Chandra* v. *Nishi Chandra* (14).

As regards the claim for arrears of rent, the plaintiffs-appellants contend that they are entitled to interest upon the sum awarded to them and the costs of that issue, but, in my opinion, in the circumstances the order of the learned District Judge refusing the plaintiffs such relief ought not to be disturbed. The result is that the appeal fails, and must be dismissed with costs.

(2) [1886] 8 All. 146=(1886) A. W. N. 37 (F. B.).
(3) [1890] 17 Cal. 711 (F. B.).
(4) [1892] 19 Cal. 683=19 I. A. 166=6 Sar. 209 (P. C.).
(5) [1907] 34 Cal. 199=5 C. L. J. 294=11 C. W. N. 513.
(6) [1918] 41 Mad. 403=44 I. C. 855=45 I. A. 54 (P. C.).
(7) [1918] 27 C. L. J. 572=47 I. C. 458.
(8) [1890] 12 All. 313=(1890) A. W. N. 137 (F. B.).
(9) [1910] 34 Bom. 546=7 I. C. 457=12 Bom. L. R. 539.
(10) [1910] 34 Mad. 417=21 M. L. J. 928=8 I. C. 429=(1910) M. W. N. 662.
(11) [1901] 25 Bom. 631.
(12) [1906] 5 C. L. J. 204.
(13) [1900] 22 All. 376=(1900) A. W. N. 129.
(14) [1920] 46 Cal. 975=54 I. C. 431.

**Suhrawardy. J.**—I agree. I wish to express my surprise at the strenuousness with which it was argued that the words "all questions arising between the parties to the suit" in S. 47 of the Code must mean all questions which were actually raised in the execution proceedings. I do not think that those words should be interpreted in that way. What I understand by those words is that the questions must be such as would relate to or affect the rights of parties to the suit. Otherwise, if we accept the contention of the appellant, the result will be that by not raising a particular question in the execution proceedings a party will thereby retain the right to bring a separate suit in order to agitate that question. As has been pointed out by the Privy Council in several cases, proceedings under S. 244 of the Code of 1882 (corresponding to S. 47 of the Code of 1908) were intended to dispose expeditiously of all questions arising relating to execution. On other points I agree with the judgment of my learned brother.

*Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 109

CUMING AND PAGE, JJ.

*Satish Chandra Bandopadhya* and *others*—Defendants—Appellants.

v.

*Hasem Ali Kazi* and *others*—Plaintiffs and Defendants—Respondents.

Appeal No. 171 of 1924, Decided on 30th March 1926, from the appellate decree of the 1st Sub-J., Bakarganj, D/- 13th September 1923.

*Bengal Tenancy Act, Sch. 3, Art. 3—Landlord purchasing the holding at sale in execution of rent decree inoperative against the tenant—Dispossession by landlord—(Cuming, J., contra Page, J.)—Art. 3 does not apply.*

*Per Cuming, J.*—A special law of limitation which largely curtails the ordinary rights of the subject by reducing the period of limitation within which he can come to enforce his rights, requires to be most strictly construed. Art. 3, Sch. 3, can only apply when the landlord dispossesses his tenant in the capacity of landlord.

When the dispossession is by the landlord in his capacity of acution-purchaser, the article does not apply : *A.I.R. 1924 Cal. 623, Diss. from.* [P 111, C 2]

*Per Page, J.*—Where the relationship of landlord and tenant exists at the time of dispossession, in what capacity the landlord dispossesses the tenant, is immaterial and Art. 3, Sch. 3 will apply : *A. I. R. 1924 Cal. 623, Foll.* [P 113, C 1]

*Jotindra Nath Sanyal* and *Suresh Chandra Talukdar*—for Appellants.

*Brojendra Nath Chatterji* and *Hemendra Chandra Sen*—for Respondents.

**Cuming, J.**—In the suit out of which this appeal has arisen the plaintiffs who are the respondents in the present appeal sought to recover possession after declaration of title of certain plots of land in karsha interest. Their case was that they with others held a karsha interest in the land under Defendants Nos. 1 and 2. The Defendants Nos. 1 and 2 brought a rent suit and obtained a decree ex parte in a suit for rent No. 961 of 1914, and in execution of the decree purcha ed the property. The plaintiffs were made parties to the suit but they were minors and were not properly represented. On November 14, 1917, the plaintiffs were fined for cutting away the paddy grown on the land on the ground that it had been grown by the Defendants Nos. 1 and 2 and after this Defendants No. 1 and 2 dispossessed plaintiffs and their cosharers. Plaintiffs' case is that not being properly represented in the Suit No. 961 of 1914 their interest did not pass. Hence this suit.

The case of the Defendants Nos. 1 and 2 was that the minors were properly represented and the suit was barred by the special limitation of Art. 3, Sch, 3, Bengal Tenancy Act. The trial Court found that the minors were not properly represented in the Rent Suit No. 961 of 1914 and so their title did not pass by the sale. That Defendants Nos. 1 and 2 took symbolical possession on 25th December as purchasers at the auction sale and they actually dispossessed the plaintiffs some time before November 1916, that the special rule of limitation applied and so the suit was barred by limitation. The plaintiffs appealed to the District Court. That Court held that by taking delivery of possession on December 25 1915, the Defendants Nos. 1 and 2 dispossessed the plaintiffs, but that as they did this in their capacity of auction-purchasers the special rule of limitation under Act. 3, Sch. 3 did not apply and hence decreed the suit.

The question which has now been raised on appeal is what is the period of limitation which applies.

The defendants contend that the dispossession was by the landlord and being more than two years before the date of suit, viz., December 25, 1915, the suit being brought on 25th July 1919, the suit is barred by limitation. They further contend on the strength of certain decisions that it is immaterial that the defendants were also auction-purchasers. As the defendant had also the capacity of a landlord the dispossession must be considered to be by the landlord. They contend that if the plaintiffs were not bound by the decree in Suit No. 961 they are still tenants of the Defendants Nos. 1 and 2 and hence the dispossession must be considered to be by the landlord. The sheet anchor of their argument is the case of *Kedar Nath Biswas* v. *Kamini Sundari Dassya* (1), a decision to which one of us was a party. The plaintiffs, on the other hand, contend that the dual capacity of landlord and auction-purchaser must be kept distinct. That the dispossession was by the landlord in his capacity of auction-purchaser and hence the special rule of limitation provided by Art. 3, Sch. 3, has no application and the ordinary 12 years' rule applies. Their sheet anchor is the cases of *Haran Chandra Barai* v. *Hari Charan Barai* (2) and *Ram Kinkar Tewari* v. *Sthiti Ram Panja* (3). Now the first point to be decided is when were the plaintiffs actually dispossessed and by whom and in what capacity.

The lower appellate Court finds that the plaintiffs were dispossessed by the Defendants Nos. 1 and 2 as auction-purchasers on 25th December 1915, when the auction-purchaser took possession through the Court. It is not specifically stated that there was then any actual ouster or finding that there was actual dispossession, that is to say, the eviction of the plaintiffs from the land.

The trial Court finds that there was actual ouster some time before November 2, 1916, by Defendants Nos. 1 and 2. He does not find in what capacity the actual ouster was.

The lower appellate Court finds that possession was taken through the Court on the 25th December 1915, by Defendants Nos. 1 and 2 as auction-purchaser. Between this date and November 2 1916, the actual ouster took place.

If the possession through the Court on 25th December 1915 was taken in the capacity of auction-purchaser it is reasonable to hold that any further action taken by Defendants Nos. 1 and 2 was in their capacity as auction-purchasers, for obviously they would have no possible semblance of legality to take possession in any other capacity and there is no reason to think that they changed the capacity. Hence we must take it that some time before November 2, 1916, the defendants as auction-purchasers took possession and ousted the plaintiffs. The point then arises whether if the Defendants Nos. 1 and 2 who were also the landlords of the plaintiffs dispossessed them in their capacity as auction-purchasers what period of limitation applies.

If Art. 3, Sch. 3 applies then clearly the plaintiffs' suit is time-barred. If not it is not time-barred.

The defendants contend that it does. They rely on the case of *Kedar Nath Biswas* v. *Kamini Sundari Dassya* (1).

In that case there was a certain holding held by two brothers Sitanath and Dwarika. Sitanath died leaving the plaintiff in the suit his widow, as his heir.

Defendants Nos. 1 and 2 in that case were the landlords. They brought a suit for rent, obtained a decree and sold the property and puchased it themselves.

The rent suit was brought not against the plaintiff but against the auction-purchaser, Defendant No. 4.

It was held that this was a fraudulent decree. The Defendants Nos. 1 and 2 dispossessed plaintiff in virtue of delivery of possession to Defendants Nos. 1 and 2 in execution of the rent-decree.

The learned Judges held that as the Defendants Nos. 1 and 2 were at the time of dispossessing the plaintiff still her landlord, Art 3 of Sch. III applied. The learned Judges held that Art. 3 applies to a case where dispossession has been by a person who at the time of the dispossession, in whatever way the dispossession might take place either through a civil wrong or by means of criminal force, occupies the position of a landlord or possesses the character of a landlord and had the capacity of a landlord; the dis-

(1) A. I. R. 1924 Cal. 623.
(2) [1921] 25 C. W. N. 102=31 I. C. 899.
(3) [1918] 27 C. L. J. 523=46 I. C. 221.

possession must be taken to have been effected by the landlord.

The respondent relies on the case of *Ram Kinkar Tewari* v. *Sthiti Ram Panja* (3). In that case the landlord obtained a decree for rent against one Khetra Nath Tewari. The judgment-debtor died leaving three infant sons. Then the decree-holder applied for execution, sold the property and bought it himself.

The uncle of the minors applied to set aside the sale. The District Judge found that as the infants had not come within two years their title had been extinguished under Art. 3, Sch. 3, and he refused to cancel the same.

Mukerji, J., held that Art. 3, Sch. 3, had no application because when a landlord in execution of a decree for rent puts the holding to sale and purchases it himself and obtains delivery of possession through the Court such dispossession of the tenant is not dispossession within the meaning of Art. 3, Sch. 3. The same view is taken in the case of *Kamal Dhari Thakur* v. *Rameswar Singh Bahadur* (4), with reference to page 818, left hand column. See also the case of *Brojo Kishore Mahapatra* v. *Saraswati Dassi* (5), with special reference to the remark of Banerji, J., at page 335.

The learned Judge remarks :

I would, however, observe, that if the article, applies, as I think it does, only to suits as between landlord and tenant it would not be right to hold that it is applicable to a suit where the dispossession is by the defendant acting, not as landlord, but expressly, in a different capacity, viz., that of auction-purchaser of the right, title and interest of a tenant at a sale held in execution of a rent-decree obtained by him as a co-sharer londlord.

The learned Judge followed the case of *Abhoy Charn Mookerjee* v. *Sheik Titu* (6), where it was held that the special limitation of Art. 3. Sch. 3, Bengal Tenancy Act, did not apply where a tenant is dispossessed from the holding by his landlord not as a landlord but as a representative of the person whose right, title and interest he has purchased. We have clearly, therefore, conflicting decisions. The case of *Kedar Nath Biswas* v. *Kamini Sundari Dassya* (1) is an authority for the proposition that if the relationship of landlord and tenant exists between the parties at the time of dispossession it is immaterial in what capacity the landlord took possession. The dispossession is to be considered as being by the landlord as such and Art. 3, Sch. 3, applies.

The other cases hold that the deciding factor is in what capacity the dispossesion is effected, and if the dispossession is by the landlord in his capacity as auction-purchaser or any other capacity except a landlord Art. 3, Sch. 3, does not apply. The question, therefore, requires to be considered by the Full Bench. My learned brother, however, is of opinion that the facts as found would not justify a reference to a Full Bench and I, therefore, proceed to decide the appeal. Speaking for myself and with great respect to the learned Judges who have held otherwise I think the case of *Kedar Nath Biswas* v. *Kamini Sundari Dassya* (1) was wrongly decided. The article in question is found in the Bengal Tenacy Act, an Act which deals with relations between landlords and tenants and defines their respective rights. As the learned Chief Justice (Jenkins, C. J.) remarked in *Rudra Narain* v. *Natabar Jana* (7) :

We recently had occasion to enter a protest against extending the terms of the Article by the use of any figure of speech or metaphor.

See also the remarks of the same learned Judge in the case of *Basanta Kumari* v. *Nanda Ram* (8). Speaking for myself, it seems to me that a special law of limitation, which largely curtails the ordinary rights of the subject by reducing the period of limitation within which he can come to enforce his rights from 12 to 2 years, requires to be most strictly construed and my own opinion is that the article can only apply when the landlord dispossessed his tenant in the capacity of landlord. When he dispossesses in any other capacity it is not a question between landlord and tenant but between the person on the land and the auction-purchaser.

In the present case it has been found that the dispossession was by the landlord in his capacity of auction-purchaser and in that view of the case I think the ordinary twelve years' rule applies. The finding of the lower appellate Court is

(4) [1913] 17 C. W. N. 817=19 I. C. 545.
(5) [1901] 6 C. W. N. 333.
(6) [1897] 2 C. W. N. 175.
(7) [1914] 41 Cal. 52=18 C. W. N. 353=21 I. C. 431=18 C. L. J. 89.
(8) [1913] 17 C. W. N. 1149=20 I. C. 350=18 C. L. J. 86.

right and I would, therefore, dismiss the appeal.

The result is that the appeal stands dismissed with costs.

**Page, J.**—I regret that I cannot take the view of this case that has found favour with my learned brother Cuming. The following salient facts were either found by the lower Courts or admitted by the parties.

At all material times prior to the institution of the present suit the relationship of landlord and tenant existed between the parties, the plaintiffs-respondents with their co-sharers, the pro forma Defendants Nos. 3 and 4, holding the lands in dispute as karsha tenants of the appellants, the Defendants Nos. 1 and 2. On the 30th May 1914 the defendants Nos. 1 and 2 brought a suit for arrears of rent against all the co-sharer tenants, and on the 10th November, 1914, obtained an ex-parte decree against the plaintiffs and Defendants Nos. 3 and 4. When the rent suit was instituted, however, the plaintiffs were minors, and not being duly represented in the suit the decree was not binding upon them, and as against the plaintiffs the proceedings were wholly null and void. On the 25th December 1915, in execution of the said decree the Defendants Nos. 1 and 2 obtained through the Court symbolical possession of the lands in suit which up till that date admittedly had been in the possession of the plaintiffs and their co-sharers.

It is common ground that the plaintiffs have been in possession of the lands within 12 years prior to the present proceeding, and the trial Court found that at the date when the plaintiffs filed the present suit the Defendants Nos. 1 and 2 were in possession through their tenants the Defendants Nos. 5 to 7, who are in actual possession of the lands. The lower Courts, however, are not in agreement as to the date upon which the Defendants Nos. 1 and 2 dispossessed the plaintiffs; the trial Court holding that the

> plaintiffs were dispossessed by the landlords some time before the disposal of the criminal case viz., some time before 2nd November 1916;

The lower appellate Court, on the other hand, being of opinion that

> there is absolutely no room for doubt that the defendants have dispossessed the plaintiffs by the delivery of possession on 25th December 1915.

As I apprehend the matter, however, it is immaterial which date is taken; for, in my opinion, in either event the plaintiffs' suit must fail.

Now, if the only form of possession which the defendants obtained was that which they received when symbolical possession of the lands in suit was given to them by the Court on 25th December 1915, the defendants cannot be held to have dispossessed the plaintiffs; for, as against the plaintiffs who were not duly impleaded and were not bound by the proceedings in the rent suit, symbolical possession is no possession at all: *Juggobundhu Mukerjee* v. *Ram Chunder Bysack* (9); *Runjit Singh* v. *Bunwari Lal Sahu* (10); *Juggobundhu Mitter* v. *Purnanand Gossami* (11); *Radha Krishna Chanderji* v. *Ram Bahadur* (12); and *Peary Mohan Mukherjee* v. *Arunodoy Ghose* (13).] Inasmuch, therefore, as upon that hypothesis the Defendants Nos. 1 and 2 cannot be regarded as having dispossessed the plaintiffs, the plaintiffs' claim to recover possession against Defendants Nos. 1 and 2 must fail. It is further to be observed that as against Defendants Nos. 5—7 who, as the trial Court held, are in actual possesssion, no relief was claimed in the plaint, and the trial Court rejected an application by the plaintiffs to amend the plaint by adding a prayer for suitable relief against these defendants. On the other hand, if it is open to this Court, having regard to the decision of the lower appellate Court upon the question whether actual dispossession was effected, to accept and proceed upon the finding of fact by the trial Court that the plaintiffs were actually dispossessed by the landlords, the Defendants Nos. 1 and 2, some time before the 2nd November 1916, I am of opinion, that the plaintiffs' suit which was brought on 25th July 1919, is barred by Sch. 3, Art 3 of the Bengal Tenancy Act (Act 8 of 1889, as amended).

Article 3 provides that a suit to recover possession of land claimed by the plaintiff as a raiyat or under-raiyat must be brought within two years from the date of dispossession. Now, the terms of Art. 3 are unrestricted, and are wide

(9) [1880] 5 Cal. 584=5 C. L. R. 543 (F. B.).
(10) [1884] 10 Cal. 993.
(11) [1889] 16 Cal. 530 (F. B.).
(12) [1918] 20 Bom. L. R. 502=16 A. L. J. 33=43 I. C. 268=34 M. L. J. 97 (P. C.).
(13) [1920] 25 C. W. N. 168=58 I. C. 581.

enough to include suits brought by raiyats or under-raiyats to recover possession of land from any person who has dispossessed them whoever he may be. Having regard to the preamble of the Act, however, and the intention of the Legislature to be collected from the terms of the enactment, it is now well settled that the term "dispossession" as used in Art. 3 means "dispossession by the landlord." *Rudra Narain* v. *Natabar Jana* (7). It follows, therefore, that a suit to recover possession of land after dispossession will not lie within the ambit of Sch. 3, Art. 3, unless (1) the plaintiff is a raiyat or under-raiyat, (2) the dispossession is by his landlord and (3), the suit is brought within two years from the date of dispossession. In the present case, however, each of these conditions is fulfilled, and, in my opinion, the suit is barred by limitation. The present suit appears to me to be indistinguishable from, and governed by, *Kedar Nath Biswas* v. *Kamini Sundari Dassya* (1). I was a party to the decision in that case, and I adhere to the opinion that I then expressed. I confess that I am at a loss to understand what difference it could make, either in that case or in the present one, that the landlord had obtained delivery of possession through the Court in execution of a decree by which the plaintiffs were not bound, and which as against them was a nullity and in no way affected the relationship of landlord and tenant that at all material times subsisted between the plaintiffs who were dispossessed and the defendants who dispossessed them.

I should have been prepared in the circumstances to let the matter rest there, and not to embark upon a consideration of the further question as to whether the capacity in which the landlord purported to dispossess the tenant affects, the applicability of Sch. 3. Art, 3 or in other words, whether the plaintiffs must have been dispossessed by the landlords as such for the trial Court found as a fact that the plaintiffs were actually dispossessed by the landlords some time before 2nd November 1916 and there is no finding by either Court that such dispossession was by the Defendants Nos. 1 and 2 in their capacity of auction-purchasers. My learned brother, however, upon the hypothesis that the Defendants Nos. 1 and 2 when they actually dispossessed the plaintiffs in or about 2nd November 1916, were acting in the capacity or auction-purchasers and not of landlords, is of opinion, that Sch. 3, Art. 3, doesf not apply to the present suit, and in these circumstances I feel that I ought to express my own opinion on the matter. No doubt, there is authority to support the view which has commended itself to Cuming, J. : see *Abhoy Charan Mukerjee* v. *Sheikh Titu* (6), *Brojo Kishore Mahapatra* v. *Saraswati Dassi* (5), *Mahomed Khalil* v. *Hirendra Nath Bhattacharya* (14), *Kamal Dhari Thakur* v. *Rameshwar Singh Bahadur* (4) and *Ram Kinkar Tewari* v. *Sthiti Ram Panja* (3).

The ratio decidendi of these cases appears to be that where a landlord has purchased the holding at an auction-sale held in execution of a decree and has obtained delivery of possession through the Court, he is given possession not as landlord, but as auction-purchaser. That, of course, is true. But if the tenants who were dispossessed in this manner were not parties to the proceedings the delivery of symbolical possession to the landlords through the Court will not affect their status or their rights. On the other hand, if the tenants were parties to such proceedings, and their landlords obtained a decree that was binding upon the tenants, and the landlords having purchased the property at an execution sale are given symbolical possession by the Court, such formal possession as against the tenants will operate as actual possession ; and limitation will commence to run against the tenants from the date when such symbolical possession was obtained. [*Radha Krishna Chanderji* v. *Ram Bahadur* (12)]. But can it be said that in such circumstances that the tenants have not been dispossessed by their landlord ? Undoubtedly, it was the Court that physically effected the dispossession, but who brought it about ? If the landlords had not applied for the attachment and sale of the property would it have been sold ? Clearly not. In my opinion the landlords cannot evade responsibility for the dispossession of their tenants merely because they have resorted to the process of the Court as a mode of effecting the ouster. The Court will lean against the recognition of such a dual legal person-

(14) [1907] 5 C. L. J. 650.

ality in the person who dispossesses the tenant. [See per Stanley, C. J., in *Bhagwati* v. *Banwari Lal* (15)].

Again, if it be urged that Sch. 3, Art. 3 ought only to apply to suits in which the tenant has been dispossessed by the landlord acting in the capacity of landlord and when the landlord has effected the dispossession "by taking the law into his own hands and otherwise than in due course of law," [*Kamal Dhari Thakur* v. *Rameshwar Singh Bahadur* (4) because of the hardship which the tenant may suffer unless a narrow construction is placed upon Art. 3, the answer is that no justification for such a restricted interpretation is to be found in the language in which Article is couched, and to read into the Article words which it does not contain upon grounds of expediency is to legislate and not to administer the law. I can find no warrant for such a construction, and I agree with the view that Chamier, C.J., expressed as to the meaning and effect of Sch. 3, Art. 3. His Lordship observed that :

> it is contended that the Article applies only when the raiyat has been dispossessed by his landlord acting as such. In fact the argument went to the length that the Article applies only when the landlord says either expressly or impliedly to the raiyat 'I am your landlord, you are my tenant. You must vacate the land' and then turn the raiyat out wrongfully.....,I am not prepared to place such a narrow construction on Art. 3. It appears to me that if it is shown that the plaintiff raiyat is in fact a tenant of the defendant who dispossessed him, in respect of the land claimed in the suit, then Art. 3 applies to the suit. The object of that Article seems to be to provide a short period of limitation for a suit by a raiyat to recover a holding from which he has been dispossessed by his landlord. The reason or excuse, good, bad, or indifferent, given or supposed to have been given by the landlord for dispossessing his tenant appears to have no bearing on the enactment and much confusion must ensue if the applicability of the enactment is made to depend upon such considerations.

*Kunti Dai* v. *Jharu Lal Das* (16) : *Aminud-din Munshi* v. *Ulfat-un-nissa Bibi* (17), *Fani Bhusan Sarkar* v. *Pulin Chandra Mandal* (18), *Satis Chandra Basu* v. *Nittya Gopal Haldar* (19), *Pitamber Mahapatra* v. *Bhagabat Lal* (20), *Nabin Chandra Shaha* v. *Wajid* (21). *Kedar Nath Biswas's* case (1) :

In this suit the plaintiffs' substantial claim is to recover khas possession of the land, and the claim for a declaration of title to the land is merely ancillary to the claim for possession which I hold to be barred by limitation. In my opinion, the Court in the exercise of its discretion ought not in these circumstances to grant the plaintiffs a declaration of their title to the property : *Sree Narain Mitter* v. *Sreemutty Kishen Soondari Dassee* (22), *Strimathoo Moothoo Vijia Ragoonadah Ranee Kolandapuree Natchiar* v. *Dorasinga Tevar* (23), *Rampal Singh* v. *Balbhaddar Singh* (24). I would allow the appeal, and dismiss the plaintiffs' suit with costs.

(15) [1909] 31 All. 82=1 I. C. 416=6 A. L. J. 71 (F. B.).
(16) [1917] 2 P. L. W. 16=40 I. C. 907=1917 P. H. C. C. 247.
(17) [1909] 13 C. W. N. 103 = 3 I. C. 315 = 9 C. L. J. 131.
(18) [1916] 21 C. W. N. 976=35 I. C. 838.
(19) [1918] 21 C. W. N. 978=40 I. C. 419.
(20) [1914] 24 I. C. 860.
(21) [1920] 31 C. L. J. 199=58 I. C. 593=24 C. W. N. 382.
(22) I. A. Sup. Vol. 149=11 B. L. R. 171=19 W. R. 133=3 Sar. 203 (P. C.).
(23) [1838] 2 I. A. 169 = 15 B. L. R. 83 = 23 W. R. 314 (P. C).
(24) [1903] 25 All. 1 = 29 I. A. 203 = 8 Sar. 340 (P. C.).

---

## A. I. R. 1927 Calcutta 114

CUMING AND PAGE, JJ.

*Mrs. Alice Maud* and *another*—Petitioners.

v.

*J. C. Galstaun* and *others* — Opposite Parties.

Civil Rule No. 154 of 1926, Decided on 18th May 1926, from an order of the 1st Sub-J., 24-Perganas, Alipur, in Title Suit No. 42 of 1925.

(a) *Civil P. C., S.* 115—*Decree amended—Order amending the decree is not revisable.*

As an amended decree supersedes the original decree and against the amended decree an appeal lies, no revision lies against an order amending the decree : 7 *All.* 276 and 411, *Foll.* [P 116, C 1]

(b) *Civil P. C., S.* 115—*Other more appropriate remedy open—No revision lies.*

Powers under S. 115 are discretionary and the High Court should not exercise those powers of revision when a more appropriate and far more complete remedy is open. [P 116, C 2]

*Nuruddin Ahmed* and *M. Amiruddin Ahmed*—for Petitioners.

*C. C. Biswas* and *Manindra Kumar Bose*—for Opposite Parties.

**Cuming, J.**—The facts of the case out of which this rule has arisen are these : The opposite party one J. C. Galstaun brought a suit in 1923 against the present petitioners aud certain other persons with regard to a certain house No. 229, Lower Circular Road. The present petitioners who are Defendants Nos. 1 and 2, alone contested the suit. The petitioners were the sub-tenants of one Mussa Ariff Bham, who it was alleged, was the tenant of J. C. Galstaun. The suit was heard and was decreed by Mr. Mohendra Nath Mukhuti, Subordinate Judge of Alipur, on the 29th June 1925. Almost immediately after the decision of the suit this officer was transferred and the decree when drawn up was signed by another Judge Mr. Asutosh Pal who succeeded Mr. Mukhuti. The material portion of the judgment of Mr. Mukhuti which forms the concluding portion of the learned Judge's judgment with which we are now concerned in the present Rule is as follows :

Ordered accordingly that the suit be decreed in part with costs on contest against Defendants Nos. 1 and 2 and ex parte against Defendants Nos. 3 and 4. The defendants are directed to make over to the plaintiff vacant possession of the disputed premises in fifteen days from this date ; on default, the plaintiff will be entitled to recover vacant possession of the same turning out all the defendants and all those who claim through him from the premises, and also to recover from the Defendants Nos. 1 and 2 the sum of Rs. 4,283-13-4 as damages for the period before suit and at Rs. 334-8-0 per month from the date of the institution of the suit to 31st March 1924, and thereafter at Rs. 675 per month until recovery of possession by the plaintiff's. On the plaintiff's recovery of possession the total amount to which he is entitled will be calculated and plaintiff pay the necessary deficit Court-fee. Amounts awarded as costs or damages will bear interest at 6 per cent. per annum.

This decree was transmitted to the High Court for execution on the 9th July 1925, and then the plaintiffs asked the High Court to attach certain moveable properties of the judgment-debtor with a view to executing the decree.

Defendants Nos. 1 and 2 had meanwhile made over vacant possession to the plaintiff before the expiry of fifteen days allowed by the decree and they raised the objection that as they had given over vacant possession it was, therefore, no longer necessary that there would be any final decree as to damages. They, therefore, contended that they were not liable for the damages as they had given over possession within fifteen days and on these allegations they asked the Subordinate Judge to recall the certificate which he had sent to the High Court. The learned Subordinate Judge refused to recall the certificate, and on the 14th August 1925, the Subordinate Judge ordered what is described a final decree which was a decree for the amount of damages, etc., to which the Defendants Nos. 1 and 2 are liable to be drawn up.

Defendants Nos. 1 and 2 had appealed to the High Court on the 9th November 1925, against the preliminary decree so far as the question of costs was concerned.

Meanwhile, the question of the attached moveables came up before my learned brother Mr. Justice Buckland in the execution proceedings in the High Court. Here again, the Defendants Nos. 1 and 2 raised the question that having given over vacant possession they were not liable for damages and, therefore, their property was not liable to be attached. This contention seems to have found favour with Mr. Justice Buckland (vide, order August 7, 1925). The learned Judge, however, added that if it was intended that the decree had any other meaning it might be still open to have the matter put right and that the decree-holder should not be prejudiced if the mistake, as the decree-holder alleged, in the decree was due to an oversight in the drafting and he allowed the decree-holder time to make such an application as he might think fit in the Court below. The decree-holder then filed an application before the Subordinate Judge on the 3rd September 1925, asking the learned Judge to amend the judgment and the decree of his predecessor.

This application was presumably made under S. 152 of the Civil P. C., about the same time the judgment-debtor applied on the 27th August to the Court asking that Court to amend the final decree and make it, as he alleged, in conformity with the preliminary decree and the judgment. These applications were disposed of by Mr. Profulla Chandra Dutt who had succeeded Mr. Asutosh Pal in the Court of the particular Subordinate Judge at Alipur and the learned Judge then apparently read over and considered his predecessor's judgment, and after consideration of all these questions he came to the conclusion that the Judge could not have intended that the

plaintiff should only get damages in the event of the defendants not giving vacant possession within fifteen days. He, therefore, amended the judgment of his predecessor holding that the word "also" must be a clerical error for "in any event," and he amended the decree accordingly. He refused to amend the final decree as prayed for by the judgment-debtor. Against this order the judgment-debtor has moved this Court in its revisional power under S. 115 of the Civil P. C. and has obtained a Rule with which we are now dealing.

The learned vakil who appeared for the judgment-debtor has raised two points. First, that it is not open to one Judge to amend the judgment of his predecessor. Secondly, that the judgment and decree under appeal cannot be amended.

I propose to deal with this Rule on the short ground that, in my opinion, on the facts stated, the matter does not fall within the purview of S. 115 of the Civil P. C. Section 115 provides that the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto. Now, in the present case an appeal does lie against the decree which has been amended and the amendment of which and the amendment of the judgment of which are the subject-matter of the present Rule. No doubt, against an order amending the decree and amending the judgment there is no appeal. But against the amended decree itself there is an appeal because this amended decree has now become the decree in suit. This is obvious, because it is difficult to imagine that in any suit there could be two decrees at the same time and which two decrees are conflicting with each other. It is clear that the amended decree supersedes the original decree and obviously against this decree, which is the decree in the suit an appeal lies.

All the grounds which were taken and argued before us in this Rule could be taken as grounds in appeal. This is the view which commended itself to Oldfield, J.( in the case of *Raghunath Das* v. *Raj Kumar* (1), where the learned Judge pointed out that the decree as amended is the decree in the suit and that as an appeal lay from it no application could lie under S. 115. The same view was taken in the case of *Surta* v. *Ganga* (2): There are no doubt other decisions which take the contrary view. I do not, however, propose to deal with them nor is it necessary for the reasons which will be clear at the conclusion of my judgment. If we now deal with this matter in revision and come to the finding that the Judge had no jurisdiction to amend the judgment and decree we shall have to set aside the decree and by so doing we should do by way of revision what can be done and should be done by way of appeal. Even if I am wrong, in this view of S. 115 and the present case could come within the purview of S. 115, I do not think that in the present case having regard to the facts and circumstances of the case it should be dealt with in revision.

Our powers under S. 115 are discretionary and I do not think, that we should exercise those powers of revision when a more appropriate and far more complete remedy is open to the appellant as is in the present case by way of appeal against the amended decree.

The Rule, therefore, stands discharged with costs—five gold mohurs.

**Page, J.**—I agree. There is no appeal from the order amending the decree in this suit. If the order in question, therefore, was a separate adjudication in a "case," then, in my opinion, it is within S. 115 of the Civil P. C., because the case is one in which no appeal lies to the High Court. I should be disposed to think, however, that the order in question was not a separate adjudication in a "case" within S. 115. It appears to me that the order amending the decree was an order made in the suit, and was not a separate "case." The point does not appear to have been decided in this Court, for in *Nalinakshya Ghosal* v. *Mafakshar Hossain* (3), the learned Judges merely expressed the view obiter that

> the plaintiff's remedy, if any, would seem to be by an application under S. 622.

In Bombay and in Allahabad, however, the High Courts have held that the High Court has jurisdiction to entertain an application by way of revision in respect of an order such as the one in question

(1) [1885] 7 All. 276=(1885) A.W. N. 13.

(2) [1885] 7 All. 411=(1885) A. W. N. 88.

(3) [1901] 28 Cal. 177=5 C. W. N. 192.

in this suit ; see *Bai Shri Vaktuba* v. *Agarsangji* (4), *Raghunath Das* v. *Raj Kumar* (1), *Raghunath Das* v. *Raj Kumar* (5), *Surta* v. *Ganga* (2), *Surta* v. *Ganga* (6), *Hasan Shah* v. *Sheo Prasad* (7).

It is unnecessary, however, in the view that we take of this case that we should express a definite opinion upon this matter, because, assuming that we possess jurisdiction to entertain an application for revision of the order amending this decree, in our opinion, we ought not to interfere with the order in the exercise of the discretionary powers vested in the Court under S. 115. I am of opinion that an appeal lies, subject to the law relating to limitation from the decree as amended—*Brojo Lal Rai Chowdhury* v. *Tara Prosanna Bhuttacharji* (8), *Visvanathan Chetti* v. *Ramanathan Chetti* (9). It cannot be doubted also that it is more convenient that the legality of the order of amendment should be considered when the case is heard on appeal, and if the remedy by way of appeal is more appropriate than the remedy by way of revision, the Court will not interfere by exercising its power of revision. There appears to be one case, however, in which it is laid down that, notwithstanding that an appeal lies from the decree as amended, the Court ought to revise an order amending a decree—*Hasan Shah* v. *Sheo Prasad* (7), but the learned Judges in holding that

> we are constrained to hold that this order is open to revision, and not to hold that the petitioner had his remedy by way of appeal from the amended decree

expressly stated that they did so because they regarded the decision in *Raghunath Das's* case (5), as a binding authority compelling them so to hold. But with all due deference in that case the Court did not consider the question as to whether there was another appropriate remedy open to the petitioner as appears not only from the report of the case, but also from the observations of Mahmood, J., in *Muhammad Naim-ullah Khan* v. *Ihsan-ullah Khan* (10), in which his Lordship stated that in *Surta* v. *Ganga* (6) and *Raghunath Das* v. *Raj Kumar* (5) the turning point was that an order under S. 206 being an unappealable order can be made the subject of the visitatorial functions of this Court under S. 622 of the Civil P. C.

In my opinion, in the exercise of its discretion the Court ought not to revise the order amending the decree in this suit under S. 115, inasmuch as another and a more appropriate remedy is open to the petitioner. For these reasons, I agree that the Rule should be discharged

*Rule discharged.*

(4) [1907] 31 Bom. 447=9 Bom. L. R. 547.
(5) [1885] 7 All. 876=(1885) A.W.N. 256 (F.B.)
(6) [1885] 7 All. 875=(1885) A.W.N. 256 (F.B.)
(7) [1893] 15 All. 121=(1893) A. W. N. 44.
(8) [1906] 3 C. L. J. 188.
(9) [1901] 24 Mad. 646.
(10) [1892] 14 All. 226=(1892) A.W.N. 14 (F.B.).

## A. I. R. 1927 Calcutta 117

GREAVES AND MUKERJI, JJ.

*Panna Lal Ghose*—Defendant—Appellant.

v.

*The Adjai Coal Co.* and *others*— Plaintiffs—Respondents.

Appeal No. 2 of 1925, Decided on 30th April 1926, against the original decree of the Sub-J., Asansole, D/- 11th September 1924.

(a) *Adverse possession—Asserting possession in a written statement is not sufficient to show possession.*

An assertion in a written statement that one is in possession, in the absence of anything else cannot be regarded as actual possession of the land itself which may go to constitute adverse possession. [P. 121, C. 1]

(b) *Limitation Act—Act leaves no scope for equity in the matter of limitation.*

It is wrong to import considerations of equity in the application of the statute of limitation. [P. 122, C. 1]

(c) *Limitation Act, Art. 96—Article applies only to cases of mistake committed in contractual transactions.*

Article 96 is limited in its application to cases of mistake committed in transactions arising in the course of relations which are more or less contractual in character and the article in any event has no application to a case where there is no question of mistake on the part of the plaintiff. [P. 123, C. 1]

(d) *Limitation Act, Art. 48 — "Conversion" means dishonest conversion ejusdem generis with preceding words—Claim for damages for trespass is not covered.*

"Conversion" in Art. 48 means dishonest conversion, ejusdem generis, with the words that precede it and the article, in view of the words in the third column, presupposes the existence of the property in the possession of some person. The claim for damages for trespass includes not merely damages for the unlawful entry but also damages for the mischief which the trespasser commits after entry on the land and therefore it is not covered by Art. 48. [P. 123, C. 1]

(e) *Limitation Act, Arts. 39 and 49—Claim for damages for underground trespass and removal of coal—Arts. 49 and 39 apply—Time runs from inadvertent taking or discovery of fraudulent taking.*

A claim for damages for trespass and removal of coal from an underground colliery is covered by Arts. 39 and 49 and time begins to run from the inadvertent wrongful taking or from discovery of fraudulent taking. [P. 123, C. 1]

(f) *Damages—Suit for damages for trespass and wrongful removal of underground coal—Coal removed negligently—Market value of coal at pits' mouth less cost of carriage to the bank should be allowed—Value on the day when coal was reduced to possession should be considered.*

Where the defendant negligently committed a trespass and removed coal from the underground colliery of the plaintiff and the plaintiff sued for damages :

*Held* : the severer rule for damages should be applied, namely, that the plaintiffs should be awarded the market-value of the coal at the pit's mouth less only the cost of bringing the coal to bank and not the cost of hewing, such value to be calculated at the time when the coal was cut and reduced to possession. The plaintiffs are entitled to interest on the amount of damages. [P. 125, C. 1]

(g) *Damages—Suit for—Interest.*

In an action for damages for trespass interest can be allowed as damages. [P. 125, C. 1]

*P. C. Mitter, Rishindra Nath Sircar, Kalisankar Sarkar* and *Khagendra Nath Mitra*—for Appellant.

*Sarat Ch. Bose, Narendra Krishna Basu*—for Respondents.

**Mukerji, J.**—This appeal arises out of a suit for damages for underground trespass committed and coal extracted by the Defendants Nos. 1 to 6, and for a permanent as well as a temporary injunction and for other reliefs. The facts which led up to the institution of the suit are these :

The plaintiffs are the Adjai Coal Co., Ltd. Before the Company was incorporated as a joint stock company with limited liability, some of the members thereof had formed a syndicate known as the Adjai Coal Syndicate. On the 6th August 1891 the syndicate obtained an amalnamah from the patnidars of village Raipur Nandi by which the latter agreed to grant the syndicate a mining lease in respect of 500 bighas of coal lands in the village and within certain boundaries and upon certain terms and conditions. The patnidars were divided into 2 groups, namely, the Laiks and the Chakrabartis, the former having a 12 annas share and the latter the remaining 4 annas. Of the Laiks Kaliprasanna had a 6 annas share, Bejoy Gobinda 1 anna 6 pies, Ram Sankar and Ram Bishnu 1 anna 6 pies, Khetramani 1 anna 6 pies and Bimala Sankar, Gouri Sankar and Durga Sankar 1 anna 6 pies. Of the Chakrabartis Sib Narain had a 2 annas share and Khudiram the remaining 2 annas.

The patnidars subsequently refused to execute the mining lease and upon that the syndicate instituted a suit for specific performance, being Suit No. 339 of 1892. Certain petitions of compromise were filed in the said suit by which the patnidars consented to have a survey and demarcation made by a civil Court Amin in respect of such lands amounting to 500 bighas in area, as would be selected by the syndicate, out of the lands of the amalnamah, to have a plan made thereof and to grant the syndicate a mining lease in respect of the same ; and on the 11th July 1893 the Court ordered a decree to be drawn up embodying those terms. The civil Court Amin, who was deputed to do the work in pursuance of the above agreement, filed his report on the 5th September 1893, and on the 16th September 1893 the Court disposed of certain objections to the report and drew up a decree which bore both the dates, *viz.*, 11th July 1893 and 16th September 1893. The decree stated that in accordance with the terms of the petitions of compromise the syndicate would get settlement from the patnidars in respect of 500 bighas of land out of the lands in the schedule to the plaint as demarcated by the black lines in the Amin's map, and further that out of the said 500 bighas of land 253 bighas 11 cottas was cultivated land and the remainder, namely, 246 bighas 9 cottas was patit land.

On the 20th March 1897 an amendment was made in the decree by inserting therein that the plan prepared by the civil Court Amin should be considered a part of the decree. In accordance with the aforesaid decree, the Court, on the 24th September 1897, executed leases in favour of the syndicate on behalf of the patnidars Guru Prasanna Chakraburty, the son of Sib Narain Chakraburty (owner of 2 annas share), Bimala Sankar, Gouri Sankar and Durga Sankar Laiks (owners of 1 anna 6 pies share), Bejoy Gobind Laik (owner of 1 anna 6 pies share), Ram Sankar and Ram Bishnu Laiks (owners of 1 anna 6 pies share) and Khudiram Chakraburty (owner of 2 annas

share). Khetramani Debi (owner of 1 anna 6 pies share) having died, her three daughters executed similar leases in respect of her share, two of the daughters on the 9th January 1900 and the third daughter on the 26th February 1900. Kali Prasanna Laik (owner of 6 annas share) had died before the decree was drawn up and certain proceedings took place between his sons Kristodhan and Sudhakrishna on the one hand and the syndicate on the other, the result of which was that the suit in so far as it was against them was revived, and on the 21st December 1901 a decree was passed from which it appears that there was a compromise between the parties under which the syndicate had obtained leases from the said Kristodhan and Sudhakrishna according to the plan of the civil Court Amin. This lease appears to have been executed on the 23rd September 1901 and it was in respect of the 6 annas share of the executants in the 500 bighas of land demarcated in the Amin's map as aforesaid.

The final decree disposing of the suit in this way was drawn up and signed by the Subordinate Judge on the 4th January 1902, and it was also stated therein that the report and the map of the civil Court Amin would be considered as a part of the decree. It should be mentioned here that in the meantime by an Indenture, dated the 30th September 1893, the syndicate transferred and assigned to the plaintiff company all their interest in, amongst others, the 500 bighas of land to be selected by them in accordance with the compromise decree which had been passed shortly before.

It appears that some time before the 23rd April 1894 the patnidars had promised a settlement of some coal lands to Dr. Radharaman Ghose, who was the Defendant No. 1 in the present suit, but who died some time after its institution. In the course of these negotiations two surveys were made, the last one of which was by an Amin named Madhusudan Dutt who prepared a map of the land to be settled. As a result of these negotiations the patnidars granted leases to the said Radharaman Ghose and his cosharers in respect of about 74 bighas of land out of an area of 101 bighas and also in respect of their demarcated lakheraj lands lying within the said area. These leases bear different dates; the lease by Bejoy Gobinda Laik (owner of 1 anna 6 pies share) was on the 11th March 1895, by Khetramani Debi (owner of 1 anna 6 pies share) on the 10th April 1895, by Ram Sankar and Ram Bishnu Laiks (owners of 1 anna 6 pies share) on the 9th May 1895, by Kristodhan and Sudhakrishna Laiks (owners of 6 annas share) on the 13th May 1895, by Guru Prasanna Chakraburty (owner of 2 annas share) on the 19th January 1897, and by Bimala Sankar, Gouri Sankar and Durga Sankar Laiks (owners of 1 anna 6 pies share) on the 27th April 1897. Khetramani's daughters executed a further lease on her death on the 30th January 1899, evidently as there was some question as to whether Khetramani had only a widow's interest in the property or not.

Khudiram Chakraburty did not execute a lease in respect of his 2 annas share. Radharaman Ghose thereupon instituted Suit No. 114 of 1897 against Khudiram Chakraburty for specific performance of an alleged contract for granting a lease in respect of his share. This suit was instituted on the 24th March 1897 and it appears that the map prepared by the Amin Madhu Sudhan Dutt was filed with the plaint in this suit. The suit, however, was dismissed on compromise on the 1st February 1900, Khudiram Chakraburty having on the day before executed a lease in favour of Radharam Ghose and his co-sharers on lines similar to the leases executed by the other co-sharers.

On the 5th February 1901 the Nandi Coal Association, which is a firm at present constituted by the Defendants Nos. 1 to 6 in this suit, and at that time was composed of Radharaman Ghose and the predecessors of the Defendants Nos. 2 to 6, commenced an action for damages for underground trespass alleged to have been committed in respect of lands acquired as aforesaid by Radharaman Ghose and his co-sharers and for other consequential reliefs against a Company known as the Nandi Coal Company, Limited. This suit was Suit No. 37 of 1901. In this suit a pleader named Babu Rakhal Chandra Das, who was deputed to ascertain the boundaries of the lands of the Nandi Coal Association and of the Nandi Coal Company, Limited, surveyed the lands, prepared a map and field book and also submitted a report. With the result of this suit we are not concerned here.

In April 1901 the plaintiff company instituted two suits being Nos. 173 and 174 of 1901, the former against the Nandi Coal Company and the patnidars and the latter against the Defendants Nos. 1 to 6 in this suit or their predecessors as well as the patnidars, on the basis of a clause in the amalnamah, dated the 6th August 1891, which provided that if any land other than the aforesaid 500 bighas of land was wanted by anybody the syndicate would have a preferential right to obtain settlement thereof if they agreed to pay the rent offered by such other person and upon the allegation that the patnidars had granted settlement to the Nandi Coal Company and to the Defendants in the present suit or their predecessors in respect of the lands of those two suits in contravention of the condition embodied in the aforesaid clause. Suit No. 173 ended in a compromise, the plaintiff company giving up their right of pre-emption under the amalnamah, and Suit No. 174 was dismissed, the plaintiff company having withdrawn their claim. Some controversy has arisen as to the exact circumstances connected with the withdrawal of the claim as the predecessors of the Defendants Nos. 1 to 6 appear to have been ordered to pay the costs of the patnidars in the suit but I do not think it matters much, for, so far as our present purposes are concerned it may be taken that the claim of the plaintiff company was dismissed, no permission having been granted to them to institute a fresh suit on the same cause of action.

It appears, however, that in 1901 Mr. Mitchell, the then manager of the plaintiff company, obtained leases from some, if not all, of the co-sharers of the patni in respect of the whole mouzah Rajpur Nandi with the exception of the lands which had been already let out to the plaintiff company, the lands in respect of which Radharaman Ghose and his co-sharers had obtained leases and some other lands. On the 28th August 1917 the Maharajadhiraj Bahadur of Burdwan granted a lease of underground rights in all coal and fireclay in the entire mouzah Rajpur Nandi, except in such portion of the mouzah as was in the possession of the Nandi Coal Association. The respondents Messrs. Andrew Yule & Co., it should be stated, are the managing agents of the plaintiff company.

The present suit was instituted by the plaintiff company on the 22nd September 1919 against the defendants, who, as I have said, constitute a firm carrying on business in coal under the name and style of the Nandi Coal Association. The plaintiffs' allegation, shortly stated, was that the defendants, taking advantage of the fact that their lands lay contiguous to those of the plaintiffs, secretly, fraudulently and furtively trespassed into the plaintiffs' underground land and extracted a large quantity of coal therefrom; that the Defendants manipulated their trespass in such a way that it was not perceptible from outside and the plaintiff company remained unaware of the same until only about six months before the suit. In the written statement originally filed by the defendants various defences were taken, amongst which may be mentioned the plea of limitation, the plea that the underground land from which coal was taken lay within the defendants' title and not within the leases under which the plaintiff company claim, the plea that in any event the Defendants' title should prevail and other objections dealing with the question of the damages claimed. Two other facts need be mentioned here. The defendant No. 1, Radharaman Ghose, died after the written statement was filed as aforesaid; and on his death his son Panna Lal Ghose was substituted in his place and he filed an additional written statement on the 8th December 1921 to which reference will have to be made hereafter. Thereafter, on the 17th January 1922, on the application of the plaintiffs Messrs. Andrew Yule & Co., who, as I have said, are the managing agents of the plaintiff company, were added as the Defendant No. 7 and they filed a written statement on the 16th February 1922.

The learned Subordinate Judge granted the plaintiffs a decree for Rs. 56,018 as damages for the coal extracted by the defendants and Rs. 18,223 as costs for constructing an artificial barrier which in his opinion was necessary to ensure the safety of the plaintiffs' mines, the same having been endangered by the extraction of coal by the Defendants Nos. 1 to 6; the said amount of Rs. 74,241, together with interest and cost was decreed against the Defendants Nos. 1 to 6 to the extent of the assets of the deceased partners of the defendant firm, namely, the Nandi

Coal Association in their hands. He also granted the plaintiff company a decree for a permanent injunction restraining the said defendants from committing any further trespass into the plaintiff company's land as demarcated by the civil Court Amin in Suit No. 339 of 1892 and relayed and shown by the commissioner appointed in the present suit in the surface and underground plans prepared by him and he also directed the said plans with the field book, Part I, to form part of the decree. From this decree, the Defendants Nos. 1 to 6 have preferred this appeal and the plaintiff company as well as the Defendant No. 7 have also filed certain cross-objections. (After dealing with certain questions of fact and finding them against the defendants his Lordship proceeded with defendants' plea of adverse possession and continued). As regards adverse possession I am not prepared to hold that assertion in a written statement that one is in possession, in the absence of anything else, can be regarded as actual possession of the land itself which may go to constitute adverse possession.

On the whole I do not find on the record any sufficient materials on which the defendants may be held to have acquired a title by adverse possession to the portion of the underground with which we are concerned in this case. If in point of fact the defendants took coal from any particular spot within this portion, their possession was that of trespassers and must be deemed to have been limited to that particular spot only and no more. (His Lordship then dealt with the plea of defendants that the plaintiff had not acquired any title to the underground and deciding against the defendants proceeded). Before dealing with the other questions that have been raised before us, it would be convenient to deal with two of the matters upon which there has been a good deal of controversy before us. They relate to the time when the acts of trespass took place and the exact character of that trespass. It will be convenient to deal with these two questions at this stage, because on the result of our investigation into these two matters will largely depend the solution of the other problems that have been raised. The learned Subordinate Judge has found as a fact that the coal was extracted before 1915. (After examining the evidence the judgment proceeded). I find myself unable to disagree with the view which the learned Subordinate Judge has taken. In agreement with him I find that it is reasonable to hold that the extraction took place before 1915 or, to put it more accurately, before the end of that year. As regards the time when the acts of trespass began, there is hardly any data to go upon, but I am not prepared to hold that this portion of the underground was worked when Mr. Mitchell was the Receiver. It seems to me altogether improbable that if it was worked at that time, Mr. Mitchell would not have known of it. It is reasonably certain therefore that the acts of trespass commenced some time after the middle of the year 1904.

As regards the character of the trespass in the plaint it was stated that the trespass was committed fraudulently, secretly and furtively and the defendants had carefully manipulated it in such a way as not to be perceptible from outside and had taken systematic steps to conceal the same. Underground trespass must in its very nature be secret and not perceptible from outside; but I have not been able to discover anything either in the evidence or in the circumstances suggesting that there was any fraud on the part of the defendants or that they had taken any steps to conceal their workings. The workings do not seem to have been carried on otherwise than in the usual way in which coal is worked in everywhere. (After dealing with evidence the judgment continued). The trespass was in my opinion inadvertent and I am prepared to go further and say that it was due to want of reasonable care which the circumstances of the case called for, the two premises being contiguous; but it was not intentional, wilful and fraudulent.

The next contention of the appellants relates to the question of limitation. The learned Subordinate Judge has observed in his judgment that this was a question about which he experienced considerable difficulty in coming to a decision which would satisfy both law and equitable considerations. He has held, though not without some diffidence as he has put it in his judgment, that Art. 96 of the Limitation Act applies to the case. As to the applicability of this article he has observed thus in his judgment:

The trespass in the present case appears to me to be due to mistake regarding the actual boundary line between the collieries of the plaintiff company and the defendants. The trespass was due to inadvertence caused by mistake and confusion created by the circumstances already discussed. The Art. 96 relates to relief on the ground of mistake. The wordings are perfectly general and would seem to apply equally to the case of mistake on the part of the plaintiff and the case of mistake on the part of the defendant.

I hold that the plaintiff is entitled to get three years from the time when the mistake became known to the plaintiff. On the evidence I find that the mistake was discovered by the plaintiff in 1919 and not earlier. There might have been some suspicion before, if I should take the letter, Ex. P., to be genuine. But suspicion is not knowledge.

He has also recorded his opinion that if Art. 36 or Art. 39 applied, as appears to have been urged on behalf of the defendants before him, the plaintiff company were not entitled to take advantage of S. 18 of the Limitation Act. He, however, appears to have been of opinion that the Court was not merely a Court of law but of equity and good conscience, and that fraud was not the only circumstance which would prevent the statute running, and that in the present case, in view of certain equitable considerations which arose in favour of the plaintiffs, limitation should run from the date of the plaintiffs' knowledge, even if Art. 36 or Art. 39 applied.

Now, as regards the date of the plaintiffs' knowledge I entirely agree with the learned Subordinate Judge in holding that the plaintiffs were not aware of the trespass before 1919, and in this connexion I am of opinion that although I do not see any good reason to doubt the genuineness of the letter of which Ex. P is the copy, I do not find that the defendants have proved that the said letter ever reached the piaintiffs, a fact which the plaintiffs deny, and I am also unable to hold that there is any such presumption, either in law or in fact that, the said letter must have reached its destination, when in point of fact there is nothing to show that it was ever despatched. I am, however, clearly of opinion that the learned Subordinate Judge was in error in importing considerations of equity in the application of such a statute as the statute of limitation. I agree with him in holding that nothing has been proved which may enable the plaintiff company to avail themselves of the provisions of S. 18 of the Limitation Act. The simple question then remains as to the article to be applied.

To answer this question the main reliefs claimed by the plaintiffs have got to be separated. They may be taken to be three in number: (1) Damages for the coal taken, (2) costs of a barrier, and (3) a permanent injunction restraining the defendants from overstepping the boundary. So far as the last of these reliefs is concerned there is no period of limitation prescribed for it in the Limitation Act, and the claim is within time if there is a cause of action. In view of the facts which have been already found there is no question as to the propriety of the relief that has been granted under this head, and it is not necessary to refer to it again. As regards the damages for the coal taken, the law is well settled in England. The following passage giving a summary of the law may be usefully quoted from Lightwood on the Time Limit on Actions. p. 300:

> Fraud which will exclude the statute is frequently referred to as 'concealed fraud.' It has always been a principle of equity that no length of time is a bar to relief in the case of fraud, in the absence of laches on the part of the person defrauded. There is, therefore, no room for the application of the statute in the case of concealed fraud, so long as the party defrauded remains in ignorance without any fault of his own.

Per Lord James of Hereford in Privy Council in *Bulli Coal Mining Company* v. *Osborne* (1). This, however, does not imply that there must be active concealment. It is no more than an assertion that the fraud, which in its nature is secret, is also undiscovered. Thus in case of fraudulent taking of minerals by underground trespass, it is not necessary, as was suggested in *Dean* v. *Thwaite* (2) and held in *Re: Asthy, etc., Coal Co. and Tyldeshy Coal Company* (3), that steps should have been taken to conceal the fact. And although the mere breaking of bounds into a neighbour's colliery is not to be regarded as fraudulent for the purpose of the statute —as was suggested by Mallins, V. C. in *Ecclesiastical Commissioners* v. *N. E. Raiiway Company* (4), yet the fact that the taking of coal is in pursuance of a wilful trespass and is secret, makes the

(1) [1899] A.C. 351=68 L.J. P.C. 49=80 L.T. 430=15 T.L.R. 257=47 W.R 545.
(2) [1855] 21 Bear 621.
(3) [1899] 80 L.T. 116.
(4) [1877] 4 Ch. D. 845=47 L.J. Ch. 20=36 L.T. 174.

taking fraudulent, and an account will be directed of the whole coal taken and will not be limited to six years; *Bulli Coal Mining Company* v. *Osborne* (1). In cases of inadvertent trespass the account is limited to six years; *Llynvi Company* v. *Brogden* (5), *Hilton* v. *Woods* (6), *Trotter* v. *Maclean* (7) and *Dawes* v. *Bagall* (8).

It is plain, therefore, that under the English Law the limit of time runs from inadvertent wrongful taking and from discovery of fraudulent taking. If this principle be applied to the present case in view of the facts found the statute would begin to run from the last act of trespass, that is to say, from the end of 1915. As regards the article of the Limitation Act applicable to the case I am of opinion that Art. 96 is limited in its application to cases of mistake committed in transactions arising in the course of relations which are more or less contractual in character and the article in any event has no application to a case where, as here, there is no question of mistake on the part of the plaintiff. Art. 36 obviously has no application if any other article applies. One of the other articles to which we were referred was Art. 48 but that also has no application as "conversion" therein referred to in my opinion should be held to mean dishonest conversion ejusdem generis with the words that precede it and the article, in view of the words in the third column, presupposes the existence of the property in the possession of some person. The claim for damages for trespass indicate not merely damages for the unlawful entry but also damages for the mischief which the trespasser commits after entry on the land. The claim in the present case is very much like a claim for damages for crops cut and carried away from the plaintiffs' land and to such a claim it has been held by a Full Bench of this Court that Art. 39 or Art. 49 is applicable: *Mangun Jha* v. *Dolhin Golab Koer* (9).

Three years having already expired from the last act of trespass the claim for damages for the trespass including the price of the claim for the coal taken is barred under the law. As regards the costs for the barrier, if the claim in respect of it is regarded as a claim for damages for the trespass it is equally barred by the three years' rule but it is possible to take the view that the claim might be put forward in the shape of a prayer for a mandatory injunction calling upon the defendants to erect a barrier and in the alternative to the cost thereof. It is therefore necessary to consider the merits of that claim and I propose to do so hereafter.

The next contention of the appellants turns upon the provisions of Act 12 of 1855, and the application of the rule actio personale moritur cum persona. As far as I have been able to appreciate this contention it is this—that Radharaman Ghose and his partners who are now dead are the persons who committed the trespass and as more than a year has elapsed from the date thereof and as they are dead the claim is barred, and the cause of action has not survived as against their heirs and legal representatives. Act 12 of 1855 relates to those wrongs which do not survive to or against the executors, administrators or representatives of a deceased person. S. 89 of the Probate and Administration Act and S. 268 of the Succession Act have been referred to on behalf of the respondents as suggesting that the cause of action in a case like this survives. As regards the question whether the plaintiffs' claim is affected by the rule actio personale moritur cum persona, the following remarks of Bowen, L. J., may be quoted from *Phillips* v. *Homfray* (10):

> The only cases in which apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be these in which property or the proceeds or value of property belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. In such cases, whatever the original form of action, it is in substance brought to recover property or its proceeds or value and by amendment could be made such in form as well as in substance. In such cases the action, though arising out of a wrongful act, does not die with the person. The property or the proceeds or value which in the lifetime of the wrongdoer could have been recovered from him, can be traced after his death to his assets and recaptured by the rightful owner there. But it is not every wrongful act by which a wrongdoer indirectly benefits that

(5) [1870] 11 Eq. 188=40 L.J. Ch. 46=23 L. T. 518=19 W.R. 196.
(6) [1867] 4 Eq. 432=36 L.J. Ch. 941=15 W. R. 1105=16 L.T. 786.
(7) [1879] 13 Ch. D. 574=49 L.J. Ch. 256= 28 W.R. 244=42 L.T. 118.
(8) [1875] 23 W.R. 690.
(9) [1898] 25 Cal. 692=2 C.W.N. 265 (F. B.).
(10) [1883] 24 Ch. D. 439=52 L.J. Ch. 833=32 W.R. 6=49 L.T. 5.

falls under this head, if the benefit does not consist in the acqnisition of property or its proceeds or value. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff and the damages which have been done to him are unliquidated and uncertain, the executors of a wrongdoer cannot be sued merely because it was worth the wrongdoer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby.

As long as the maxim actio personale moritur cum persona is preserved by the law of this country the line drawn is neither inconvenient nor unreasonable. If every wrongful act which was attended consequently and indirectly with advantage to the wrongdoer or his pocket were to warrant an action against executors, it would be impossible to know when executors were liable or not and the maxim would, in fact, become a mere source of litigation. We have not now to consider the policy of the maxim. It is part of the law and while it is so ought not to be frittered away.

So far as the claim for damages for trespass is concerned the estate of the deceased partners must be presumed to have increased the assets of the firm of Nandi Coal Association and benefited the estate of the deceased partners, and the defendants as their heirs and legal representatives are liable to the extent of the assets including the assets of the firm received by them. As regards the claim for the cost of the barrier, if it is regarded as a claim for damages for the negligent manner in which the underground was worked by the deceased partners such indirect benefit as may have accrued by the tortuous act of the deceased partners cannot, on the principle laid down in *Phillips* v. *Homfray* (10), be taken to have increased the assets and if this principle has not been abrogated by the provisions of the Probate and Administration Act and the Succession Act to which reference has been made, it is doubtful if the claim under this head may be enforced against the defendants, such as they are at present. It is not necessary, however, to pursue the matter further because as I have already stated the claim with regard to the barrier may not unreasonably be regarded as one relating to a mandatory injunction and in the alternative for recovery of costs and may be enforced against the defendants if there is a proper foundation for the claim on the facts. (Then his Lordship proceeded to deal with the question of assessment of damages and continued.) The rule however, as to assessment of damages in cases of this description is well settled. In the case of *Livingstone* v. *The Rawyards Coal Co.* (11), it was laid down that the value of the coal taken must be the value of the coal to the person from whom it is taken and at the time it is taken. Lord Hatherley in his judgment in that case said that :

> if a man furtively and in bad faith robs his neighbour of property and because it is underground, is not for sometime detected the Court of equity will punish fraud by fixing the person with the value of the whole of the property which he has furtively taken, and making him no allowance in respect of what he has so done as would have been justly made to him if the parties had been working by agreement or if they had been the one working and the other permitting the working through a mistake.

Further on his Lordship observed thus :

> Each case must stand upon its own particular foundation in that respect ; but regard being had to the rule vigilantibus non dormientibus it requires to be carefully considered in each particular case how far the principle is just which deals with property under such circumstances as property which has been acquired by one person from another without payment and by inadvertence. But when we once arrive at the fact that an inadvertence has been the cause of the misfortune, the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him in specie.

The case of *Livingstone* v. *The Rawyards Coal Company* (11) was a very peculiar case and one singularly free from difficulty, for both the parties there were under a mistake and there was no wilful trespass or wilful taking of the coal and the defendant did not know that what he was taking did not belong to him. For the purpose of allowances to be made, fraudulent, negligent and wilful trespass have often been treated on the same footing and only the cost of bringing to bank is allowed : *Wood* v. *Morewood* (12) ; *Trotter* v. *Maclean* (7) and *Ecclesiastical Commissioners of England* v. *North Eastern Railway Company* (4). In the first of these cases Parke, B, directed the jury that if there was fraud or negligence on the part of the defendants they might give as damages under the count of trover the value of the coals at the time when they first became chattels on the principle laid down in *Martin* v. *Porter* (13), and in the last of the aforesaid cases

(11) [1880] 5 A.C. 25=44 J.P. 392=42 L.T. 334 =28 W.R. 357.
(12) [1841] 3 Q.B. 440n.
(13) [1839] 5 M. & W. 352=2 H. & H. 70.

the same measure of damages was applied though it was a case of inadvertent working. In the present case upon the findings at which I have arrived I am disposed to take the view that there was negligence on the part of the defendants, though they acted honestly. I am therefore of opinion that the severer rule for damages should be applied, namely, that the plaintiffs should be awarded, if their claim is not barred, the market-value of the coal at the pits' mouth less only the cost of bringing the coal to bank and not the cost of hewing, such value to be calculated at the time when the coal was cut and reduced to possession. As the actual dates of such cutting are not ascertainable the plaintiffs in my opinion are entitled to the most advantageous rates between the middle of 1904 and the end of 1915 during which the coal must have been taken by the defendants. The burden being on the defendants to prove what coal was taken at any particular point of time [*Dean* v. *Thwaite* (2)], and all that they have succeeded in proving being that the coal was taken during the above period, this is the proper order to be passed in the circumstances. I am also of opinion that in a case like this the plaintiffs are entitled to interest on the amount of damages which may be awarded on this footing from the beginning of 1916 and calculated at the rate of 6 per cent. per annum. That damages may in the shape of interest be awarded in an action for trespass cannot be disputed and the case, in my opinion, is one in which it should be awarded if the plaintiffs succeeded in recovering any decree for damages at all.

The only other question that remains for consideration is that relating to the cost of the barrier. The claim in this respect may, as I have said, be treated as within time if the prayer be taken as one for a mandatory injunction and in the alternative for recovery of costs. The allegation of the plaintiff company in their plaint upon which this claim is based runs in these words :

> To prevent further and future trespass and to prevent the water and foul gases, if any, coming from the defendants' mines to the plaintiffs' mines it is absolutely necessary to erect barriers at the boundary or at some other convenient place.

The commissioner in his report observed that water was seen to have accumulated here and there in the galleries at certain places and water was also seen leaking out in small quantities at certain other places. Judging from the distance of these places on the Commissioner's underground plan from the working faces of the defendants' working, it is unreasonable to hold the defendants responsible for this leakage. The learned Subordinate Judge has observed thus in his judgment :

> The evidence in this case does not show that there is any present risk of fire, water or foul gas coming to the plaintiffs' colliery from the defendants' colliery even if the plaintiffs by working up to the encroached portion happen to establish connexion between the two mines. I mean that there is no present risk, on the assumption that the defendants will work their colliery properly.

It is not necessary for our present purposes to go so far and enquire what might or might not happen if the plaintiff company establish a connexion between the two mines, but it is, in my opinion, enough that it has been found by the learned Judge—and this is a finding with which I entirely agree as being the only reasonable finding on the evidence such as it is on the record—that at present there is no risk of fire, water or foul gas coming to the plaintiffs' colliery from the defendants' colliery. This finding, in my opinion, is enough to put the plaintiff company out of Court in so far as their claim for the costs of the barrier is concerned. It is urged on behalf of the respondents that the arrangement between the defendants and the patnidars was that a margin was to be left of 10 bighas of land between the plaintiffs' lands and the defendants' lands but I am of opinion that the plaintiffs are not entitled to take advantage of that arrangement in the absence of any stipulation on the part of the patnidars in the leases granted to the syndicate, that such a margin would be left. It is true that in the absence of any regulation making the keeping of a barrier as between two neighbouring mines compulsory, the plaintiffs are entitled to work right up to the limits of their lands. It is also true that rent was not to be paid for the 10 bighas of margin by the defendants and if the defendants worked in that region they might incur liability to the patnidar for use and occupation or perhaps for damages. But it was to the patnidars alone and not to the plaintiff that the defendants were answerable for the use of the margin.

In my opinion the plaintiffs, if they want to ensure the safety of their own mine, are bound to look to themselves for leaving a barrier of reasonable magnitude at the extremities. That means that they lose the quantity of coal which they cannot take if a barrier is to be left. They may still keep such a barrier if they like out of the coal that is left between the two mines. The quantity of coal they lose, if they keep such a barrier, is evidently much less than what they would have to lose if they had to keep a barrier on the east and south of their boundary at the encroached portion the difference being that between the lengths of two sides and the hypotenuse of a right-angled triangle.

I entirely dissent from the view of the learned Subordinate Judge that the defendants are liable to pay the costs of a barrier, because, as the learned Judge put it in his judgment, he cannot ask the plaintiff to rely on the good sense and competency of the defendants in the further working of their mines. I may state here also that if the plaintiffs are entitled to have a barrier the cost awarded by the learned Judge on that head appears to be reasonable: only the form of the decree should be altered by granting a mandatory injunction on the defendants, and providing further that if they fail to carry it out then the plaintiffs would be entitled to recover the costs aforesaid on erecting the barrier in question.

The result then is that in my judgment, if I could hold that the plaintiffs' claim for damages was not barred by limitation I would have set aside the decree of the learned Subordinate Judge and ordered a decree to be entered in favour of the plaintiffs granting a permanent injunction restraining the Defendants Nos. 1 to 6 from committing any further trespass underground into the plaintiff company's land to the west of and beyond the black line of the Amin's map in Suit No. 339 of 1892 as relaid in the surface and underground plans prepared by the commissioner in the present suit and declaring that the said plans and field book, Part I, do form a part of the decree, and would have directed a further investigation with liberty to the parties to adduce such evidence as they may desire, in order to ascertain the most advantageous market-value of coal at the pits' mouth between the years 1903 and 1915 and the cost of carriage of the said coal to the bank at the most advantageous rate to the plaintiff and then to award a decree on the lines indicated above. I would have dismissed the plaintiffs' claim for the costs of a barrier and decreed the appeal and the plaintiffs' cross-appeal with costs proportionate to the respective successes of the parties in this Court and also in the Court below.

In view, however, of the opinion I have formed on the question of limitation, I do not see my way to do anything else than set aside the decree of the learned Subordinate Judge except as to the permanent injunction that he has granted and dismiss the rest of the plaintiffs' suit. Having regard to the fact that the defendants are wrongdoers whom the law, as it stands, is unable to reach, I would not allow them any costs in this Court and would allow the decree as to costs passed by the Court below to stand as the plaintiffs have succeeded in their main contention, namely, that as regards the position of the eastern boundary of their land both in that Court and here. The plaintiffs' cross-appeal should also be dismissed, but without any order as to costs; and the cross-appeal of the Defendant No. 7 which relates to costs not awarded to him by the Court below is similarly dismissed.

**Greaves, J.**—I agree.

*Appeal partly allowed.*

---

## A. I. R, 1927 Calcutta 126

GREAVES AND MUKERJI, JJ.

*Iswar Chandra Agradani* and *others*—Defendants—Appellants.

v.

*Jogendra Lal Roy*—Plaintiff—Respondent.

Appeal No. 235 of 1924, Decided on 11th May 1926, from the appellate decree of the Addl. Dist.-J., Tipperah, D/- 11th December 1923.

(*a*) *Civil P. C., O. 41, R. 27—Mere non-recording of reasons for receiving additional evidence is nothing but a mere irregularity.*

If a proper case is made out for the reception of additional evidence, and if there is no likeli-

hood of any prejudice being caused to the party against whom such evidence is sought to be used, the mere fact that reasons have not been recorded by the Court which received that evidence would not amount to an illegality but would amount only to an irregularity : 24 *Cal. L. J.* 457, *Expl.*, 49 *I. C.* 510, *Dist.* ; 12 *Cal.* 37, *Rel. on.* [P. 128, C. 2]

(b) *Bengal Tenancy Act, Ch.* 10—*Situation of land in municipal area is not sufficient to make Ch.* 10 *inapplicable.*

In the absence of any notification, as is contemplated by S. I, the mere fact that the land is situate within Municipal area is not sufficient for holding that Ch. 10 does not apply to it. [P. 129, C. 1]

(c) *Evidence Act, S.* 101—*Onus—Value of.*

The question of onus is not very material after the whole of the evidence has been adduced by the parties and gone into in the case. [P. 130, C. 1]

*Gopal Chandra Das* and *Bhuban Mohan Saha*—for Appellants.

*Gunada Charan Sen* and *Chandra Sekhar Sen* for *Bhagirath Chandra Das* —for Respondent.

**Mukerji, J.**—This appeal arises out of suit instituted by the plaintiff for declaration of his title by purchase of a homestead and for recovery of possession thereof by ejecting the defendants who according to the plaintiff are tenants-at-will with respect to the homestead. The Court of first instance declared the plaintiff's title and gave him a decree declaring his right to joint possession with the defendants to the extent of 8-annas share. The plaintiff preferred an appeal and the learned Additional District Judge by his decree dated the 11th December 1923, decreed the plaintiff's suit in full. The defendants have thereupon preferred this appeal.

The plaintiff's case shortly stated was that in the subject-matter of this suit, namely, the homestead, one Kala Chand had nishkar right. Kala Chand's son Kali Kumar mortgaged the said homestead to Kula Chandra Bisharad. The latter sued on the mortgage, obtained a decree and in execution of it he put up the homestead to sale. One Nanda Lal Roy purchased the homestead at the auction-sale and from Nanda Lal the plaintiff purchased the same in July 1922. The plaintiff's case is that by this purchase he acquired 16-annas nishkar right to this homestead and that the Defendant No. 1 was a tenant-at-will in respect of this homestead paying a rent of Rs. 2 per annum. The plaintiff instituted the suit to eject the Defendant No. 1 and to recover khas possession of the homestead. The defence of the Defendant No. 1 was that he was not a tenant-at-will in respect of the homestead but that his father, one Amar Chand who was a cousin of the aforesaid Kula Chandra Bisharad, was entitled to 8 annas nishkar right in the homestead. The case for the said defendant was that the homestead was made a gift of to Kula Chandra and Amar Chand on the occasion of the Sradh of a deceased person and that, therefore, they were entitled each to an eight-annas share therein. As I have already stated the defendants' case was accepted by the Court of first instance and the learned Judge on appeal has given the plaintiff a decree in full.

Four grounds have been urged on behalf of the appellants in support of this appeal. The first ground relates to the question of some additional evidence that was received by the learned Judge on appeal. The additional evidence consisted of certified copies of an award and a map made in connexion with some land acquisition proceeding. The land acquisition proceeding referred to a plot of land bearing No. 897, the subject-matter of the present suit being Plot No. 772. Both these plots, according to the cases of both parties were made a gift of at the time of the Sradh to which I have referred and this additional evidence was adduced at the appellate stage of the case for the purpose of showing that in respect of this plot, namely, Plot No. 897, the compensation money awarded in the land acquisition proceeding was appropriated by the plaintiff and the defendant in unequal shares, the plaintiff taking the major part of it and the defendant a very small portion, thus suggesting that in respect of the said plot the defendant was not an 8-annas co-sharer of the plaintiff and the plaintiffs' case, namely, that he was entitled to 16-annas right and the Defendant No. 1 was only a tenant was true.

What the exact circumstances were under which this additional evidence was received by the learned Judge are not deposed to in any affidavit filed on behalf of the appellants. The appellants ask us to speculate and infer that there was some irregularity in connexion with the reception of this additional evidence.

What appears from the record, however, is that, on the 10th December 1923, during the argument or at the time when the arguments were going on, this additional evidence was filed on behalf of the plaintiff. The documents so tendered in evidence were reported to in the course of the arguments and they have been also referred to in the judgment which the learned Judge passed on the 11th December 1923. The documents, however, were not then marked as exhibits in the case and some days after the judgment was pronounced, namely, on the 25th February, 1924, a petition was put in on behalf of the plaintiff in which it was stated that the documents had been filed as aforesaid and referred to in the course of the argument, but that through oversight no exhibit mark had been put on them ; and upon receipt of that petition the learned Judge seems to have called for a report from the peshkar, and on receiving the peshkar's report he made the order that the documents should be marked as exhibits in the case.

Now the appellant's first objection is that the documents should not have been received in the way that they have been by the learned Judge. As far as it can be made out from the record it is clear that it was not after the arguments were over, as has been suggested on behalf of the appellants, that the documents were filed in Court, but that it was during the arguments that they were so filed and both sides had opportunities to refer to those documents. Under these circumstances we have got to see whether the reasons which were given by the party producing the documents were sufficient or not for the reception of the said documents as additional evidence. In the petition which was filed along with these documents it is stated that the documents came into existence after the disposal of the suit in the Court of first instance and that consequently they could not possibly file them when the suit was pending in that Court. These documents are admittedly relevant for the purpose of the issues which arise in the suit, and there can be no question that the learned Judge was right in allowing the appellant before him an opportunity of producing those documents provided the other side, namely, the respondents before him, were not prejudiced in any way by the adoption of this course. It has not been shown to us by the appellants before us that there was prejudice caused to them by the reception of those documents. What has been urged before us is only this : that the reasons which are necessary to be recorded under the provisions of O. 41, R. 27, Civil P. C. for the reception of additional evidence were not recorded by the learned Judge at the time when the documents were admitted.

It has been urged that the omission to record these reasons is not merely an irregularity but an illegality which vitiated the reception of the said evidence. The point came up for consideration before this Court in a case reported as *Gopal Singh* v. *Jhakri Rai* (1) and it was there laid down that the provisions of S. 568 of Act 14 of 1882, which corresponds to the provisions of O. 41, R. 27 of the present Code as to appellate Court recording its reasons for admitting additional evidence, is directory merely and not imperative. There can be no doubt, as has been laid down in a series of decisions, that the powers conferred by the said rule should be very sparingly used. But when a proper case is made out for reception of additional evidence, I am of opinion, the mere non-recording of reasons for receiving that evidence amounts to nothing but a mere irregularity. In support of the position taken up by the appellants in connexion with this contention reliance has been placed upon the decision of this Court in the case of *Gajadhar Prosad* v. *Lohia* (2).

That was a case where additional evidence was received after the arguments were over and when the party against whom that evidence was used had no opportunity of rebutting the same. In that case one of the grounds upon which the reception of that evidence was condemned by this Court was that no reasons had been recorded by the learned Judge who admitted that evidence. That decision, however, is not a clear authority upon the question as to whether the mere omission to record the reasons would amount to such an illegality as would vitiate the reception of that evidence, because the learned Chief Justice expressly stated in his judgment in that case that he did not wish to rest

(1) [1886] 12 Cal. 37.
(2) [1916] 24 C. L. J. 457=35 I. C. 698.

his judgment merely upon the ground that no reasons had been recorded by the Court which received the additional evidence. Another decision of this Court which is not reported has also been referred to before us and that is the decision in *Mohesh Chandra Shaw* v. *Bepin Behari Khan* (3). It does not appear, however, that the decision in the case of *Gopal Singh* v. *Jhakri Rai* (1), to which I have referred, was brought to the notice of the learned Judges who decided that case. I am clearly of opinion that if a proper case is made out for the reception of additional evidence, and if there is no likelihood of any prejudice being caused to the party against whom such evidence is sought to be used the mere fact that reasons have not been recorded by the Court which received that evidence would not amount to an illegality but would amount only to an irregularity.

The second ground urged on behalf of the appellants is that the learned Judge was in error in relying upon an entry in the Record of Rights as raising a presumption in favour of the plaintiff that he had 16 annas nishkar right in the land and that the Defendant No. 1 was a tenant under him at a rent of Rs. 2. The objection that is taken on behalf of the appellants in this respect is that the Plot No. 772 of the Record of Rights which is the subject-matter of this suit is situate within the Municipal limits of the town of Brahmanberiah and that the Bengal Tenancy Act does not apply to the said area and that, therefore, no presumption attaches to the entry in the Record of Rights which has not obviously been made under the provisions of Ch. 10 of the Bengal Tenancy Act. As regards this contention it does not appear that there has been any notification such as is contemplated by S. 1 of the Act, and in the absence of any such notification the mere fact that the land is situate within the Municipal area is not sufficient to enable us to hold that Ch. 10 of the Bengal Tenancy Act does not apply to it.

In the course of the argument it was suggested on behalf of the appellants that the provisions of that Chapter do not also apply inasmuch as the land in suit is homestead land. The answer of the respondent to this contention, however, is that this objection was not taken in any of the Courts below, nor indeed has it been taken in the grounds of appeal before this Court, and if any such objection had been taken in proper form it would perhaps have been open to the respondent to prove by placing proper materials before the Court that although the subject-matter of the suit is homestead land at the present moment at some time or other previously it partook of the character or formed a part of an agricultural holding and that, therefore, the provisions of Ch. 10 applied thereto. There is considerable substance in the objection which has been taken on behalf of the respondent as there is no indication anywhere in the record suggesting that it was ever objected to on behalf of the appellants at any stage of the proceedings that by reason of the fact that the plot in dispute is homestead land the provisions of that chapter did not apply.

If any such objection had been taken it would have been necessary for us to consider whether in view of the cases of this Court, namely, *Sashi Kanta Acharjya* v. *Sandhya Moni Dasya* (4) and *Chand Mia Munshi* v. *Tukamia* (5), in which it has been laid down that although the provisions of Ch. 10 of the Bengal Tenancy Act may not be applicable to a certain land, the presumption arising under S. 103 B of the Bengal Tenancy Act applies to entries made in respect thereto, or whether in view of the decision in the case of *Ramdas Mokhopadya* v. *Bipra Das Pal Choudhury* (6), it should not be held that such entry is altogether inadmissible in evidence. The question, however, does not arise in the present case for the reasons that I have given.

The next contention urged on behalf of the appellants is to the effect that the learned Judge has wrongly placed the onus of proof on the defendants and that he should have held that inasmuch as it was the admitted case of both parties that gifts made at the time of Sradha were taken in equal shares jointly by the plaintiff and Defendant No. 1 and because it has been found by the Court of first instance that the land in suit had been made a gift of in equal shares to

(3) [1919] 49 I. C. 510.

(4) A. I. R. 1921 Cal. 236.

(5) A. I. R. 1924 Cal. 667.

(6) 27 Ind. Cas. 446=19 C. W. N. 35.

the parties, the onus was upon the plaintiff to show that in this particular instance he was entitled to the sixteen annas of the nishkar right in the land. As a proposition of law, no doubt, it is perfectly correct, but I do not see that the learned Judge has made any mistake in the way in which he has dealt with the question. The question of onus is not very material after the whole of the evidence has been adduced by the parties and gone into in the case. The learned Judge, it appears, was unable to place much reliance upon the oral testimony which had been adduced on behalf of the parties. He relied more upon the subsequent conduct of the parties in relation to the land in suit and on a consideration of the evidence relating to such conduct which he has set out in great detail in his judgment he has come to the conclusion that the plaintiff had received a gift of the sixteen annas nishkar right in respect of this land. This is a finding which I do not think it is possible for the appellants to challenge in second appeal.

The last ground urged on behalf of the appellants is that the learned Judge was wrong in declaring the plaintiffs' nishkar right to the land inasmuch as the sale certificate shows that what he purchased was merely a jote right thereto, and if it was a raiyati right which was purchased by the plaintiff the fact that Defendant No. 1 had in a mortgage executed by him in favour of Kula Chandra stated that he was the holder of a jote right would not show that he was holding rights subordinate to the plaintiff in respect of this land. It is true that there is some confusion in the sale certificate as to the description of the exact right which the plaintiff had purchased. But reading the sale certificate in conjunction with the mortgage and the mortgage-decree it cannot be said that what has been found by the learned Judge is altogether unfounded. Besides, the learned Judge has relied upon the mortgage which was executed by the father of the Defendant No. 1 in favour of Kula Chandra as evidence showing that the father of the Defendant No. 1 admitted therein that he was a tenant under Kali Kumar. This admission the learned Judge has relied upon, and he has also held that it was not due to mistake. If this admission is relied on it is clear that the defendant was in possession of the homestead not as co-sharer of Kula Chandra but as tenant paying rent to him. In any case it having been found that Defendant No. 1 was a tenant at will which was the case set up on behalf of the plaintiff there is no reason to interfere at his instance with the decree declaring the plaintiff's title which has been passed in the case.

I am, therefore, of opinion that all the grounds that have been urged in support of this appeal fail and the appeal should be dismissed with costs.

**Greaves, J.**—I agree.

*Appeal dismissed.*

---

## A. I. R 1927 Calcutta 130

SUHRAWARDY AND M. N. MUKERJI, JJ.

*Debendra Nath Mitra Majumdar*—Defendant—Appellant.

v.

*Sheik Sefatulla* — Plaintiff—Respondent.

Appeal No. 2524 of 1923, Decided on 5th February 1926, from the appellate decree of the Sub-J., Burdwan, D/- 6th August 1923.

(a) *Civil P. C., S. 92—Public wakf—Any person whose personal rights are infringed can sue in his individual capacity in respect of the wakf.*

The question whether a person interested in a public mosque simply as a person who has a right to worship therein, can institute a suit in respect of it in his individual capicity depends on the determination of the question in each particular case as to whether the plaintiff has or has not a cause of action which would entitle him to the relief which he claims. The question as to whether the suit will be maintainable at the instance of a particular plaintiff depends not upon any inherent right which one may have to worship in a mosque or a temple, upon the fact of his living in the vicinity or his being a mere resident of the district. Every Mahomedan has a right apart from his right as member of the community to worship in a public mosque, but on that does not depend his right to maintain any and every suit in connexion with it. If there is an individual right in the plaintiff which has been violated, or if some injury to that right is threatened, the suit will lie: (*Case law fully discussed*). P. 135, C. 1]

(b) *Mahomedan Law—Wakf—Professing to act as mutwalli gives no right to sue in respect of the wakf properties.*

The mere fact that a man professes to act as Mutwalli does not entitle him to institute a suit for recovering possession of wakf proper-

ties from one who may have wrongfully acquired possession of it: 19 *Cal.* 203 and 24 *Bom.* 170, *Dist.* [P. 135, C. 2]

(c) *Mohamedan Law—Wakf — Mutwallishi p not hereditary — Person holding office if not ousted within six years gets indefeasible title— Limitation Act, Art.* 120.

The office of Mutwalliship not being a hereditary one, a suit to oust a person from his office as Mutwalli is regulated by Art. 120 of the Act, and if no suit has been brought to oust him by reason of his having held the office for over six years he would acquire an indefeasible right to hold the office of Mutwalli and would acquire a complete title for the purposes of litigation or anything connected with the endowment: 19 *Cal.* 776; 26 *Mad.* 113 and 37 *Cal.* 263, *Rel. on.* [P. 135, C. 2, P. 136, C. 1]

(d) *Mohamedan Law — Wakf — Mutwalli— Right to hold wakf properties.*

To hold the properties of the wakf is a right appurtenant to the office as Mutwalli: 27 *I. A.* 60, *Foll.* [P. 136, C. 1]

*Jadu Nath Kanjilal* and *Bijan Kumar Mukherjee*—for Appellant.

*Nuruddin Ahmed* and *Nurul Huq Chowdhury*—for Respondent.

**Mukerji, J.**—The plaintiff obtained in the Court of first instance a decree declaring his title as Mutwalli to the lands in suit and entitling him to recover possession thereof from the defendant. That decree has been affirmed on appeal by the lower appellate Court and the defendant has preferred this second appeal.

The history of the wakf to which the suit relates is important. One Khairat Ali in 1234 made a wakf in respect of a third share of his properties, and gave the remaining two-thirds share to his two grandsons Dadali and Mohamedali in equal shares. The grandsons partitioned the properties between themselves, and the property now in suit fell to the share of Dadali. The latter, by a deed dated 1265, made a wakf in respect of his properties and appointed his two wives Akbarannesa and Nujamannesa as Mutwallis. The two wives acted as Mutwallis till the death of one of them, viz., of Akbarannesa, when the other viz., Nujamannesa became the sole Mutwalli. She, in 1298 and before her death, appointed one Kudrutulla, the father of the present plaintiff, as Mutwalli of the wakf estate. Kudrutulla managed the wakf till his death in 1312. The plaintiff's case is that he was appointed Mutwalli by his father and he was acting as Mutwalli since his father's death, when a dispute arose between him and his brother Nur Mohamed which eventually onded in a compromise by which some of the wakf properties were taken by one brother and some by the other, and they both managed the wakf estate as such. In 1320 Nur Mohamed died and thereafter the plaintiff again became the sole Mutwalli. The defendant had purchased the property in suit from Nur Mohamed and the plaintiff's case is that the sale was void as not having been made for legal necessity. The two main prayers in the plaint were as follows:

(Ka) that it be declared that the properties in the schedule appertain to the wakf of Khairatali and Dadali; and (Kha) that the plaintiff be awarded a decree for possession it being declared that the defendant has acquired no title by his purchase. The other prayers were for subsidiary reliefs.

The suit, as I have stated, has been decreed by the Courts below in the form stated above. The findings, which cannot be disputed and indeed have not been disputed at the present stage are that the wakf was a valid one: that the property is wakf property and that there was no legal necessity for the sale. The ground upon which the validity of the decree has been challenged is that the plaintiff has not proved his title as Mutwalli, and therefore is not entitled to the decree.

The Court of appeal below has rested its decree upon the ground that the plaintiff was the de facto Mutwalli of the wakf properties since the death of Kudrutulla, that the plaintiff also acted as Mutwalli during the period that management was in the hands of Nur Mohamed, and that after Nur Mohamed's death Nur Mohamed's heirs allowed a decree to be passed in plaintiff's favour declaring his right to the Mutwallishi p.

The learned vakil for the respondent has sought to justify the decree upon a further ground, viz., that as a Mahomedan his client can maintain a suit like the present one.

It will be convenient to deal with the second ground first. A very interesting discussion of the question involved in this contention will be found in Mr. Ameer Ali's Mahomedan Law, Vol. I, Ch. 19, headed Rules of Procedure. So far as this Court is concerned it was held in effect in the case of *Jan Ali* v. *Ram-*

*Nath Mundul* (1) that the mosques, etc., to which the provisions of Act 20 of 1863 apply are not any mosques, etc., but any mosques, etc., for the support of which endowments have been made by the Government or private individuals. In that suit two of the worshippers at a certain mosque instituted a suit after having obtained the sanction of the Advocate-General under S. 539 of the Civil P. C. of 1882 against the Mutwalli of the mosque and two other persons to whom the Mutwalli had mortgaged part of the endowed property, and one of the mortgagees had sold some of the wakf property in execution of a decree which he had obtained upon his mortgage and the property had been purchased by the other mortgagee. The plaintiffs in the suit prayed that the property purchased might be declared wakf, that the sale in execution might be declared to be invalid, that a Mutwalli might be appointed by the Court and that the costs of doing the acts of the wakf might be defrayed from the profits of the property belonging to the endowment.

It was held by this Court that so far as regards such portion of the prayer as fell within the provisions of S. 539 of the Code the plaintiffs were not entitled to sue as they were not "persons having a direct interest in the trust"—that being the language of the section as it stood at the time—within the meaning of the section, and that the suit should have been instituted under S. 14 of Act 20 of 1863 after sanction had been obtained under S. 18; and as regards the relief asked for in the other prayers the plaintiffs might possibly have obtained leave to sue under S. 30 of the Code on behalf of themselves and other persons attending the mosque, and they not having obtained such leave the suit was not maintainable for those other prayers. It will be observed that in that case the interest which the plaintiffs alleged they had in the endowment was an interest based on their being followers of the Moslem religion, living in the vicinity of the mosque and being in the habit of attending the musjid: see the report at p. 41.

In the case of *Lutifunnissa Bibi* v. *Nazirun Bibi* (2) the plaintiff sued to recover possession as Mutwalli of certain lands alleging that they had been dedicated as wakf for certain charitable and religious purposes. She based her right to sue upon the fact that her deceased husband had been Mutwalli and she prayed that the property in suit might be declared wakf and that certain alienations made by her stepson since her husband's death might be set aside. It was held in that case that even assuming that the endowment alleged was neither a public charity within the meaning of S. 539 of the Civil P. C. nor a religious endowment to which Act 20 of 1863 applied, the plaintiff was not entitled to sue alone as it was clear upon the face of the plaint that others were interested in the subject-matter of the suit and therefore she could only sue on behalf of all who were so interested having first obtained the leave of the Court and having otherwise complied with the provisions of S. 30 of the Code. A dissentient note was struck in the case of *Mohiuddin* v. *Sayiduddin* (3) in which case the plaintiff charged a Mutwalli and Sajjudanashin with various breaches of trust and for the removal of the Mutwalli and the manager appointed by the Mutwalli, and for the appointment of one of the plaintiffs as Mutwalli and for the framing of a scheme. It was a suit instituted with the consent of the Advocate-General. In that case the learned Judges observed thus:

> Nor do we think that the present suit is bad on the ground that the provision of S. 30 of the Civil P. C., has not been complied with. Since the judgment in the case of *Jan Ali* v. *Ram Nath Mundal* (1) there has been a material alteration effected in the section and we think that the reasoning in the Allahabad cases: *Zafaryab Ali* v. *Bakhtawar Singh* (4) and *Jewahra* v. *Akbar Hussain* (5), showing that the right of worship of each worshipper in a Mahomedan mosque or religious endowment is an independent right wholly irrespective of the other worshippers is correct.

In a recent decision of this Court in the case of *Ashraf Ali* v. *Mohammad Nurojjoma* (6) which was a suit instituted in accordance with the provisions of O. 1, R. 8 of the Civil Procedure Code by two worshippers of a mosque for themselves and as representing other worshippers in the locality for a declaration that a permanent lease granted by the Mutwalli was void and inoperative, it was held that such a suit was maintainable.

(1) [1881] 8 Cal. 32=9 C. L. R. 433.
(2) [1884] 11 Cal. 33.
(3) [1893] 20 Cal. 810.
(4) [1883] 5 All. 497=(1883) A. W. N. 91.
(5) [1884] 7 All. 178=(1884) A. W. N. 324.
(6) [1918] 23 C. W. N. 115=49 I. C. 355.

In that case Shamsul Huda, J. (N. Chatterjea concurring) after referring to certain authorities observed thus:

It is clear from these texts that the worshippers living in the vicinity of a mosque have rights to it over and above those possessed by the Mahomedan public and have a more direct interest in its maintenance and in the proper administration of the properties endowed for its benefit. In Mahomedan Law there is definite recognition in many matters of what is termed Huq-ul-jiram or the rights of neighbours. The competency of a Mahomedan worshipper to enforce his individual rights in respect of a mosque and the trusts relating thereto has been recognized in numerous cases and I need only refer to the decision of Keramat Hossain and Chamber, JJ., in *Dasondhay* v. *Muhammad Abu Nasar* (7).

These observations, though made in a case in which the suit had been instituted under the provisions of O. 1, R. 8 of the Civil P. C., in so far as they refer to the individual rights of a Mahomedan worshipper in a mosque appear to be in conflict with the view expressed by the learned Judges in the case of *Jan Ali* v. *Ram Nath Mundul* (1). In the case of *Zafaryab Ali* v. *Bakhtawar Singh* (4) it was held in effect that a suit to set aside a mortgage of endowed property belonging to a mosque, the decree enforcing the mortgage, and sale of the mortgaged property—a Takia known by the name of Najut Ali Shah—in execution of that decree and for the demolition of buildings erected by the purchaser was maintainable by Mahomedans entitled to frequent the mosque and to use the other religious buildings connected with the endowment.

In the case of *Jawahra* v. *Akbar Husain* (5) a Full Bench of the Allahabad High Court laid down that every Mahomedan who has a right to use a mosque for the purpose of devotion is entitled to exercise such right without hindrance and is competent to maintain a suit against anyone who interferes with its exercise, irrespective of the provisions of Ss. 30 and 539 of the Civil P. C. The plaint in that case alleged that there was an old dilapidated mosque intended for Mahomedan worship which was protected and looked after by the plaintiff and other Mahomedans of the village that the mosque and its appurtenances had been excluded from the partition of the village being wakf property, that the plaintiff wanted to repair the mosque, but the defendants made certain structures on the land appurtenant thereto, committed acts of trespass in connexion therewith and would not pay any heed to the plaintiff's remonstrance. Upon these allegations the plaintiff prayed for a declaration of his right to repair the mosque by removal of the defendants' interference and the demolition of the compound and removal of the mill, the thatches and the straw stored in the mosque. Petheram, C. J., in his judgment observed that a mosque is not the subject of human ownership but all the members of the Mahomedan community are entitled to use it for the purposes of devotion whenever it was open, that the right which they had in this respect is not a joint right but a right which belongs to many people, and S. 30 did not apply to such a case but would apply to a case in which many persons are jointly interested in obtaining relief. He held that the suit by the plaintiff was maintainable as it was clear that the individual right of the plaintiff was violated. Mahmud, J., in the same case remarked:

That section (meaning S. 30) applies only to cases where no individual right is interfered with but here we have the case of a mosque in a small village and one of the worshippers in that mosque is obstructed in his use of it for the purposes of devotion. He had a private right and it was violated.

The learned Judge dissented from the remarks made in the case of *Jan Ali* v *Ram Nath Mundul* (1) holding that it is an undoubted principle of Mahomedan Law that the persons who have the most direct interest in a mosque are the worshippers who are entitled and accustomed to use it. In the case of *Wajib Ali Shah* v. *Dianat-ul-lah Beg* (8) a Mahomedan had brought a suit against a person in possession of certain property for a declaration that the property was wakf, but did not allege himself to be interested in the property further or otherwise than as being a Mahomedan and he was not a Mahomedan resident of the district in which the wakf was situate. It was a suit under S. 42 of the Specific Relief Act. The reasons upon which the suit was held not maintainable were that the plaintiff had no legal character which was denied by anyone, as he only asserted his character as a Mahomedan which was not questioned by any body, and he did not for himself assert right as to any

(7) [1911] 33 All. 660=11 I. C. 36=8 A. L. J. 710.

(8) [1885] 8 All. 31=(1885) A. W. N. 318.

property, and by no act of the defendant had his right to any property been denied. In the case of *Muhammad Alam* v. *Akbar Hussain* (9) a suit for declaration was brought by seven Mahomedan residents of the city of Kanauj for a declaration that an idgah and the lands adjoining it, which were situate in a village in Pargana Kanauj was wakf property, and it was held on a review of the earlier decisions of the Court and relying upon Mr. Ameer Ali's work on Mahomedan Law Vol. 1, Ch. 19, that as Mahomedans who had a right to use the idgah they were entitled to sue.

In *Dasondhay* v. *Muhammad Abu Nasar* (7), which was followed in this Court in the case of *Ashraf Ali* v. *Mohammad Nurojjoma* (6), to which I have already referred, two Mahomedans in whose hands lay the superintendence of certain wakf properties had sued for a declaration that a plot of land appertained to the wakf and for recovery of possession thereof on setting aside its alienation by those who were in charge thereof. It was held in the case that the plaintiffs were entitled to maintain the suit for a declaration that the alienation was void as the land was wakf, but not for a declaration for recovery of possession. In a later decision of the same Court in the case of *Ram Chandra* v. *Ali Muhammad* (10) the principle was re-affirmed that every Mahomedan who has a right to use a mosque for purposes of devotion is entitled to exercise such right without interference and is competent to maintain a suit against anyone who interferes with its exercise, but if he brings a suit in his personal capacity and not on behalf of the whole Mahomedan community that decision will be binding only as between the plaintiff and the defendant and cannot be taken advantage of by, and be binding on, the Mahomedan community in general. This was a case in which the mosque where worship was performed was attempted to be taken possession of by some Hindus in execution of a decree on a mortgage. In the case of *Muhammad Fahimul Huq* v. *Jagat Ballav Ghosh* (11), it was held that every Mussalman who derives any benefit from a wakf is entitled to maintain an action against the Mutwalli to establish his right thereto or against a trespasser to recover any portion of the wakf property which has been misappropriated without joining any other person who may participate in the benefit, and that the plaintiff who in that case was a member of the family of a charitable wakf, being a beneficiary under the wakf, could sue for recovery of possession of property wrongfully alienated and for the incidental declaration that the property being wakf property could not be alienated and that where consequential relief was available to him he was not entitled to a mere declaration.

A similar contention appears to have been put forward in the case of a Hindu temple in a suit under S. 92 of the Civil P. C., in the case of *T. R. Ramachandra Aiyyar* v. *Parameswaran Unni* (12) the contention being to the effect that every Hindu has an interest within the meaning of the section, in every Hindu temple throughout the length and breadth of India, but it was held by a majority of the learned Judges that the definition of 'interest' in S. 15 of the Religious Endowment Act (20 of 1863) cannot be used as guide in interpreting the word as used in S. 92 of the Code and that 'interest' under S. 92 of the Code denotes an interest which is substantial and not sentimental or remote and it must be a present and substantial and not a remote and fictitious or purely illusory interest. In that case of the two plaintiffs who instituted the suit with the consent of the Advocate-General in the District Court of North Malabar in respect of a Hindu temple situated in Tellichery in that district, one of them being a Hindu residing in Madras and the other in Tellichery, it was found that the former had gone to worship in the temple on one or two occasions in the past and might go there to worship in future if business took him to Tellichery; it was held that he had no interest within the meaning of S. 92 to maintain the suit.

In the present case no such considerations arise as would arise under S. 92 of the Code of Civil Procedure or under Ss. 14 and 18 of the Religious Endowments Act, and the simple question which arises upon this contention of

(9) [1910] 32 All. 631=6 I. C. 835=7 A. L. J. 797.

(10) [1913] 35 All. 197=18 I. C. 797=11 A.L.J. 233.

(11) A. I. R. 1923 Patna 475=2 Pat. 391.

(12) [1919] 42 Mad. 360=36 M. L. J. 396=9 L. W. 492=50 I. C. 693=(1919) M.W.N. 370.

the respondent is whether a person interested in a public mosque simply as a person who has a right to worship therein, can institute a suit of this nature in his individual capacity.

In such cases the true rule, in my opinion, is to determine in each particular case as to whether the plaintiff has or has not a cause of action which would entitle him to the relief which he claims. The question as to whether the suit will be maintainable at the instance of a particular plaintiff depends not upon any inherent right which one may have to worship in a mosque or a temple upon the fact of his living in the vicinity or his being a mere resident of the district. I should venture to think that every Mahomedan has a right apart from his right as a member of the community to worship in a public mosque and every Hindu has a right to worship in a temple, but on that does not depend his right to maintain any and every suit in connexion with a religious endowment. It is not a question of any inherent right at all. If there is an individual right in the plaintiff which has been violated, or if some injury to that right is threatened, the suit will lie. In each case this question will have to be determined upon the allegations made; and the nature of the relief that the plaintiff will be awarded will be consonant with the infringement that has been caused or the injury that has been threatened. The plaint in the present case does not disclose any such infringement or injury, actual or threatened, nor is there to be found any complaint therein on the ground of the plaintiff's right as a worshipper in the mosque—assuming that he does worship in the mosque though he ordinarily resides in Calcutta—having been or is likely to be interfered with. He claims the relief in his character as Mutwalli of the wakf properties and not in his character as a Mahomedan who uses the mosque or participates in the benefits of the endowment. In my opinion the plaintiff in the present case is not entitled to maintain the suit as framed except in his character as Mutwalli in respect of the wakf. In any event it is quite clear that the decree which has been passed in the suit, namely a decree declaring his right as Mutwalli to the land in suit and entitling him to recover possession thereof is not a decree which he could obtain on the footing of his being a Mahomedan only.

To turn now to the ground upon which the learned Judge has held the suit as maintainable. The learned Judge has given the plaintiff a decree on the footing not of his being a validly appointed Mutwalli but on the ground that he is the de facto Mutwalli. So far as this matter is concerned, in the first place, a very high ground has been taken on behalf of the respondent. It has been contended that if a man professes to act as Mutwalli he is entitled to institute a suit for recovering possession of wakf properties from one who may have wrongfully acquired possession of it. In support of this proposition reliance has been placed upon the decision in the case of *Piran* v. *Abdool Karim* (13) and *Kazi Hassan* v. *Sagun Balkrishna* (14). In the first of these cases it was held that the plaintiff in the case who was in charge of the Dargah and was discharging the duties connected with the institution had been elected to the office of Sajjadanashin by a large number of Mahomedans residing in the locality and that appointment was held to have been a valid one and so the plaintiff had title to maintain the suit. In the second case it was found that the plaintiffs were not merely beneficiaries but members of the family of the Mutwallis on whom the office of Mutwalli would fall by descent, if indeed it had not already fallen on them, as alleged in the plaint by abandonment and resignation of the Mutwallis who were charged with having illegally made the alienations. These cases therefore are no authority for the proposition in the form in which it has been put before us.

It was next urged on behalf of the respondent that the plaintiff was entitled to maintain the action having acquired a right by prescription to his office as Mutwalli having acted adversely to all possible claimants for over the statutory period. The office of Mutwalli not being a hereditary one, a suit to oust the plaintiff from his office as Mutwalli is regulated by Art. 120 of the schedule to the Limitation Act, and if no suit has been brought to oust the plaintiff by reason of his having held the office for over six years he would acquire an inde-

(13) [1891] 19 Cal. 203.
(14) [1893] 24 Bom. 170 = 1 Bom. L. R. 619.

feasible right to hold the office of Mutwalli and would acquire a complete title for the purposes of litigation or anything connected with the endowment, *Jaya Nath Das* v. *Birbhadra Das* (15); *Kidambi Ragavachariar* v. *Tirumali Asari Nallur Ragavachariar* (16); *Khajeh Salimullah* v. *Abdul Khair Mustafa* (17); *Kassim Hassan* v. *Hazra Begum* (18). That the right of the plaintiff to hold the properties of the wakf is a right appurtenant to his office as the Mutwalli cannot be disputed: *Gnanasambandha Pandara Sannadhi* v. *Velu Pandara* (19).

The question therefore is whether the plaintiff has held the office of Mutwalli adversely to the rest of the world, that is to say, to all possible claimants in respect of the wakf and for the statutory period of six years. There is no express finding of the learned Subordinate Judge on this question. He has, no doubt, in agreement with the trial Court, found that although the management of the properties was in the hands of Nur Mohammed the plaintiff was de facto Mutwalli, but this finding does not go far enough. Moreover, the legal effect and bearing of the matters upon which he has relied for this finding expressed in so general terms, do not appear to us to have been correctly appreciated, e. g., the declaration of the plaintiff's right in a suit between him and the heirs of Nur Mohammed on consent by the said heirs not being a judgment in rem has been erroneously regarded as evidence as against the defendants, the declaration contained in the Nadabi Ekrar (Ex. A.) as to the rights of the plaintiffs, if any, in the properties which were given to Nur Mohammed does not appear to have been duly considered and the facts bearing upon the document executed by the plaintiff in favour of Eshaque in 1314 do not appear to have been sufficiently investigated. On the whole we are of opinion that the appeal has not been properly dealt with by the learned Subordinate Judge, and we accordingly set aside the decree passed by him and direct that the whole appeal be reheard except as to the question of the validity of the wakf, the question whether the property in suit is wakf property or not and the question of legal necessity, the findings on these matters being taken as in plaintiff's favour. After proper findings are arrived at on all the other questions which arise in the case, the appeal will be disposed of by the lower appellate Court. Costs of this Court will abide the result.

In view of the fact that this case, as well as the case out of which appeal No. 2152 of 1923 has arisen, both relate to the same wakf and in the latter case also a similar order of remand has been passed, we direct that both the cases, if possible, should be dealt with by one and the same Court but separately and each upon its own merits.

**Suhrawardy, J.**—I agree.

*Appeal allowed.*

(15) [1892] 19 Cal. 776.
(16) [1902] 26 Mad. 113.
(17) [1909] 37 Cal. 263=11 C. L. J. 304=3 I. C. 419=14 C. W. N. 497.
(18) [1920] 32 C. L. J. 151=60 I. C. 165.
(19) [1899] 23 Mad. 271=27 I. A. 69=10 M. L. J. 29=7 Sar. 671 (P. C.).

## A. I. R. 1927 Calcutta 136

GREAVES AND MUKERJI, JJ.

*Birendra Kishore Manikya Bahadur* —Plaintiff—Appellant.

v.

*Durga Sundari Chowdhurani* and *others*—Defendants—Respondents.

Appeals Nos. 444, 475, 479 and 486 of 1920, Decided on 19th April 1926, from the appellate decrees of the Spl.-J. Noakhali, D/- 17th September 1919.

(a) *Bengal Permanent Settlement Regulation* (1 *of* 1793), *S.* 1—*Independent taluks.*

The mere fact that in various reports made and proceedings taken under the then existing Regulations the taluks are mentioned as decennial taluks does not make them independent taluks. [P. 138, C. 2]

(b) *Bengal Decennial Settlement Regulation* (8 *of* 1793), *S.* 4—*Dowls after confiscation.*

The fact that dowls were taken from the holders of the taluks after the confiscation does not make the taluks independent, if in point of fact at the Decennial Settlement or in pursuance of the Regulation relating thereto separate engagements had not been made in respect of them. [P. 138, C. 2]

(c) *Crown—Escheat—On confiscation zemindari does not merge in permanent right of Government—Whether there was merger is a mixed question of law and fact—Civil P. C., S.* 100.

On confiscation a zemindari does not merge in the permanent right of the Government, so as to create a new zemindari when the estate is resettled with another. The question whether there was merger or not is a mixed question of

law and fact, and it has to be determined upon a construction of the order of confiscation the interest which the Government was capable of holding in those days and upon various other matters. [P. 132. C. 1]

*Romes Chandra Sen*, *Gobinda Chandra De Roy* and *Birendra Chandra Das*—for Appellant.

*Bhagirath Chandra Das*—for Respondents.

*Biraj Mohan Mazumdar*—for Deputy Registrar.

**Mukerji, J.**—These four appeals arise out of as many applications under S. 105 of the Bengal Tenancy Act for settlement of fair and equitable rent in respect of certain tenures which had been recorded in the finally published Record of Rights as bearing jamas which are enhanceable. The facts shortly stated are these :

Pargana Dandra was held in two shares, viz., the 4-annas share and the 12-annas share. The 4-annas share was owned by one Mahomed Ali Chowdhury. Mahomed Ali Chowdhury was declared a rebel and his estate was confiscated by the Government in February 1793. There were in this estate before the escheat, 45 taluks, a nij taluk and some other lands. After the escheat the nij taluk was divided into 35 tapas. The Collector then made dowl settlement with the talukdars, and in the dowls that were taken only the rents were specified without specification of the area of land comprised in each taluk. For several years Government used to collect the rents by leasing out the zemindari in ijara, but subsequently the dues used to be realized from the talukdars and holders of the tapas. For some time malikana was paid to the heirs of Mahomed Ali Choudhury, but subsequently it was discontinued and it was said that the payment had been made under a mistake. In 1824 the tapas were surveyed and assessed at the rate of Rs. 3-6-0 per kani.

The 45 taluks were not assessed then and they retained the rents which they used to pay all along. In the meantime 12 annas share of the pargana was partitioned into four separate shares, two of which were subsequently sold for arrears of revenue in 1835 and were purchased by the Government. From time to time measurements were made of the lands of the taluk, but for one reason or other the jamas of these taluks were not interfered with. Considerable difficulty, however, was experienced in the management of the estate because whenever a dispute arose, as the areas were not specified, confusion was created by the uncertainty as to whether any particular land was included in the 4-annas estate of Mahomed Ali Choudhury or the other two shares out of the 12 annas which had been purchased by the Government or the remaining two shares. In 1845 the Revenue Officers proceeded to measure all the lands of the taluk and the jama was assessed at Rs. 3-15-0 per kani. The talukdars were offered a deduction of ⅓ of the jamas so assessed if they would agree to the jamabandi made as aforesaid, but they refused.

One of them instituted a suit to set aside his jamabandi. He was successful in the Court of the Munsif. The Government then preferred an appeal to the District Judge who appears to have partly upheld the decree of the Munsif. On a special appeal preferred to the Sader Dewany Adalat the decrees of the Courts below were set aside and the suit was dismissed on the ground that the civil Courts had no jurisdiction in the matter. An appeal was preferred to the Commissioner of Calcutta against the assessment made as aforesaid, but the assessment was upheld on the 6th June 1848. In July 1848 the final jamabandi was prepared and jamas were settled with the talukdars for 30 years from 1845 to 1874. The tapas were assessed again in 1848 and settled similarly as the taluks. Of the lakheraj mahals in the estate some were released ; some were left unassessed ; and some were resumed; and those that were resumed were assessed : some were assessed at half the rates of the tapas as being of a date prior to 1790 and others on full rates as tapas being of dates subsequent to 1790. In 1869 the estate consisting of the said 4-annas share was permanently settled with one Asima Banu and heir of the aforesaid Mahomed Ali Choudhury and with one Bharat Chandra Deb who had purchased the interests of his other heirs. From them the plaintiff purchased the zemindari in 1880. Appeals Nos. 444, 475 and 486 relate to three of the taluks, and Appeal No. 479 relates to the lands of a resumed lakheraj tenure.

Appeal No. 479 may be disposed of shortly. The Assistant Settlement

Officer held that the tenure to which this appeal relates was created after 1790. It was resumed in 1845 and was made into a tapa and assessed with full rates as a tapa. The Assistant Settlement Officer held that the rents of the tenure were enhanceable under S. 7 of the Bengal Tenancy Act. He, however, took into consideration the provisions of Cls. (a) and (b) of sub-S. 3 of that section and granted an enhancement on that basis. The plaintiff, claiming more, preferred an appeal and though there was no appeal on behalf of the defendants the learned Special Judge dismissed the appeal as well as the original case. This evidently was wrong. The learned vakil for the respondent seeks to justify the order of dismissal of the case as passed by the learned District Judge on the ground that the reasons given by him for dismissing the other cases relating to tapas apply to this case as well, but this argument cannot be accepted as well founded in the fact of the clear findings of the Assistant Settlement Officer to which I have referred. Appeal No. 479 must accordingly be allowed and the portion of the decree of the lower appellate Court which purports to dismiss the original case must be expunged, the decree passed by the Assistant Settlement Officer being restored and affirmed by this Court. The appellant will be entitled to his costs in this appeal.

Appeals Nos. 444, 475 and 486 relate to three of the taluks. The Assistant Settlement Officer held that these taluks originally belonged to the class of independent taluks mentioned in S. 1 of Regulation 1 of 1793 and S. 4 of Regulation 8 of 1793 but that they had lost their character as such, that they are nevertheless taluks which had existed since the Permanent Settlement and, therefore, the provisions of S. 6 of the Bengal Tenancy Act applied to them, and as the requisite proof was wanting the plaintiffs were not entitled to any enhancement. The plaintiffs thereupon appealed with the result that the learned Special Judge held that the taluks were independent taluks, that the rents were not variable and in that view of the matter he dismissed the appeals before him as well as the original cases to which they related. The plaintiffs have preferred these appeals. The first question which arises in these appeals is whether the taluks are independent or dependent taluks. The learned Special Judge was right in holding that the onus of proving that they were independent taluks lay on the defendants the presumption arising from the finally published Record of Rights being in plaintiff's favour.

The learned Judge has found and in my opinion rightly found upon the facts set forth and statements contained in various reports made and proceedings taken under the then existing regulations, that the taluks existed from before the Permanent Settlement. He has further held that in the aforesaid papers the taluks are mentioned as decennial taluks and this expression he proceeds to observe under Regulation I of 1793 means independent taluks. This is one of the grounds given by him for arriving at the conclusion that the taluks are independent taluks. In this, however, I am unable to agree with the learned Judge. There is absolutely nothing in the judgments of either of the Courts below to show that the holders of these taluks prior to the confiscation by the Government ever paid their dues direct to Government or that they ever set up any such right. There is nothing to show that they had at the time of the Decennial Settlement entered into engagements with the Government to pay their revenues direct. I do not see that the expression "decennial taluks" has any recognized meaning according to the regulation to which the learned Judge has referred. The fact that dowls were taken from the holders of the taluks after the confiscation did not make the taluks independent if in point of fact at the Decennial Settlement or in pursuance of the regulation relating thereto separate engagements had not been made in respect of them.

There are indications in the reports and correspondence of the Revenue Authorities which are on the record suggesting that perhaps some of the talukdars though not all had dowls of the Decennial Settlement but the learned Judge has not found as a fact that any such engagements had been entered into in respect of these taluks to which the appeals relate. On the other hand, we find that the holders never applied to be separated in accordance with the provisions of S. 14 of Regulation 24 of 1801. Thi omission on their part had this

effect under the said provisions that the taluks would on the expiry of the period prescribed therein be considered as dependent taluks not entitled to be separated from the zemindaries to which they may attached though in other respects the rights of the talukdars were not meant to be in any degree affected by the regulation. This, therefore, is not conclusive but, the learned Judge, in my view, was not right in treating this omission as altogether negligible. The other ground upon which the learned Judge has proceeded is this : he is of opinion that on confiscation the zemindari of Mahomed Ali Choudhury merged in the permanent right of the Government and when in 1869 the estate was settled with Asima Banu and Bharat Chandra Deb, a new zemindari was created to which the taluks either as existing from before the Permanent Settlement or as created by fresh assessment in 1840 cannot be said to be dependent. The learned Judge has held that there was merger and in arriving at this conclusion he has relied upon a rule in the Bengal Survey and Settlement Manual, and upon the fact that

had not the proprietary right and the zemindari merged in the permanent title of the Government the zemindari would have been sold and the taluks etc., would have been annulled.

It is difficult to see how the rule in the Bengal Survey and Settlement Manual can determine this question of merger and how this one circumstance of the zemindari not having been sold can enable a Court to hold in the affirmative that there was merger. He has attached no significance to the fact that for some time malikana was paid as it was alleged that it had been paid under a mistake. The question whether there was merger or not is a mixed question of law and fact. It has to be determined upon a construction of the order of confiscation the order by which the estate was returned to one of the heirs of Mahomed Ali Choudhury and the representative of the other heirs, the interest which the Government was capable of holding in those days and upon various other matters, the relevant evidence bearing upon which does not appear to have been placed before the Court by either of the parties. On the other hand, there is the undeniable fact that the zemindari bore one touzi number and was treated as one estate all along. The question whether the zemindari had been extinguished by the confiscation, in the estate of the record, therefore, in my opinion, can only be answered by saying that it has not been proved whether there was such extinguishment or not. The result, therefore, in my opinion, is that it has not been established that the zemindari ceased to exist at any time or that the taluks existed before the creation of the zemindari and that the presumption arising in favour of the plaintiffs upon the finally published Record of Rights as to the dependent character of the taluks stands. If the taluks have not been proved to be independent taluks and the presumption to which I have referred stands, then it follows that the plaintiffs must prove one or other of the conditions mentioned in Cls. (a) and (b) of S. 6 in order to succeed.

In the present case there arises no question under Cl. (b) and the only question is whether the plaintiffs are entitled to enhance the rent either by local custom or by the conditions under which the tenure is held. It is contended on behalf of the respondents that the learned Special Judge has dealt with the matter and has recorded a finding against the plaintiffs that the rent is not variable. Now the learned Special Judge in one passage of his judgment has observed thus :

If otherwise there was no merger and the Government was only trustee for the rebal then they can be said to have been only dependent taluks with rents which varied.

It is difficult to follow what this passage exactly means for it appears to be in conflict with what the learned Judge says later on and which runs in these words :

From 1848 to 1869 they also paid miscellaneous rents and previous to 1848 there having been no ascertainment of definite areas it cannot be properly said that the rents of these taluks varied. If there was any increase it was for excess area.

Any way it seems to have been the view of the learned Judge that the variation in the rent was due to alteration in area. For this supposition, however there is absolutely no foundation. In 1840 the rent was assessed at Rs. 3-15-0 per kani, but there is no indication that this was the rate adopted when the dowls were taken or that the rent was assessed then at any particular rate per kani, and on the other hand, the proceedings to which reference has been made in the judgment of the Assistant Settlement Officer plainly indicate that the areas of

the taluks were not ascertained at the time. This variation, therefore, cannot be ignored in the way that it has been by the learned Judge. Nor again does the variation altogether lose its effect because, as it has been urged on behalf of the respondents, the variation was submitted to under compulsion. This compulsion is nothing more than this that the Revenne Authorities imposed the jamas and the talukdars had to submit to them in spite of protest. It is, however, not conclusive one way or the other but its bearing and effect on the question which arises under Cl. (a) of S. 6 of the Bengal Tenancy Act will have to be duly considered. So also the other facts and circumstances of the case including the fact that the jamas were fixed in 1848 for 30 years which would prima facie indicate an intention not to fix the rent in perpetuity. There is some evidence, it is said, in the shape of judicial decisions indicating a custom to enhance the rent of tenures of similar character and description in the locality: if such there is, that also will have to be considered. Upon a consideration of all these matters proper findings will have to be arrived at on the question whether the plaintiffs have succeeded in making out a case under Cl. (a) of S. 6 of the Bengal Tenancy Act.

In conclusion I must refer to a judgment of another Division Bench of this Court which has dealt with a number of other appeals preferred from the same judgment of the learned Special Judge. These appeals related to other cases under S. 105 which were governed by the same judgments of the Assistant Settlement Officer and of the Judge as are before us in these appeals. That Division Bench appears to have arrived at conclusions different from ours and with the utmost deference to the learned Judges who constituted that Bench we feel that we cannot agree in the view they have taken. We have accordingly given the matter our most anxious consideration as to the course that we should adopt. We have now arrived at the conclusion that the decision of that Bench is not binding on us and for two reasons: firstly, because on the question whether the plaintiffs have succeeded in proving the condition mentioned in Cl. (a) of S. 6 of the Tenancy Act which is a question of fact there is no finding of the Special Judge in his judgment and we think we are free to arrive at our own conclusion on it independetly of the opinion expressed by the other Division Bench: and secondly because the question of the status of the defendants, which is a question of law, does not appear to have been treated by the learned Judges as such but, on the other hand, the subsidiary question involved therein, viz., whether the zemindari was extinguished or not has been treated by the learned Judges as a question of fact only, a view with which we are unable to concur.

The decrees passed by the learned Special Judge must accordingly be set aside and the appeals remitted to his Court so that they may be re-heard as to this part of the case and dealt with and decided in accordance with law. Costs will abide the result. Hearing fee is assessed at one gold mohur in each of the appeals.

**Greaves, J.**—I agree.

*Case remanded.*

---

## A. I. R. 1927 Calcutta 140

CUMING AND PAGE, JJ.

*Tirthamayi Dassi*—Plaintiff— Appellant.

v.

*Atikulla* and *another* — Defendants— Respondents.

Appeal No. 1490 of 1924, Decided on 12th May 1926, from the appellate decree of the 1st Sub-J., Sylhet, D- 25th March 1924.

*(a) Civil P., C. 41, R. 27—Additional evidence can be admitted in appeal under general principles of law or O. 41, R. 27—Whether such evidence should be admitted should be decided when appeal is actually heard—(Page, J.)—Evidence can be admitted by appellate Court in its discretion—High Court will interfere in exceptional cases.*

*Per Cuming J.*—Additional evidence can be admitted by an appellate Court either under the general principles of law or under the specific provision of O. 41, R. 27. [P 142 C 2]

A party cannot be allowed to supplement his evidence in appeal unless some very good reason is given, and the question whether additional evidence is to be admitted or not in appeal has to be determined at the time when the appeal is actually heard. 31 *Bom.* 381, *Rel. on.* [P 143 C 1]

*Per Page, J.*—The discretion of an appellate Court is not restricted in respect of the admission of additional evidence as in a Court of review under O. 41, R, 1, but the discretion is a judicial discretion which should be exercised with caution. Further when an appellate Court has duly admitted additional evidence, that otherwise is admissible, in the exercise of the power that it possesses in that behalf, it is only in rare and exceptional circumstances that the High Court will interfere with the discretion of the lower appellate Court and hold that the additional evidence was improperly admitted and cannot be taken into consideration : 21 *Cal.* 484 ; 42 *Mad.* 737 and 23 *All.* 121 *Ref.*

[P 145, C 2]

(b) *Practice—Second appeal—Lower appellate Court improperly admitting additional evidence—High Court can dispose of the case only when lower appellate Court has based its conclusion on other than such evidence.*

Where the lower appellate Court has admitted additional evidence improperly, the High Court can itself dispose of the case only in such cases where independently of the evidence improperly admitted the lower Court has apparently arrived at its conclusion upon other grounds : *A. I. R.* 1924 *Cal.* 1042 ; 35 *Cal.* 701 and 23 *Cal.* 179, *Rel. on.* [P 143 ,C 2]

(c) *Civil P. C., O.* 41, *R.* 27—*One party adducing additional evidence—Other party should be allowed to rebut it.*

Where the appellate Court admits additional evidence at the instance of one party, the other party must be given opportunity to adduce rebutting evidence. [P 143, C 2]

(d) *Benami—Slight evidence is sufficient to prove.*

As benami transactions are very common in Indian practice, even a slight quantity of evidence may suffice to show that it was a sham transaction : 15 *Cal.* 20 (*P. C.*), *Rel. on.*

[P 144, C 1]

(e) *Practice—Judgment must be based on legal evidence and not on surmise.*

The decision of a Court must not rest on suspicion and surmise but must be based on legal grounds established by legal testimony.

[P 147, C 2]

*Braja Lal Chakravarti* and *Priya Nath Dutta*—for Appellant.

*Pugh* and *Bhupendra Chandra Guha*—for Respondents.

**Cuming, J.**—The facts of the case out of which this appeal has arisen are these.

The plaintiff brought a suit for recovery of possession of a 4-annas share in some 8 and odd kedars of land. Her case was that one Nabin Chandra Deb who was a co-sharer in a certain mehal Madanraja had opened a separate account for this share. The land now in dispute lies within this mehal. In 1906 Nabin made a gift of his share covered by the separate account No. 69 to his son-in-law Girish Chandra. Four days later Girish granted a patni lease of the major portion of the land to his brother-in-law Satis who is the respondent in the present appeal. The rent reserved was Rs. 361. After that the mehal was sold several times for arrears of revenue. Finally in 1913 it was once more sold for arrears of revenue and purchased by one Baikuntha, Dianath Ram (the husband of the plaintiff) and some others.

It was again put up for sale on January 15th, 1915, and purchased by Dianath and one Naba Kishore. In 1916 Dianath executed a conveyance in favour of the present plaintiff his wife of 4-annas share of Estate No. 69. Her name was duly registered in respect of this share. In August 1918 Dianath made a deed of gift of the same share to the present plaintiff (his wife). She in September 1918, brought the present suit against one Atikulla for a declaration of her title and recovery of possession. Atikulla set up the title of the patnidar Satis in defence. Satis was then added as a defendant and the suit proceeded. The trial Courts dismissed the suit holding that the patni was really in existence and could not be avoided or annulled. On appeal to the District Court the Subordinate Judge held that the patni lease was not a real transaction and gave a decree declaring the plaintiff's title and allowing her possession through Defendant No. 1 Atikulla. Defendant No. 2 Satis the added defendant appealed to this Court.

The case was sent back to the lower appellate Court to decide the appeal after determining whether the patni tenure was a real transaction. The lower appellate Court held that the patni was a real transaction and so dismissed the appeal and confirmed the judgment of the trial Court which had dismissed the suit. Against this decree and judgment the plaintiff has appealed to this Court. It is admitted that the decision of the appeal depends now entirely on the question whether the patni granted to Satis was or was not a real transaction. Mr. Chakravarti who has appeared for the plaintiff-appellant has raised three points.

(1) That the question of the registration of the patni was raised in the High Court and that Court decided then that certain evidence which has since been

admitted was inadmissible. A consideration of the judgment of the High Court to which I was myself a party makes it quite clear that the High Court did not decide this point.

The next point which has more substance is that the lower appellate Court admitted in evidence certain documents which were not admissible because their admission does not come within the four corners of O. 41, R. 27. The documents which it is contended were improperly admitted were certain revenue challans A-f to A-f-12 and certain papers to prove that the patni tenure had been registered by the Deputy Commissioner.

Now O. 41, R. 27 provides that the parties to an appeal shall not be entitled to produce additional evidence whether oral or documentary in the appellate Court unless (a) the Court from whose decree the appeal has been preferred has refused to admit evidence which ought to have been admitted, or (b) the appellate Court requires any document to be produced or witnesses to be examined to enable it to pronounce judgment or for any other substantial cause. There is a proviso that where additional evidence is allowed to be produced the appellate Court shall record the reason for its admission.

Now the present case does not admittedly fall within sub- S. (a). Neither does it fall nnder the first part of sub-S. (b). It is not suggested for one moment that the appellate Court required these documents to enable it to pronounce judgment for the evidence was produced at the instance of one of the parties and not at the instance of the Court. If, therefore, it is in any way admissible it must be obviously under the concluding portion of sub-S. (b) viz., for any other substantial reason. I have been referred to the case of *Indrajit Pratap Bahadur Sahi* v. *Amar Singh* (1) where their Lordships of the Privy Council remark that the defendants took the only and proper course, viz., to apply to the High Court which was in possession of the case to admit the additional evidence under either the general principle of law or under the specific provision of R. 27 which lays down that the appellate Court may for any other substantial cause (viz., other than those specified) allow such evidence to be produced. Their Lordships go on to state that it is desirable to observe that there is no restriction on the power of the Board to admit such evidence for the non-production of which at the initial state sufficient ground has been made out.

Mr. Chakravarti has contended that the case for the admission of fresh evidence in appeal must come strictly within the four corners of O. 41, R. 27 and in support of his contention relies on the case of *Kessowji Issur* v. *G. I. P. Ry. Co.* (2). This is also a decision of the Privy Council. No doubt their Lordships do state as follows:

> Now, at this stage the question is, under what jurisdiction was the fresh evidence taken by the appellate Court? They had, as has been noticed, no jurisdiction to reverse the refusal of Mr. Justice Tyabji, appeal from his decision being excluded by statute. The 568th section of the Civil P. C. (now O. 41, R. 27) can alone be looked to for sanction of these proceedings.

That the decision most strongly supports Mr. Chakravarti is evident but it seems to me that it has been modified to some extent by the case of *Indrajit Pratap Bahadur Sahi* v. *Amar Singh* (1) which would allow the adducing of fresh evidence in appeal under either the general principles of law or under the specific provision of O. 41, R. 27.

If, however, I understand the case of *Indrajit Pratap Bahadur Sahi* v. *Amar Singh* (1) correctly the additional evidence in that case was admitted under "any other substantial cause." However be that as it may, I cannot see how either under O. 41, R. 27, or the general principle of law the evidence in the present case could possibly have been admitted for the first time at the appellate stage. What actually happened it is not too easy to discover from the record but we find on the 18th March a petition was put in by the appellant in which she stated that the Court had passed an order admitting these papers in evidence. She strongly protested against their admission and asked that if they were admitted she should be allowed to adduce rebutting evidence. On this petition the learned Subordinate Judge passed the following order:

> The documents are public records. The plaintiff raised no objection to the admissibility of these documents nor applied to produce any rebutting evidence though they were filed on the 25th August 1920, and 20th March 1923, and

(1) A. I. R. 1923 P. C. 128=2 Pat. 676 (P. C.).

(2) [1907] 31 Bom. 381=34 I. A. 115=9 Bom. L. R. 671=4 A. L. J. 461 (P. C).

were not rejected or admitted before. I therefore, reject the plaintiff's application as frivolous and filed with an ulterior motive.

I confess I cannot understand the learned Subordinate Judge's order. He states the documents are public records. That of itself would not make them admissible for the first time in appeal. He then goes on to state the plaintiff raised no objection to their admissibility or asked to bring rebutting evidence though the documents were filed on 25th August 1920, and 20th March 1923.

Now the plaintiff had no opportunity for objecting to their admissibility until the appeal was actually heard which apparently was on the 18th March, the date of the order. The question whether additional evidence is to be admitted or not in appeal has to be determined at the time when the appeal is actually heard. [see : *Kessowji Issur* v. *G. I. P. Ry. Co.* (2).] Clearly, the plaintiff had no occasion or opportunity before to object to the admissibility of the documents because as I have pointed out this can only be determined at the time of hearing the appeal.

The learned Judge offered no reason as far as I understand his order for admitting the evidence. Neither in appeal before us is it suggested what reason there could be for admitting the evidence? It is not suggested that it is evidence which was not available to the defendant at the time of the hearing of the case and which he could not with due diligence have discovered. Even if it were, the proper course would have been to apply for a review of judgment. A party cannot be allowed to supplement his evidence in appeal unless some very good reason is given. None has been given or even suggested. The Judge was clearly wrong in allowing the additional evidence to be given at the appellate stage.

It has been argued that in accordance with the provision of S. 167 of the Evidence Act the improper admission of evidence is not by itself a sufficient reason for ordering the appeal to be remanded for a finding on the admissible evidence if the Court is of opinion that independently of the evidence wrongly admitted there is sufficient evidence to justify the finding. But it must be borne in mind that this is a second appeal and that we are not judges of fact.

The principle by which the Court is to be guided in dealing in second appeal with evidence improperly admitted has been discussed in *Womes Chunder Chatterjee* v. *Chunder Churn Roy Chowdhury* (3) where Garth, C. J., in dealing with the case dissented from his own decision in *Watson & Co.* v. *Gopee Soonduree Dossee* (4) and laid down the rule which as far as I am aware has never been departed from in this Court that the only cases the High Court could itself dispose of in these circumstances were cases where independently of the evidence improperly admitted the lower Court has apparently arrived at its conclusion upon other grounds. [see also the cases of *Ramani Pershad Narain Singh* v. *Mahanth Adaiya Gossain* (5) and *Jagadish Chandra De* v. *Harihar De* (6).] Applying this test to the judgments now under appeal it certainly cannot be said that the Subordinate Judge came to his conclusion independently of the inadmissible evidence for a perusal of his judgment will show that it is mainly based on the inadmissible evidence. In such a case it seems there is no alternative but to remand the case again to the Court of first appeal to decide the case after excluding the evidence wrongly admitted, viz., Exs. A-f to A-f 12 and Exs. Ae, Ag. Ah.

There is a third ground also which is equally fatal to the order of the first appellate Court. When the Judge allowed the defendant, Satis, to adduce this fresh evidence in the appeal Court the plaintiff asked and asked quite rightly that he should be allowed to adduce evidence to rebut the new evidence. That he is entitled to do seems to be obvious. The learned Judge rejected the application by his order of 18th March 1924, apparently on the ground that the inadmissible evidence had been on the record a long time and the plaintiff had made no application before to produce rebutting evidence. No doubt the inadmissible evidence had been kept with the record for a long time but it had not been admitted nor could it be admitted until the appeal was heard. Until the evidence was admitted the plaintiff could not ask for permission to bring evidence to rebut it. The appeal was heard on 18th March

(3) [1882] 7 Cal. 233.
(4) 24 W. R. 302.
(5) [1904] 31 Cal. 380.
(6) A. I. R. 1924 Cal. 1042.

1924. On the day when the evidence was admitted the plaintiff applied as he was obviously entitled to do to bring rebutting evidence which application the learned Judge for some reasons which is not easy to understand, stigmatized as frivolous and filed with an ulterior motive. It seems to me to have been a most reasonable application.

Mr. Pugh argues for the respondent that irrespective of the admissible evidence the appeal is concluded by the findings of fact by the lower appellate Court. His argument would appear to be this. The Defendant No. 2, Satis, the respondent in this case produced the document by which it was alleged the patni was created. He having done this it was for the plaintiff to show that the document was a benami one and that the lower Court having found there was not an iota of evidence on the plaintiff's side to prove it was fraudulent or benami that concludes the case. The argument has little or no substance for the following reasons. The plaintiff sued Atikulla the tenant in possession to evict him. Atikulla set up the title of the present respondent and this person was then added as a party. It was for Atikulla to prove that there was really an intermediate tenure between him and the zemindar. The document was only a piece of evidence to prove the existence of this tenure. Even supposing for the sake of argument that once the defendant had proved the document it was then for the plaintiff to show that the document did not represent a real transaction, the learned Subordinate Judge was not correct in holding that there was not an iota of evidence on the plaintiff's side to show that it was a fictitious transaction. As has been pointed out in the case of *Bhubanmoyini Dasi* v. *Kumudbala Dasi* (7) as benami transactions are very common in Indian practice—even a slight quantity of evidence to show that it was a sham transaction may suffice for the purposes. Here the learned Judge is quoting the words of Lord Hobhouse in the case of *Uman Parshad* v. *Gandharp Singh* (8). No doubt, the person who impugned it must show something or other to establish it is a benami or sham transaction. In the present case there is evidence, namely, the fact that Nabin, the owner, gifts the property to his son-in-law who at once grants a lease of it to Nabin's own son.

This is a fact which would go to show that the transaction was a sham one and, therefore, it is not correct to say that there is not an iota of evidence as to the sham nature of the transaction. It may not be conclusive but it is some evidence. But after all as has been often pointed out, once both parties have given evidence the burden of proof is of little importance. The Judge clearly did not rely on this point of view of the case to decide it. If he had, he would not have discussed the whole of the evidence as he has done. But for the inadmissible evidence to which the Judge refers immediately before dealing with this part of the case it is quite possible he would not have been willing to accept so easily the genuineness of the transaction in spite of the circumstances under which it took place.

To sum up the case :

The conclusion to which I have come, first, is that the Judge has based his findings on inadmissible evidence. Secondly, that even if the evidence was admissible he was bound to have given the plaintiff an opportunity of rebutting it.

Much as I regret it, it seems to me that there is no alternative but to send back the case to the learned Subordinate Judge to decide the issue as to the genuineness of the patni lease on the admissible evidence before him excluding the documents I have mentioned above as inadmissible retaining the appeal on the file of the Court.

**Page, J.** —It is with regret that I find it necessary to differ from my learned brother in this case, but, in my opinion, this appeal should be dismissed with costs. It would, I think, be a calamity if the only course open to the Court is once more to remand this case to the lower appellate Court for further consideration. The suit, and also the appeal, is valued at Rs. 25 and it does not involve the consideration of any principle of law, the issue to be determined in the case being whether the creation of a patni tenure was or was not a genuine transaction. Yet the case has been dragging its way through various Courts for nearly eight years ; it has twice been before the High Court on second appeal ; and the issue which it is

(7) A. I. R. 1924 Cal. 467.
(8) [1888] 15 Cal. 20=14 I. A. 127=5 Sar. 71 (P. C.).

contended must again be sent down for trial has already been determined on three occasions by the lower Courts. Nothing but the compelling force of law would induce me to acquiesce in an order by which this case should be sent back to be tried for the fourth time. In my opinion, however, it is neither necessary nor desirable that the case should be remanded for further consideration. The facts have been stated by my learned brother; they are simple, and I need not recapitulate them. On the last occasion upon which the case was before the High Court an order was passed that the case should be remanded to the lower appellate Court:

In order that the question whether the patni set up by the defendant was a bona fide tenure and acted upon may be decided and the case disposed of according to law.

I am not quite clear as to the meaning of the term 'acted upon' in the order, for if the patni was created duly and bona fide its validity would not depend upon whether it was acted upon or not, although, no doubt, if the document by which the patni was created was not acted upon that fact might be some evidence that the transaction was not a genuine one. It is in that sense I presume that their Lordships intended the term to be understood. At the re-trial after remand the learned Subordinate Judge found that the patni was granted bona fide to the respondent, and had been acted upon for 17 years, and he dismissed the appeal with costs.

The appellant has again appealed to the High Court in second appeal, and contends that the decision of the learned Subordinate Judge was based upon certain inadmissible evidence which was improperly received for the first time in the lower appellate Court, that the decision appealed from thereby was vitiated, and that the case ought to be sent back to be re-heard according to law.

The evidence which the appellant contends ought not to have been admitted was (1): 12 challans, from the Revenue Authorities for revenue paid in respect of the patni; (2) a certified copy of an order and of an amended order whereby the patni was specially registered under the Assam Regulation, 1886, Ch. IV, and a copy of an entry in the register relating to such registration. Now, it was not contended before us that these documents were not relevant and admissible; the complaint was that they had been tendered and improperly admitted in evidence for the first time in the lower appellate Court after remand. But an appellate Court is entitled in its discretion to admit additional evidence.

either under the general principles of law or under the specific provisions of O. 41, R. 27 which lays down that the appellate Court may for any other substantial cause (viz., other than those particularly specified) allow such evidence or documents to be produced or witnesses to be examined. Rules of procedure are not made for the purpose of hindering justice:

[Per Mr. Ameer Ali in *Indrojit Partap Bahadur Sahi* v. *Amar Singh* (1) see also *Imambandi* v. *Mutsaddi* (9)]

The discretion of an appellate Court is not restricted in respect of the admission of additional evidence as in a Court of review under O. 47, R. 1, but the discretion is a judicial discretion which should be exercised with caution, since the reason for the restrictions that have been placed upon the right of litigants to adduce additional evidence in the later stages of litigation is to prevent perjury and the fabrication of false documents. On the other hand, when an appellate Court has duly admitted additional evidence, that otherwise is admissible, in the exercise of the power that it possesses in that behalf, it is only in rare and exceptional circumstances, such as those obtaining in *Kessowji Issur* v. *G. I.P. Ry. Co.* (2) that the High Court will interfere with the discretion of the lower appellate Court and hold that the additional evidence was improperly admitted and cannot be taken into consideration: *In the goods of Upendar Mohan Ghose* v. *Gopal Chandra Ghose* (10); *Vathinatha Pillai* v. *Kuppa Thevar* (11); *Ram Piari* v. *Kallu* (12); *Young* v. *Thomas* (13) and *Sanderson* v. *Blyth Theatre Co.* (14).

The documents in question were filed in the lower appellate Court on the 25th August 1920, and on the 20th March 1923, and the learned Judge admitted them as appears from the order of the

(9) [1918] 45 Cal. 878=47 I. C. 513=45 I. A. 73 (P. C.).
(10) [1894] 21 Cal. 484.
(11) [1919] 42 Mad. 737=37 M. L. J. 125=10 L. W. 122=53 I. C. 274=(1919) M. W. N. 525 (F. B.).
(12) [1901] 23 All. 121=(1901) A. W. N. 11.
(13) [1892] 2 Ch. 134=61 L. J. Ch. 496=40 W. R. 468=66 L. T. 575.
(14) [1903] 2 K. B. 533=72 L. J. K. B. 761=52 W. R. 33=19 T. L. R. 660=89 L. T. 159.

18th March 1924, upon the ground that the respondent had applied for leave to adduce the additional evidence a year before, that no objection had been taken to their admssibility, and that they were documents which emanated from a public source, and therefore it was unlikely that they had been fabricated. If the matter had rested there I should not have been prepared to interfere with the discretion of the Judge in admitting the documents : *Goshain Tota Ram* v. *Raja Rickmunee Bullub* (15) and *Ram Chunder Dutt* v. *Chunder Coomar Mundul* (16) ; *Minakshi* v. *Velu* (17) ; *Mewa Lal Sahu* v. *Kumerji Jha* (18). The learned Judge, however, while admitting the documents notwithstanding the protest of the appellant refused to allow the appellant to adduce evidence in rebuttal. That he ought not to have done ; and in taking this course he cannot, in my opinion, be regarded as having exercised his discretion judicially. It cannot be said that the rights of the appellant may not have been prejudiced by the reception of the additional evidence in such circumstances : *Ghoshain Tota Ram* v. *Raja Rickmunee Bullub* (15). I think, therefore, that it must be held that these documents were improperly admitted. What is the result? Under S.167 of the Evidence Act, 1872, if it appears

that independently of the evidence objected to and admitted there was sufficient evidence to justify the decision

the improper admission of the additional documents would not of itself be ground for a new trial or reversal of the decision of the lower appellate Court.

It is not pretended that apart from the documents to which objection is taken, there was not abundant evidence to justify the decision that the patni was bona fide created and acted upon, and if this Court was hearing the matter in first appeal, it would have been the clear duty of the Court, in my opinion, to dismiss the appeal. But it appears, having regard to Ss. 100 and 101 of the Civil P. C. that the Court when hearing second appeal has not the same jurisdiction, and that where evidence has improperly been admitted the Court is compelled to remand the case for re-hearing unless the lower Court has not based its decision upon such evidence or unless independently of the evidence improperly admitted the lower Court has apparently arrived at its conclusion upon other grounds: *Womes Chunder Chatterjee* v. *Chunder Churn Roy Chowdhury* (3); *Palakdhari Rai* v. *Manners* (19); *Baleshwar Bagarti* v. *Bhagirath Dass* (20); *Banwarilal Singh* v. *Dwarkanath Missir* (21); *Jagdish Chandra De* v. *Harihar De* (6).

It is a strange anomaly that the tpower of the High Court finally to determine an appeal is less restricted in connexion with first than it is with second appeals in which the decision of the lower appellate Court should be treated on broad lines, and ought not to be disturbed unless there has been a substantial miscarriage of justice but we must administer the law as we find it and it becomes necessary, therefore, to analyze the grounds upon which the learned Subordinate Judge based his decision. The learned Judge appears to have considered the issue which he had to determine first in the light of the case presented on behalf of the respondent and afterwards in the light of that urged on behalf of the appellant, and came to the conclusion that from whichever standpoint the case was regarded the patni must be held to have been created bona fide and acted upon.

He believed the orale vidence adduced on behalf of the respondent that Nabin executed the deed of gift in favour of his "domesticated son-in-law" in order to fulfill his promise that if Gris came to live in his house he would make him a gift of some property ; and that as Gris was in Government service and unable to attend to the management of the property he executed the patni in favour of the defendant Satis. Having come to the conclusion that the transaction was conceived in order that Nabin might confer a benefit upon Gris the learned Judge proceeds to consider the oral and documentary evidence that the deed of gift and the patni had been acted uron. He finds that the first defendant, who admittely what a tenant with occupancy

(15) [1869] 13 M. I. A. 77=3 B. L. R. 34=12 W. R. 32=2 Suther. 253=2 Sar. 487 (P. C.).
(16) [1869] 13 M. I. A. 181=2 Sar. 507 (P. C.).
(17) [1885] 8 Mad. 373.
(18) [1909] 10 C. L. J. 33=2 I. C. 946=13 C. W. N. 797.
(19) [1896] 23 Cal. 179.
(20) [1908] 35 Cal. 701=7 C. L. J. 563=12 C. W. N. 657.
(21) [1919] 29 C. L. J. 577=52 I. C. 825.

rights, had paid rent to Satis after the grant of the patni and that Satis had paid patni rent to Gris. He further found that the oral evidence was corroborated by the documents adduced by the respondent, rent receipts, collection papers, revenue challans, a receipt by the appellant's co-sharer, the registration of Gris' name in the Collectorate, a decree obtained by Satis in an ejectment suit, and the special registration under the Assam Regulation of 1886, all tending to prove that the patni was a bona fide tenure. The conclusion at which he arrived was that

> the overwhelming documentary evidence added to the oral evidence on the defendents' (respondents') side will leave no room for doubt that the patni was really granted to the Defendant No. 2 and acted upon for the last 17 years.

In my opinion, it would be idle to contend that apart altogether from the evidence relating to the special registration and the revenue challans there was not abundant evidence to justify the decision of the lower Court. But it is clear that in considering the issue before him in the light of the evidence adduced by the respondent the learned Judge did base his conclusion to some extent upon the evidence which in the circumstances he ought not to have taken into account and as the High Court in second appeal is not entitled to examine the evidence in order to ascertain whether the remaining evidence was sufficient to justify the decision of the lower Court the case must be remanded, unless the lower Court

> independently of the evidence improperly admitted has apparently arrived at its conclusion on other grounds.

As I apprehend his judgment there is no doubt that the learned Judge did base his decision on more than one ground for, apart altogether from the evidence adduced on behalf of the respondent the Judge arrived at the same conclusion after considering independently the case presented on behalf of the appellant. The execution of the document by which the patni was created not being challenged, the burden of proving that the tenure thereby created was not bona fide, or, in other words, that the transaction was not a genuine one was shifted upon the appellant. It cannot be doubted that that was the correct view to take of the legal position : see Ss. 101 and 102 of the Evidence Act. The learned Judge, however, finds that the appellant had entirely failed to discharge the onus that lay upon him. He states that there is not an iota of evidence on the plaintiff's side that the patni is fraudulent or benami. No allegation of it is made in the plaint, nor in the petition by which the Defendant No. 2 was added as a defendant. The decision of a Court must not rest on suspicion and surmise, but must be based on legal grounds established by legal testimony. The plaintiff must show something definite to establish that it is a sham transaction on the principle that the burden of proof lies upon the person who claims contrary to the terms of the deed, and alleges that the apparent is not the real state of things.

It has been held that Nabin's statements in the previous suits cannot be used as admissions or substantive evidence. Mere argument is no evidence. The statements of witnesses are oral evidence. The lower Court found that the plaintiff adduced no evidence to show that Nabin is in possession of the patni mahal, and that there is satisfactory evidence to show that the patnidar Satis is in possession. So it is found that the patni and the gift are not fictitious transactions. In this part of his judgment the learned Judge based his decision upon a different and separate ground, namely, that the appellant had utterly failed to discharge the onus probandi that lay upon him. This ground is entirely independent of the evidence improperly admitted, for it is based, not upon the evidence adduced by the respondent but upon the failure of the appellant to produce any evidence at all to support his contention that the patni tenure was part of a sham transaction.

In *Womes Chunder Chatterjee's* case (3) the Court refused to order a remand in circumstances not dissimilar from those in the case before us. In my opinion for these reasons it is neither necessary nor desirable that the present case should be remanded to the lower appellate Court in order that the issue as to whether the patni tenure was bona fide created and acted upon should once again be re-heard. The learned Judge regarding this issue from more than one point of view as I apprehend his judgment has arrived at the same conclusion, and one adverse to the appellant—upon

separate and independent grounds; and I am of opinion that the case ought not to be remanded and that the appeal should be dismissed with costs.

*Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 149

CUMING AND PAGE, JJ,

*Srish Chandra Ray* and *others*—Plaintiffs—Appellants.

v.

*Gaharali Talukdar* and *others*—Defendants—Respondents.

Appeal No. 439 of 1924, Decided on 27th April 1926, from the appellate decree of the Addl. Sub-J., Backergunj, D/- 13th November 1923.

*Bengal Land Revenue Settlement Regulation, 7 of* 1822—*Diara Deputy Collector cannot assess rent.*

A Diara Deputy Collector acting under the regulation has no power to assess rent of the tenants, but he can only record rents paid by the tenants: 23 *C. W. N.* 587, *Foll.* [P.148, C. 2]

*Sures Chandra Talukdar* and *Surendra Mohan Ghose*—for Appellants.

*Gunada Charan Sen* and *Radhika Ranjan Guha*—for Respondents.

**Cuming, J.**—In the suit out of whioh this appeal has arisen the plaintiffs sued to recover rent for four years of a certain 4·45 acres of diara land at a jama of Rs. 29-3-6. The defendant's case was that they held a nim howla under the plaintiffs which comprised some 17 odd acres at an annual jama of Rs. 21-10-7.

The first Court found that this jama of 5·45 acres had been carved out of a larger jama of 17 acres by the Diara Deputy Collector. The trial Court held that the diara assessment could not supersede the Record of Rights unless it was shown that the tenants were parties to the diara proceedings, and on this finding he dismissed the plaintiffs' suit. The plaintiffs appealed to the District Court. The District Court held that the Diara Deputy Collector acting under Regulation 7 of 1822 had no power to assess the rent to be paid by a tenant to a zemindar. All that he could do was to record what rents were actually being paid by the tenants, and in this view of the law he dismissed the plaintiff's suit. The plaintiffs have appealed to this Court and it has been argued on their behalf that a Diara Collector had power under Regulation 7 of 1822 to assess rents that were to be paid by the tenants to the talukdars.

In support of this contention reliance has been placed on an unreported decision of this Court in Letters Patent Appeals Nos. 35, 36, 37 and 38 of 1920 (*Gopal Chand Biswas* v. *Jahanulla Sheikh*) decided on the 11th August 1920. This authority does not really support the point that Mr. Talukdar would ask us to hold that it does. All that this decision lays down is that where tenants were not parties to the proceedings under Regulation 7 of 1822 they were not bound by the proceedings. That is not the same as holding that a Diara Deputy Collector had the power to assess and fix rent under Regulation 7 of 1822. On the other hand there is a long course of decisions beginning with the case of *Jagadindra Nath Roy* v. *Mohendra Nath Mozumdar* (1) where it is held that a Diara Deputy Collector acting under Regulation 7 of 1822 had no power to assess rents of the tenants, but he could only record rents that were being paid by the tenants. This point is, therefore, decided against the appellants.

Mr. Talukdar then argued that he should at any rate have been given a decree at the rate admitted by the defendants, namely, Rs. 21 odd. This contention finds first of all no place in the grounds of appeal. Secondly, it has no substance. The plaintiffs sued for rent of a certain jama of five acres odd at a rent of Rs. 29-3-6 and the defendants proved that they held a much bigger jama on a smaller rent. There is, therefore, no question of the plaintiffs getting rent at the rate admitted by the defendants because the rent admitted by the defendants is for an entirely different jama and not the jama which the plaintiffs contend that the defendants hold.

The appeal, therefore, fails and is dismissed with costs.

**Page, J.**—I agree.

*Appeal dismissed.*

---

(1) [1919] 23 C. W. N. 587=52 I. C. 90.

## A. I. R. 1927 Calcutta 149

SUHRAWARDY, DUVAL AND B. B. GHOSE, JJ.

*Ashutosh Ganguly*—Petitioner.

v.

*E. L. Watson*—Opposite Party.

Civil Revision No. 168 of 1925, Decided on 7th May 1926, from the order of the Ch. Presy. Mag., Calcutta.

(a) *Presidency Towns Insolvency Act, S. 102—Scope.*

Section 102 of the Presidency Towns Insolvency Act applies only to an insolvent adjudicated under that Act. [P. 151, C. 2]

(b) *Provincial Insolvency Act, S. 72 (1) and (2)—Sub-S. (2) lays down the only procedure by which offence under sub-S. (1) can be proceeded with (Per Suhrawardy and Ghose, JJ.)—Sub-S. (2) does not take away right of private party and prosecute on his own motion (Duval, J.).*

*Per Suhrawardy and Ghose, JJ. contra Duval, J.*—S. 72 lays down the only mode by which a person accused of an offence under the first sub-section may be proceeded against, that is, by the method laid down in sub-S. (2). Both clauses of S. 72 should be read together and no prosecution under the first clause can be initiated without the Insolvency Court sending the case for trial to the nearest Magistrate of the First Class. [P. 150, C. 1, P. 155, C. 2]

*Per Daval, J.*—S. 72 only lays down the procedure which the Court may adopt when it determines to prosecute for an offence under this section. This sub-section cannot take away the right of a private party to prosecute on his own motion if he is aggrieved by what has occurred. ]P. 152, C. 1]

(c) *Interpretation of statutes—Liability created by a statute—Specific remedy provided by the same statute excludes all other remedies.*

If a statute creates a new duty or imposes a new liability, and prescribes a specific remedy in case of neglect to perform the duty of discharge...the liability, the general rule is that no remedy can be taken but the particular remedy prescribed by the statute. [P. 150, C. 2]

(d) *Interpretation of statutes—Proceedings of Legislature are not relevant.*

A Court is not authorized to look into the proceedings of the Legislature to see what took place there during the passage of the Bill which passed into law or what was the reason why a particular clause was put in for the purpose of interpreting a statute. [P. 153, C. 2]

*A. C. Dutt* and *Phanindra Nath Das*—for Petitioner.

*Khondkar*—for the Crown.

*Mritunjoy Chattopadhyaya*—for Opposite Party.

**Suhrawardy, J.**—This is a Rule calling upon the Chief Presidency Magistrate and the opposite party to show cause why the conviction of the petitioner should not be set aside on the grounds: (1) that the conviction under S. 102 of the Presidency Towns Insolvency Act is bad in law, (2) that the joint trial of the petitioner with Monmohan Bose is illegal and (3) that the identity of the petitioner is not established. As to the third ground it has not been seriously pressed nor is there any substance in it. The other two grounds are, therefore, to be considered in connexion with the facts of this case which are: that the petitioner along with one Monmohan Bose was placed on his trial before the Chief Presidency Magistrate for an offence under S. 102 of the Presidency Towns Insolvency Act on the allegation that the accused contracted debts of about Rs. 6,000, while they were undischarged insolvents, and was convicted of the offence and sentenced to three months' rigorous imprisonment. Section 102 of the Presidency Towns Insolvency Act is in these words:

> An undischarged insolvent obtaining credit to the extent of Rs. 50 or upwards from any person without informing such person that he is an undischarged insolvent shall, on conviction by a Magistrate, be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.

It appears that the petitioner was adjudicated insolvent by the Court of the District Judge of Hooghly and his co-accused Monmohan Bose was adjudicated insolvent in the Original Side of this Court. The first question that arises is Can the petitioner be convicted under S. 102 of the Presidency Towns Insolvency Act? It has been urged on behalf of the Crown, and the trial Magistrate in his explanation has submitted the same view, that S. 102 enunciates an offence committed by an undischarged insolvent by whichever Court he may have been adjudicated. This view is clearly wrong. That section is included in Part VIII of the Presidency Towns Insolvency Act which deals with penalties presumably incurred by an insolvent so declared under the Act. Section 103 which also does not define the insolvent makes punishable certain acts of the insolvent which could only be done under the Presidency Towns Insolvency Act. The conviction of the petitioner under S. 102 of the Presidency Towns Insolvency Act is, therefore, illegal; but it is argued that he may be convicted under S. 72 (1) of the Provincial Insolvency Act, 1920 and tried jointly with Monmohan Bose, under S. 239, Cl. (d), Criminal P. C., as the facts found are that the two accused incurred the debts

while carrying on a joint business under the name and style of the Indo-European Import and Export Company, Limited, in the town of Calcutta.

Section 72, Cl. (1) of the Provincial Insolvency Act is word for word the same as S. 102 of the Presidency Towns Insolvency Act III of 1909. The second clause of S. 72 runs thus :

> Where the Court, has reason to believe that an undischarged insolvent has committed the offence referred in sub-S. (1), the Court, after making any preliminary enquiry that may be necessary, may send the case for trial to the nearest Magistrate of the First Class, and may send the accused in custody or take sufficient security for his appearance before such Magistrate ; and may bind over any person to appear and give evidence on such trial.

It is contended on behalf of the petitioner that both clauses of S. 72 should be read together and no prosecution under the first clause can be initiated without the insolvency Court sending the case for trial to the nearest Magistrate of the First Class. In my opinion this contention ought to prevail. It seems to me that the first clause of S. 72 defines and states an offence which an undischarged insolvent commits when he obtains credit to the extent of Rs. 50 or upwards and the second clause of that section prescribes the procedure to be followed when such offence is committed ; in other words the first clause may be compared to the Penal Code and the second to the Criminal P. C. As there is no section in the Presidency Towns Insolvency Act corresponding to S. 72, Cl. (2) of the Provincial Insolvency Act, it may or may not be necessary to invoke the help of the Insolvency Court to prosecute an insolvent under S. 102 of that Act. I express no opinion on the point. But S. 72, Cl. (2) of the Provincial Insolvency Act corresponds to S. 161 of the English Bankruptcy Act, 1914, and the practice in England so far as I have been able to ascertain, ( see Williams on Bankruptcy Practice, p. 450) is that for an offence under S. 155 of the Bankruptcy Act, which corresponds to S. 102 of the Presidency Towns Insolvency Act and S. 72 (1) of the Provincial Insolvency Act, the Insolvency Court shall, before such prosecution, enquire and order a debtor to be prosecuted for such offence. It seems to me that the provision in S. 72 (2) of the Provincial Insolvency Act has been borrowed from the English Act which for some reason or other has not been copied in the Presidency Towns Insolvency Act. S. 72 of the Provincial Insolvency Act, 1920, is a reproduction of S. 53 of the Provincial Insolvency Act III of 1907. The view that the Insolvency Court should take cognizance of the matter before prosecution can be initiated in the ordinary criminal Court is supported by the Report of the Select Committee on the Bill which became Act III of 1907. The Committee stated :

> Section 53. We think that it is advisable to make provision by the addition of a new sub-Cl. (2) to Cl. 40 of the Bill as introduced, for the prosecution of an undischarged insolvent who obtains credit by concealing his insolvency, a procedure such as on the lines of the procedure enacted by S. 476 of the Criminal P. C. 1898 : Gazette of India, 2nd March 1907, part V, page 10.

This observation of the Select Committee supplies the true clue to the meaning of S. 72, Cl. (2), and the intention of the Legislature in enacting it.

The accepted rule of construction of statutes in such cases also helps the view I am inclined to take. If a statute creates a new duty or imposes a new liability, and prescribes a specific remedy in case of neglect to perform the duty of discharge...the liability, the general rule is " that no remedy can be taken, but the particular remedy prescribed by the statute " Craies on Statute Law, third Edition, p. 217.

The offence under S. 72, Cl. (1) of the Provincial Insolvency Act has been created by statute and the mode of prosecution for such an offence if provided by that statute should be the only mode for initiating prosecution. I am not impressed by the argument that the wording of Cl. (2) of S. 72 is different from that of S. 195 of the Criminal P. C., or similar sections in other enactments for the clause is sufficiently clear that the insolvency Court is to enquire into the matter before placing it before the Magistrate.

It is also argued that in S. 72, Cl. (2) the use of the expression " may send the case for trial " shows that it is not obligatory upon the Insolvency Court to enquire into the offence and thus take it out of the jurisdiction of the ordinary criminal Court, but the Court may, if it so pleases, do so when the matter is brought to its notice. I do not think that the word " may " in the clause has been put with that intention. Why

"may" is used in the clause can be ascertained by comparing it with S. 161 of the English Bankruptcy Act, where it is not obligatory upon the Court to order prosecution unless it appears to the Court that there is reasonable probability that the debtor will be convicted and unless it appears to the Court that the circumstances are as to render a prosecution desirable. The second clause of S. 72 of the Provincial Insolvency Act, therefore, leaves it to the discretion of the Court not to order a prosecution if there are not sufficient materials to sustain it or if in the circumstances of the case it is not desirable. The view that I take avoids a serious anomaly. If the Insolvency Court does not deem it desirable to order prosecution, an ordinary criminal Court should not take cognizance of the offence in supersession of the order of the Insolvency Court. The provision in the English Bankruptcy Act is an old one, a reproduction from the repealed Debtors Act, 1869, and is a salutary one, which should be followed in this country as a rule of justice, equity and good conscience.

The view that I have taken of the law is supported by the special provision in Cl. (2) of S. 72 that if the Court sends the case for trial it must be done to the nearest Magistrate of the First Class. If it is open to any creditor to start proceedings before an ordinary criminal Court on a complaint, such complaint can be made not necessarily to a Magistrate of the First Class. There does not seem to be any sense in enacting that if a Court orders prosecution it must be before the nearest Magistrate of the First Class whereas a private party may prosecute the offender before any Magistrate exercising even second class powers if specially authorised to receive complaints.

In the above view of the law I hold that the prosecution of the petitioner without observing the procedure laid down in S. 72 (2) of the Provincial Insolvency Act is invalid in law and the conviction and the sentence, therefore, must be set aside.

As my learned brother has taken a different view the case will be placed before the Honourable the Chief Justice under S. 439 read with S. 429, Criminal P. C., for reference to a third Judge.

**Duval, J.**—In this matter which is one which comes up in revision two persons Monmohan Bose and Asutosh Ganguly were put on their trial under S. 102 of the Presidency Towns Insolvency Act, on the complaint of one Mr. E. L. Watson of the firm of Messrs. D. Waldie and Company. It appears that Bose and Ganguly were members of a firm known as the Indo-European Export and Import Company and, as such, ordered goods amounting to several thousands of rupees in value from D. Waldie and Company. Subsequently, having obtained the goods they did not pay for them and a suit was brought in the High Court and a decree obtained. Then it transpired that Bose was an undischarged insolvent having been so adjudicated by the High Court and Ganguly, too, was an undischarged insolvent having been so adjudicated by the District Judge of Hooghly.

The present case was brought on the complaint of Mr. Watson; the facts are not in dispute. The Chief Presidency Magistrate has convicted both of them under S. 102 of the Presidency Towns Insolvency Act and has sentenced Bose to a fine of Rs. 100 and Ganguly to three months' rigorous imprisonment. A. T. Ganguly alone has moved this Court and has obtained a Rule on the grounds, firstly, that the conviction and sentence of the petitioner under S. 102 of the Presidency Towns Insolvency Act are bad in law and ought to be set aside; secondly, that the joint trial and conviction of Ganguly along with Bose are illegal under the provisions of S. 239, Criminal P. C., and the whole proceedings should be quashed; and, thirdly, that the identity of the petitioner has not been legally established and, therefore, the conviction was not maintainable. At the hearing of the Rule, the third point was not urged. Now, it is clear that Ganguly was an insolvent by virtue of an order of the District Judge of Hoogly and not by a Judge in the Presidency Town. S. 102 of the Presidency Towns Insolvency Act appears to me only to relate to an insolvent adjudicated under that Act; but S. 72 (1) of the Provincial Insolvency Act is exactly in the same words as S. 102 of the corresponding Presidency Towns Insolvency Act. In my opinion, therefore, though no doubt the conviction under S. 102 of the Presidency

Towns Insolvency Act is incorrect the only difference is that the sentence should have been under S. 72 (1) of Provincial Insolvency Act.

But it is urged that though there is nothing in the Presidency Towns Insolvency Act which requires the sanction of any Court before initiating any proceeding under S. 102 of that Act, S. 72 (2) of the Provincial Insolvency Act enjoins that there can be no prosecution except by order of the Court itself. And as the Court at Hoogly has not ordered this prosecution, the conviction cannot stand. In my opinion, that is not so. Any person aggrieved by an offence committed to his detriment is ordinarily entitled to make his complaint to a Magistrate without obtaining any sanction and, in my opinion, it is only when there is a definite legislative enactment preventing the entertainment of a complaint unless with sanction of a Court or other high authority (e. g., cases of perjury, sedition, offences under the Arms and Explosives Act and the like) that the sanction of a Court or other authority is necessary before a case can be instituted. Here S. 72 (2) of the Provincial Insolvency Act only lays down the procedure which the Court may adopt when it determines to prosecute for an offence under this section and there is no definite enactment debarring a private prosecution. In my opinion, this sub-section cannot take away the right of a private party to prosecute on his own motion if he is aggrieved by what has occurred. I would only contrast with S. 72 (2) of the Act in this connexion the wording of Ss. 195—199, Criminal P. C., where the restriction on the right of an individual to complain is in the words:

> No Court shall take cognizance of an offence unless with the previous sanction or on the complaint; of

and S. 7 of the Explosive Substance Act.

> No Court shall proceed to the trial of any person ..... under this Act except with the consent of the local Government or the Governor-General in Council.

As to the question of joint trial, though no doubt the proper conviction of the two accused should have been under two separate Acts, the facts alleged against them are the same, i e., that each obtained credit concealing the fact that he was an undischarged insolvent.

In my opinion, under the new S. 239 (d), Criminal P. C., which lays down that persons accused of different offences in the same transaction may be tried together, there is, in my opinion, nothing illegal in trying these two persons together. In my opinion, therefore, the Rule should be discharged with the exception that the conviction of A. T. Ganguly should be altered to one under S. 72 (1) of the Provincial Insolvency Act.

**B. B. Ghose, J.**—This is an application for revision of an order passed by the Additional Presidency Magistrate of Calcutta convicting the petitioner under S. 102 of the Presidency Towns Insolvency Act and sentencing him to three months' rigorous imprisonment. The case has come before me on acconnt of a difference of opinion between two learned Judges of the Divisional Bench. (His Lordship after setting out the facts proceeded). With regard to the question whether the conviction of the petitioner under S. 102 of the Presidency Towns Insolvency Act can be sustained, it appears that both the learned Judges who heard the case on the previous occasion were agreed that the conviction under that section was not sustainable. But the whole case is before me now, and I have to decide the questions raised before me. Mr. Khondkar, the Deputy Legal Remembrancer, who appears in this case at the direction of the Bench which granted the Rule, contends that the conviction is sustainable under that section. Mr. Chatterjee, who appears for the complainant, opposite party, on whom the Rule was served, was also heard by me and he, too, supports that contention. It is, therefore, necessary for me to determine whether the conviction of the petitioner under S. 102 of the Presidency Towns Insolvency Act is sustainable or not. There is no question that the petitioner was not adjudicated an insolvent under the Presidency Towns Insolvency Act. But the contention on behalf of the opposite party is that S. 102 of the said Act is quite general in its terms, and is applicable to the case of the petitioner. It proceeds thus:

> An undischarged insolvent obtaining credit to the extent of Rs. 50 or upwards from any person without informing such person that he is an undischarged insolvent shall, on conviction by a Magistrate, be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.

The argument is that that there is no definition of an undischarged insolvent given in the Act and the provisions of S. 102 of the Presidency Towns Insolvency Act are in the same terms as the provisions of S. 72, sub-S. (1) of the Provincial Insolvency Act. Whichever Act applies to the petitioner's case, he is an undischarged insolvent, and being such and having committed the offence within the Presidency Town of Calcutta he is punishable under S. 102 of the Presidency Towns Insolvency Act.

It seems to me that a fallacy underlies this contention. The offence defined in S. 102 of the Presidency Towns Insolvency Act has been created by the statute itself, and in order to determine who comes within the provisions of that section, one must find out whether he is an insolvent, as contemplated under the Act and is still undischarged. Under S. 10 of the Presidency Towns Insolvency Act, an order of adjudication may be made adjudging a person an insolvent In order to convict a person of an offence under S. 102 of that Act it must first be fouud that that person was adjudged an insolvent under S. 10 of the Act and he is still undischarged. That being so, in my opinion, the petitioner cannot be said to be a person falling within the description under S. 102 of the Presidency Towns Insolvency Act and cannot, therefore, be convicted of an offence under that section. It is argued that a person committing an offence in Calcutta, under S. 72 (1) of the Provincial Insolvency Act cannot be proceeded against at all, as that Act does not apply to Calcutta. I do not think that would be the result of my holding that the petitioner cannot be convicted under S. 102 of the Presidency Towns Insolvency Act. There cannot be any question, however, nor has it been contended on behalf of the petitioner, that if the conviction under S. 102 of the Presidency Towns Insolvency Act is unsustainable, but the facts disclose an offence under S. 72 (1) of the Provincial Insolvency Act, this Court may alter the conviction to one under S. 72, sub-S. (1) of the latter Act, provided the proceedings can be held to be valid with reference to that section. The facts which have been found against the petitioner, apart from any other question, undoubtedly constitute an offence under S. 72, sub-S. (1) of the Provincial Insolvency Act.

The question that I have now to determine, which is the most important one in this case, is whether a complaint made otherwise than as provided by sub-S. (2) of S. 72 of the Provincial Insolvency Act is according to law and a conviction for an offence under sub-S. (1) based on such a complaint would be sustainable. The contention on behalf of the Crown as well as of the complainant in substance is that sub-S. (1) of S. 72 defines the offence and sub-S. (2) of the said section enacts only one method by which the offender may be brought to justice and it does preclude the person who has been aggrieved by the act of the accused from lodging a complaint against him under the ordinary law as laid down in the Criminal P. C. The contention on behalf of the petitioner, on the other hand, is that sub-S. (2) of S. 72 prescribes the only mode by which the offender can be brought to trial. In support of the contention, on behalf of the petitioner, Mr. Dutt invited me to look into the report of the Select Committee on the Bill which was subsequently passed into the Provincial Insolvency Act of 1907. The Court, however, is not authorized to look into the proceedings of the Legislature to see what took place there during the passage of the Bill which passed in to law or what was the reason why a particular clause was put in for the purpose of interpreting a statute. I need only refer to the well-known case of *Administrator-General of Bengal* v. *Premlal Mullick* (1), where Lord Watson in delivering the judgment of the Judicial Committee said :

> Their Lordships observe that the two learned Judges who constituted the majority in the appellate Court, although they do not base their judgments upon them, refer to the proceedings of the Legislature which resulted in the passing of the Act of 1874 as legitimate aids to the construction of S. 31. Their Lordships think it right to express their dissent from that proposition. The same reasons which exclude these considerations when the clauses of an Act of the British Legislature are under construction are equally cogent in the case of an Indian statute.

I, therefore, decline to look into the proceedings of the Legislature in order to assist me in construing the provisions of the Act. Mr. Dutt made reference to

(1) [1895] 22 Cal. 788=22 I. A. 107=6 Sar. 603 (P C.).

the English Bankruptcy Act for the purpose of pointing out that, in England, under the present Bankruptcy Act of 1914, as well as under the previous law, a private person is not allowed to prosecute in case of a similar offence. S. 155 of the Bankruptcy Act of 1914 makes it an offence for an undischarged bankrupt to obtain credit for a certain amount as is provided in S. 72 of the Provincial Insolvency Act here. In S. 161, there is a clear provision as to how a prosecution for an offence under S. 155 should be conducted. There is no room for any contention that a private person may lodge a complaint for an offence under the English Act and S. 165 provides that either the Public Prosecutor or the Board of Trade themselves, or through the Official Receiver may initiate the prosecution. Mr. Dutt argued that S. 72 of the Provincial Insolvency Act of 1920 is the same as S. 53 of the Provincial Insolvency Act of 1907 and both these sections have been taken from S. 31 of the English Bankruptcy Act of 1883. In the English Bankruptcy Act of 1883, there was the same provision as in the Act of 1914, namely, that the Court should direct the trustee to prosecute the bankrupt if it appeared that there was a reasonable probability that the bankrupt might be convicted. This provision appears in S. 16 of the Debtors Act of 1889, to which reference must be made in this connexion. The policy of the Legislature in England, therefore, it is contended, was that there should be no prosecution by a private person for such an offence as this and it may, therefore, be very reasonably inferred that it was the intention of the Legislature here in enacting S. 72 of the Provincial Insolvency Act to adopt the same policy, namely, that no private prosecution should be allowed in such a case.

The contention of Mr. Khondkar, on the other hand, is that the provisions in the English Act are very clear and definite, and if it had been the intention of the Legisiature here that the same policy should be adopted in this country as in England, there was nothing to prevent the Legislature from making the language of the Act as clear as it is in the English Acts. It must be admitted that there is a good deal of force in this argument. I have, however, to construe the section as it stands and I must do so with reference to the accepted rules of construction in coming to my conclusion. Mr. Khondkar's contention is that the section should be construed in this way. If, in the course of any judicial proceeding, the Court finds that an undischarged bankrupt has committed the offence mentioned in S. 72, sub-S. (1) of the Provincial Insolvency Act, then the Court may proceed in the way prescribed in sub-S. (2); but if there is no proceeding in Court on account of any debt incurred by the insolvent, there is nothing that precludes the party injured by the offence committed under S. 72, sub-S. (1), to have recourse to the Court of his own accord. One great difficulty in accepting this contention is that the provisions of sub-S. (2) of S. 72 would be absolutely unnecessary because, if any person is entitled to institute a complaint, why should he take the trouble of bringing the matter to the notice of the Court and ask the Court to have a preliminary enquiry made and to send the case to be tried by a Magistrate. He would, if he is allowed to do so, under ordinary circumstances, go direct to the Magistrate and lodge his complaint instead of going through the circuitous process of asking the Court to send the case for trial to the Magistrate and taking the chance of an adverse opinion.

The next question that seems to arise is whether the two sub-sections should be dealt with as laying down separate provisions or as separate enactments, or, in other words, whether sub-S. (1) of S. 72 should be read as a provision prescribing a penalty for an offence and sub-S. (2) as a matter of procedure quite dissociated from the provisions of sub-S. (1). It seems to me that the division of an enactment into sub-sections does not permit that mode of construction of the statute. I would refer to one of the rules of construction given in Craies on Statute Law, 3rd Edition, (page 194), which runs as follows:

> Whether an enactment be printed as part of one section or made in another section can make no difference in the construction of the statute.

I must, therefore, read S. 72 as if there were no divisions into sub-S. (1) and sub-S. (2). If that is done, it would appear that S. 72 creates a new offence and it itself provides how the offender should be proceeded against. It is argued by Mr. Khondkar as well as by Mr. Chatterji

that there is no such provision in the Provincial Insolvency Act as is contained in S. 195 of the Criminal P. C. which begins with the negative words: "No Court shall take cognizance," and particular reference is made to sub-S. (c) of that section in which it is provided which offences shall not be taken cognizance of except on the complaint in writing of the Court. Upon this, the contention is that the ordinary procedure under the Criminal P. C. is not excluded and, therefore, a private prosecutor may institute a complaint for an offence under S. 72 (1) of the Provincial Insolvency Act.

I am unable to accept this contention, as I am of opinion that where a special offence is created by a statute and the mode how the penalty should be imposed is provided in that statute, it can only be imposed in the mode provided therein and in no other mode. In this connexion I may cite the case of *Reg* v. *Cubitt* (2). In that case, a certain person committed an offence under the Sea Fisheries Act, the provisions of S. 11 of which Act run thus: "The provisions of this Act shall be enforced by Sea Fishery Officers," who are defined by that section. It was held in that case that:

> the effect of the above words is that no one except a Sea Fishery Officer can prosecute for an offence against the Act.

Mr. Khondkar, to whom I pointed out this, case attempted to distinguish it on the ground that there the enactment was that the provisions of the Act should be enforced by certain officers who were bound to act for the purpose of enforcing the penalty and, therefore, no other person could do so. There was no such provision in the Insolvency Act and, therefore, the offender might go unpunished. I do not think there is any substance in this contention. I must refer to the observations made by Lord Coleridge, C. J., in that case which are as follows:

> Certain offences are created by the Act, which then goes on to point out who shall enforce its provisions. If anyone may enforce the Act, S. 11 is useless. I do not think that negative words are required to exclude proceedings by persons other than Sea Fishery Officers. For instance, if an Act provided that the Attorney-General was to sue for a penalty, no one else could sue for it, it is obvious that if every one could sue for the penalty the Attorney-General could sue for it, so that on that view of the instatute the clause enabling him tosue would be unnecessary and useless. The same observation applies to this Act, the words of which are direct nd clear.

The same learned Chief Justice repeated these observations in another case, *Anderson* v. *Hamlin* (3), and I think I must accept the principle laid down in those cases. I, therefore, hold that S. 72 of the Provincial Insolvency Act lays down the only mode by which a person accused of an offence under the first subsection of S. 72 of the Provincial Insolvency Act may be proceeded against that is, by the method laid down in sub- S. (2). In the present instance, the case having been tried on the complaint of a person who was not authorized to make the complaint the trial for an offence under that section would be vitiated, and on that ground I do not think I can alter the conviction as one under S. 72 (1) of the Provincial Insolvency Act. The conviction of and the sentence passed on the petitioner must be set aside.

There is one observation that I ought to make with reference to the arguments advanced by Mr. Khondkar that there is no reason why an offender under the Provincial Insolvency Act should have a greater privilege than an offender under the Presidency Towns Insolvency Act. It is, however, difficult to divine the reas on why there is such a difference between the two enactments. The only thing that occurs to me is that the law of insolvency was elaborately enacted for places outside the Presidency towns for the first time in 1907, and it might be that the policy of the Legislature was that prosecution for offences first created by that new Act should be under the control of the Court, that is, the insolvency Court which adjudged the person against whom a charge is made as an insolvent.

On the finding I have arrived at, it is unnecessary for me to go into the question as to whether the joint trial of the petitioner with the other man Monmohan Bose was bad. Considerable argument was addressed to me by both sides on this point. My inclination was to hold that, if the complaint against the petitioner had been in accordance with law there could be a joint trial. But it is

(2) [1889] 22 Q. B. D. 622=87 W. R. 492=58 L. J. M. C. 132=53 J. P. 470=16 Cox. C.C 618=60 L. T. 638.

(3) [1890] 25 Q. B. D. 221=54 J. P. 757=59 L. J. M. C. 151=17 Cox. C.C. 129=63 L. T. 168.

not necessary for me to say anything further with regard to that question.

My order, therefore is that the conviction of and the sentence passed on the petitioner be set aside. This order of mine will not certainly preclude the Court from taking such steps as it may think fit under S. 72, sub-S. (2) of the Provincial Insolvency Act against the petitioner. Let the petitioner be discharged from his bail-bond.

*Rule made absolute.*

---

## A. I. R. 1927 Calcutta 156

GREAVES AND MUKERJI, JJ.

*Purna Chandra Kundu* and *others*—Petitioners.

v.

*Manobini Devi*—Opposite Party.

Civil Rule No. 335 of 1926, Decided on 26th April 1926, from the order of the Munsif of Howrah, D/- 11th March 1926.

*Civil P. C., O.* 21, *R.* 100—*Purchaser of the whole of non-transferable occupancy holding can apply under R.* 100.

The purchaser of the whole of an occupancy holding not transferable by custom is not a representative of the judgment-debtor and therefore entitled to apply under R. 100 of O. 21 : 3 *Pat. L. J.* 579, *Doubted* ; 42 *Cal.* 172 (*F. B.*), *Ref.* [P 157 C 1]

*G. C. Sen*, *S. K. Basu* and *Arun Kumar Roy*—for Petitioners.

*Dwarkanath Chakravarti*, *Panchanan Ghose* and *Durga Das Roy*—for Opposite Party.

**Greaves, J.**—This Rule was issued calling on the opposite party to show cause why a certain order of the Munsif of the 11th March 1926, dismissing an application on the ground that it was not maintainable under the provisions of O. 21, R. 100, Civil P. C., should not be set aside or varied on the ground that the petitioners were entitled to maintain the application on the facts set out in the Munsif's order. The facts are as follows :

The petitioners commenced a title suit impeaching a sale in which the landlord decree-holder had purchased the land and they asked for confirmation of their possession. In that suit the petitioners applied for an injunction restraing delivery of the land to the decree-holder. Owing to the laches of the clerks in the Munsif's office the injunction order was not shown to the clerk who issued the writ of possession, so the writ of possession was issued and symbolical possession was delivered to the decree-holder in due course. The decree-holder took actual possession, as he had received no notice of the injunction that had been passed. Thereupon the petitioners applied to the Munsif under the provision of O. 21, R. 100, Civil P. C, asking that they should be restored to possession. The Munsif has found that the petitioners were in possession of the disputed land and property for many years and that the judgment-debtor against whom the opposite party had obtained a rent decree ex parte had not been in possession for a long time.

The petitioners had obtained a transfer of the holding from the judgmenr-debtor some time previously. The Muusif then went on to hold that under the provisions of O. 21, R. 100, the petitioners on the facts were entitled to recover possession as they had been in possession until the decree-holder obtained possession under the order to which I have referred. But the Munsif further held that in spite of this there were difficulties in the way of the petitioners as the holding according to the Munsif was a non-transferable occupancy holding, and the Munsif then held that the petitioners are representatives of the judgment-debtor and as such are not entitled to make the application under the provisions of O. 21, R. 100, Civil P. C. Now the petitioners' case is that the holding is a mourasi mokarari holding. This question we cannot go into for the purposes of this Rule, and we must accept the Munsif's finding that the holding is a non-transferable occupancy holding for the purpose of the present application. O. 21, R 100, provides that where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for possession of such property, the Court shall fix a day for investigating the matter, and R. 101 provides that, when the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put into possession of the property.

If therefore the Munsif was right in holding that the petitioners obtained title through the judgment-debtor then clearly they would not be entitled to maintain the application under the provisions of O. 21, R. 100. But the holding was a non-transferable occupancy holding, or so we must take it to be for the purpose of this rule. The landlord has never consented to the transfer nor has he recognized the petitioners. Consequently the petitioners are trespassers so far as he is concerned and obtained no title by virtue of the transfer to them of the property by the original tenant. This being so it seems to me that they cannot be taken to be representatives of the judgment-debtors as they are merely trespassers and obtained no title from him. This being so it seems to me that they are entitled to maintain the application under the provisions of O. 21, R. 100.

But the Munsif relied on a case to which we have been referred this morning, *Panchratan Koeri* v. *Ram Sahay Singh* (1). The head note is as follows :

> The purchaser of the whole or part of an occupancy holding not transferable by custom is a representative of the judgment-debtor and entitled to object under S. 47 to a sale. He is therefore not entitled to maintain proceeding, under O. 21, R. 100.

The learned Judges in delivering their judgment referred to *Dayamoyi's* case (2) in support of their decision. Now reference to *Dayamoyi* v. *Ananda Mohan* (2) shows that the decision in that case referred not to the transfer of the whole of an occupancy holding but merely to a part, and one must read the first answer to the question propounded as an answer to a reference with regard to the transfer of a portion only of a holding and not to the transfer of a whole. Accordingly I feel some doubt as to the correctness of the decision in *Panchratan Koeri* v. *Ram Sahay Singh* (1), and to the construction put upon *Dayamoyi's* case (2) on which the decision was founded. The result therefore is that I think the Munsif was not entitled to rely on that case as an authority for refusing to exercise jurisdiction which he had under the provisions of O. 21, R. 100.

Consequently for the reasons which I have indicated and on the facts and circumstances which I have stated the petitioners are entitled to order which they asked for in the circumstances here stated unless we think we ought not to interfere at the present stage having regard to the fact that a suit has already been instituted in which the question will be decided and having regard to the fact that if there is a remedy by suit open, the Courts are loth to interfere under the provisions of S. 115, Civil P. C. ; and we were referred by the learned Government Pleader, who appeared to show cause, to the Civil R. 540 of 1921 where the facts are very similar to the facts now before us. Although no suit had there been instituted the Court refused to interfere under the provisions of S. 115 having regard to the fact that there was a remedy by suit. The present case of course is a stronger case. Here a suit has been instituted and it might be said that accordingly we ought not to interfere as the question, as I have already stated, will be ultimately decided in that suit. But we think we have got to bear in mind the facts before us, namely, that the petitioners have been in possession for some 10 or 12 years by virtue of the transfer, that, but for the mistake which arose with regard to the injunction granted by the Munsif, their possession would have remained unimpaired until the suit was decided.

Consequently I think that we ought in this case to exercise the jurisdiction vested in us under the provisions of S. 115 and make the rule absolute. I am not unmindful of the fact, which was pressed upon us by the learned Government Pleader, that the result may be that the suit may now be discontinued and the question never decided. But after all if that result does occur, I mean the discontinuance of the suit, it is open to the landlord himself to commence a suit to have the matter determined.

Under the circumstances which I have indicated we make the Rule absolute. The matter will go back to the Munsif in order that a formal order may be passed. The petitioners are entitled to costs of this rule,

**Mukerji, J.**—I agree.

*Rule made absolute.*

(1) [1918] 3 Pat. L. J. 579=43 I. C. 969=4 Pat. L. W. 129.
(2) [1914] 42 Cal. 172=18 C. W. N. 971=27 I. C. 61=20 C. L. J. 52 (F. B.).

## A. I. R. 1927 Calcutta 158

CUMING AND PAGE. JJ.

*Asutosh Ghosh* and *another*—Defendants—Petitioners.

v.

*Indu Bhusan Ghose*—Piaintiff—Opposite Party.

Civil Revision No. 317 of 1926, Decided on 31st May 1926, from an order of the 1st Sub-J., 24-Pergannas, Alipur, D/- 28th January 1926, in Miscellaneous Suit No. 121 of 1925.

(a) *Civil P. C., S.* 151—*Inherent power can be exercised only where there is no remedy provided by the Code for doing justice.*

Whenever it is necessary for the ends of justice or to prevent an abuse of the process of the Court, the Court always has jurisdiction to pass an order under S. 151, unless its jurisdiction in that behalf has specifically been taken from it. But whether justice does require a Court to invoke its inherent jurisdiction, must be determined with reference to the particular facts of the case and the rule of law that a Court cannot invoke an inherent jurisdiction where there is a provision in the Code, which, if applied, will meet the justice of the case : 44 *Cal.* 929, *Foll.* [P. 159, C. 2]

(b) *Civil P. C., O.* 11; *R.* 21—*Dismisial of suit—Court cannot review its order under S.* 151 —*Civil P. C., S.* 151.

Where plaintiff's suit has been dismissed under O. 11, R. 21, the Court has no power to review its order under S. 151, the order being appealable. [P. 160, C. 1]

*Dwarka Nath Chakravarti* and *Bhupendra Chandra Guha*—for Petitioners.

*Sarat Chandra Roy Choudhury* and *Suresh Chandra Talukdar*—for Opposite Party.

**Cuming, J.**—The facts of the case out of which this Rule arises are these : The opposite party brought a money suit against the petitioner claiming a sum of Rs. 1,800. In the course of this suit certain interrogatories were delivered to the plaintiff by the defendant. The plaintiff did not answer these interrogatories by the date fixed by the Court. On the date fixed for the delivery of the answers to the interrogatories by the plaintiff, the opposite party's pleader stated that he had no further instruction. On this the Court dismissed the plaintiff's suit for non-prosecution under O. 11, R. 21, Civil P. C. The plaintiff then moved the Court under O. 9, R. 9 and S. 151 of the Civil P. C., praying to have the suit restored for various reasons which it is not necessary to set forth.

The learned Judge thus dealt with the matter. He stated that it seemed a fit case for restoration. He noted that it had been argued that neither O. 9, R. 4 nor S. 152 applied to a suit dismissed under O. 11, R. 21. He, however, held that it is quite immaterial which of the sections applied. He further held that it did not matter in the least if an application for a review was necessary. The Court, he held, had sufficient power and authority to set aside the order of dismissal if justice demanded it and he proceeded to set aside the order. He did not, as far as I can ascertain from his judgment, apparently purport to act under any section of the Code. Against this order the defendant moved this Court and he contends that the Judge had no jurisdiction to do what he did. Now, under what provisions of law the learned Judge purported to act it is not easy to discover. If I have understood him rightly he purported to act under no provisions of law. He seems to think that if justice demanded it he could set aside any order whether the Code empowered him to do so or not. Mr. Roy Choudhury contends that the learned Judge must be considered to have acted under S. 151 of the Civil P. C., for admittedly there is no other section of the Code under which he could have acted. It may be pointed out that Courts of law are bound to act in accordance with the law prescribed and not according to a Code of their own making. Their jurisdiction is derived from the Code and by the provisions of the Code they must be guided. I must take it, therefore, that the learned Judge acted under S. 151. If he did not, his action is wholly illegal and without jurisdiction.

We have now to consider whether he had jurisdiction under S. 151 to review his former order and set it aside. Now, to my mind, S. 151 can have no application to a case which is already provided for by the Civil P. C. A Court cannot review its own order under S. 151. Order 47 provides the cases in which a Court can review its own order and it seems to me by implication that unless the case falls within O. 47, a Court has no power to review. If a Court can deal in review with case that do not fall within O. 47, then obviously it was a waste of time to have enacted O. 47, or indeed to have enacted a Code

at all. For if all the matters which are dealt with under the Code can be dealt with under S. 151 as has been seriously contended then obviously the whole of the elaborate Code could have been contained in the five lines of S. 151.

My own view is that a Court has only power to act under S. 151 and invoke its inherent power when the case is not provided for by any specific enactment in the Code; but if there is a specific enactment in the Code under which the matter can be dealt with, the Court has no jurisdiction to invoke its inherent powers under S. 151. This is not a case in which there was no remedy provided by the Code. There was a remedy by way of appeal against the order dismissing the suit for default under O. 11, R. 21. In such circumstances the learned Subordinate Judge had no jurisdiction to review his order under S. 151. He does not sugggest that he reviewed the order under O. 47, nor indeed is it suggested that the order could have been reviewed under that order.

The result is that the Rule must be made absolute, the order of the learned Subordinate Judge restoring the case to file vacated and the order dismissing the suit under O. 11, R. 21 restored. The petitioner is entitled to the costs. Hearing-fee: two gold mohurs.

**Page, J.**—I agree that the Rule should be made absolute.

I regret, however, that it is necessary that we should do so, because I think that the learned Judge firmly believed that in passing the order in question he was taking the best step available to remedy what he regarded as an unfortunate order that he had passed on the 21st October 1925. It appears to me to be clear from the first words of his order of the 28th January 1926, that the learned Judge purported to restore the case under S. 151 of the Civil P. C. The question that we have to consider is whether in passing the order under S. 151 he was either exercising a jurisdiction with which he was not vested or if he possessed jurisdiction in that behalf whether he was exercising it according to law. Speaking for myself I should hesitate before I place any restriction upon the inherent powers which it is expressly provided by S. 151 are to be retained by the Court. As I apprehend the matter the Court, in the words of the Code, possesses inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court, In my opinion, the question that we have to determine is whether the Court, in passing the order in question, was entitled to do so, because it was necessary that the order should be passed to meet the ends of justice.

I think that the true scope of the jurisdiction of the Court under S. 151 was stated by Woodroffe, J., in *Abdul Karim Abu Ahmed Khan Ghazanavi* v. *Allahabad Bank, Ltd.* (1). In my judgment, whenever it is necessary for the ends of justice or to prevent an abuse of the proccess of the Court, the Court always has jurisdiction to pass an order under S. 151 unless its jurisdiction in that behalf has specifically been taken from it. But

> whether justice does require a Court to invoke its inherent jurisdiction must be determined with reference to the particular facts of the case and the rule of law that a Court cannot invoke an inherent jurisdiction where there is a provision in the Code, whether by way of remand or otherwise which, if applied, will meet the justice of the case.

If a Court passes an order under S. 151, where there is a provision in the Code which, if applied, will meet the justice of the case, in my opinion, it is not exercising the jurisdiction with which it is vested under S. 151, Civil P. C., in accordance with law. However desirable a Court may deem it that an order should be passed under S. 151 the Court is not acting in accordance with law if it elects arbitrarily to disregard the express provisions of the Code which, if applied, would meet the justice of the particular case. It is conceded that in the present case an application to review the order in question under O. 47, R. 1 would not have been successful, for, admittedly, the plaintiff could not have brought his case within the ambit of O. 47, R. 1. But was it necessary in these circumstances to meet the ends of justice that the Court should have proceeded under S. 151? In my opinion, clearly not; for it was open to the plaintiff to appeal against the order which had been passed dismissing his suit. It follows, therefore, that if the learned Judge passed

(1) [1917] 44 Cal. 929=26 C. L. J. 49=41 I. C. 598=21 C. W. N. 877.

the order purporting to act under S. 151 he was not exercising the jurisdiction with which he was vested according to law.

For these reasons I agree that the Rule should be made absolute.

*Rule made absolute.*

---

## * A. I. R. 1927 Calcutta 160

GREAVES AND MUKERJI, JJ.

*Santosh Kumar Mullick*—Defendant—Appellant.

v.

*Ganesh Chandra* and *another*—Plaintiffs—Respondents.

Appeal No. 225 of 1924, Decided on 18th February 1926, from the original decree of the Addl. Sub-J., Hooghly, D/- 21st August 1924.

* (a) *Hindu Law — Widow — Alienation — Powers are same as manager—Her maintenance, expenses of religious ceremonies for salvation of her husband's soul are, but anticipation of her wants is not, legal necessity—Necessity, meaning of.*

The power of the widow in respect of alienation for legal necessity is the same as that of the manager of the family property; and it can only be exercised in the case of need or for the benefit of the estate. The actual pressure on the estate, the danger to be averted or the benefit to be conferred on it, in the particular instance, is the thing to be regarded: 6 *M. I. A.* 393 *P. C.*, *Appl.* [P. 162, C. 1]

There can be no question that she may make alienations to procure maintenance for herself or to defray the expenses of her own religious ceremonies, such as may be necessary, for the salvation of her husband's soul, but she is not at liberty to anticipate her wants.

The word "necessity" has a somewhat special, almost a technical meaning. Necessity, does not mean compulsion, but the kind of pressure which the law recognizes as serious and sufficient. [P. 162, C. 1]

(b) *Hindu Law—Alienation by widow—Necessity—Alienee must prove necessity or his belief as to there being necessity—Due enquiry and his bona fides are necessary.*

An alienee has to show either that there was a necessity for the alienation or at least that he was led on reasonable grounds to believe that there was necessity for the alienation. Due inquiry by an alienee and his bona fides are the two requisites for constituting a transaction a binding one. [P. 162, C 2]

*Ram Chandra Majumdar*, *Hari Charan Ganguly* and *Indu Prokas Chatterji*—for Appellant.

*S. C. Bose*, *Krunamoy Ghose* and *Basanta K. Mukherji*—for Respondents.

**Mukerji, J.**—This appeal arises out of a suit instituted by a reversioner during the life time of a Hindu widow for a declaration that the alienation made by her is not binding on him. The suit has been decreed by the trial Court. The alienee has preferred this appeal. The undisputed facts in this case are very few. There is a lamentable lack of restraint on the part of the parties and their witnesses. Each party has immensely exaggerated its own allegations and has either totally denied or tried its utmost to minimize the effect of the facts alleged on behalf of the other.

Ramlal and Kedar were two brothers, and one Basanta, who is alive, was their sister. Ramlal and Kedar had separated during their life time and their ancestral house had been partitioned between them. The relations as between them were rather indifferent. Kedar died leaving a son Ganesh who is the plaintiff in this suit. Ramlal was without employment for several years and was ill for a few months at the end of his life and died about the 9th or the 10th of April 1920. Ramlal's son Nandlal used to work as a carpenter under the Port Commissioners. Nandlal fell ill in November or December 1919, and was confined to bed by the end of the latter month and was unable to work since then. He had to go to hospital towards the beginning of April 1920, where he died on the 10th of April 1920 a few days after his admission and a few hours after the death of his father Ramlal.

The immovable properties left by Nandlal consisted of two items: first, one-storeyed brick-built house standing on about a half of a plot of 6 cottas of land, the other half being vacant land and a demarcated share in a tank which adjoins the said land and which covers an area of about 6½ cottas; and second, a plot of garden land about 1½ bighas in area. The former property is situate at Bajey Sibpur and is the property which Ramlal got by partition with his brother Kedar and the latter is situate at a place called Dharsa and was purchased by Nandlal himself. On the 22nd May 1920 Nandlal's widow Prasadmoyee and the plaintiff Ganesh sold the Dharsa garden to one Ahad Bux for a sum of Rs. 375. On the 28th June 1920 Prasadmoyee executed a bianapatra in respect of the first of these properties in favour of the appellant Santosh Kumar Mullick

agreeing to sell the same to the latter for a consideration of Rs. 4,999 and accepting Rs. 101 as earnest money. The necessity for the sale was stated in the bianapatra in these words:

> Soon after the death of my husband on the 28th Chaitra 1326 last when I was overwhelmed with grief and was seriously ill, Ganesh Chandra the son of my husband's uncle, fraudulently and without letting me understand anything sold one plot of jamai land measuring about 1-1/2 bighas, in Dharsa, left by my husband and misappropriated the whole of the sale-proceeds thereof.
>
> Now, as I am in need of money in order to pay off the debts incurred by me for the performance of the sradh ceremony of my husband, for treatment of my diseases and for my maintenance: and there being no other means of my maintenance, in order to maks arrangements for my maintenance and dwelling and to perform the Gaya sradh of my husband and for the treatment of my diseases I notified to sell, etc.

On the 9th August 1921 she executed a conveyance in favour of the appellant in respect of the said property and purported to transfer it to the latter on receipt of the balance of the consideration money. In this deed the allegation of misappropriation of the entire amount of sale-proceeds of the Dharsa garden by Ganesh was repeated and it was further stated:

> I am continuously suffering from diseases such as beri-beri, fever, rheumatism, heart disease, etc., from the life-time of my husband and up till now. Upon the death of my husband I contracted debts of Rs. 1,000 from Jatindra Nath Kundu and Ashutosh Nandi of Santragachi and Surendra Nath Pal and Upendra Nath Pal of Bantra and small debts of about Rs. 50 for the treatment of my diseases, for the sradh ceremony of my husband, for the sapindakaran and for my maintenance.
>
> The above debts are necessary to be paid off and there is no possibility of maintaining myself from the income of the properties described in the schedule below; because to reside in the house described in the schedule below and to let it out to tenants at the same time is not proper or possible, and even if it is so done, or if I let out the whole house described in the schedule below without dwelling there, the income so derived will not be sufficient for my maintenance; therefore it is necessary to make arrangements for my maintenance inasmuch as debts are gradually increasing on account of my maintenance and it has become difficult to raise loan according to necessity, and as I am still suffering from rheumatism, fever and heart disease, and as the treatment is going on money is wanting for the said treatment. The Gaya sradh of my husband has not yet been performed; money is required to perform the same. For the above mentioned legal necessities it having become necessary to sell, etc.

It is this sale which is the subject-matter of this suit, the plaintiff Ganesh alleging that the sale was collusive and without consideration and that there was no legal necessity for it. In the suit the purchaser Santosh Kumar Mullick is the Defendant No. 1 and Prasadmoyee Dasi the Defendant No. 2.

Ramlal and Nandlal admittedly left no debts and the first and most important question is whether the Defendant No. 2 contracted any. (His Lordship, after considering evidence as to the debts proceeded:) We arrive then at the conclusion that the case as to the debts alleged to have been incurred by the Defendant No. 2, and for the repayment of which the sale was made fails; and it must be held that it has not been proved what debts, if any, were actually incurred by her, and in any event there is no evidence that there was any pressure from any quarter which justified the sale.

There remains then the question of maintenance and religious expenses. Now, all the property which we are able to find upon the evidence in the case as being available to the Defendant No. 2 is the property which was sold. It is conceded on all hands that the income from this property in the state in which it was at the time was Rs. 180 a year: the plaintiff admitted this in the pleader's letter to which I have referred. From this must be deducted the rents and municipal taxes. This would leave a balance at the outset of about Rs. 10 a month. The position also seems to be that having regard to the age of the Defendant No. 2, she cannot with propriety live in the house if it be let out on rent to a stranger. As regards expenses incurred in the performance of sradh at Gaya for the benefit of her husband's soul and her visit to Benares of which the Defendant No. 2 has not given us any details it cannot be said that the expenses were unnecessarily incurred. It therefore becomes relevant to consider the question as to whether circumstanced as she was, with no evidence that she had any property but the one which she sold, and having regard to the finding at which I have arrived, namely, that she may have incurred some debts, the exact nature and amount of which the appellant has not been able to prove, there was legal necessity for the sale.

It is well-settled now that the principles laid down in the case of *Hunooman Pershad* v. *Mt. Babooee Munraj Kun-*

*waree* (1) will equally apply to acts of the widow and to the obligation of those who deal with her, to inquire into the circumstances which justify her dealings. The power of the widow in this respect is the same as that of the manager of the family property ; and in the words of the Privy Council :

> it can only be exercised in the case of need or for the benefit of the estate :

Their Lordships also observed :

> The actual pressure on the estate, the danger to be averted or the benefit to be conferred on it, in the particular instance, is the thing to be regarded.

There can be no question that she may make alienations to procure maintenance for herself or to defray the expenses of her own religious ceremonies or such as may be necessary, for the salvation of her husband's soul, but she is not at liberty to anticipate her wants. In the present case there is no evidence of any actual pressure on the estate. The Defendant No. 2, it may be fairly conceded, had her wants, but something more is necessary to make out a case of legal necessity. In the case of *Rimsumran Prasad* v. *Mt. Shyam Kumari* (2) the Judicial Committee has observed thus :

> It should be observed in limine that the word necessity when used in this connexion has a somewhat special, almost a technical, meaning. A widow can alienate if there are no other means available for the obligatory ceremonies to repose the soul of her husband. A holder of a Hindu woman's estate can in some circumstances alienate immovable property to pay the last owner's debts or (if there is no other available source of supply) for her own or infant children's maintenance. Necessity does not mean actual compulsion, but the kind of pressure which the law recognizes as serious and sufficient.

Judged by this test I am unable to hold that the appellant has succeeded in showing that there was any such serious or sufficient pressure either on the ground of debts, if any, incurred or on the ground of maintenance or the religious ceremonies that she undertook to perform. The appellant seems to have concentrated all his endeavours in making out a case of contracting of debts for justifying the sale. It does not appear that the Defendant No. 2 was actually put to any difficulty for her residence or her maintenance or for meeting the costs of her treatment or that there was any pressure from any creditor for any debts that she may have contracted, There is no indication anywhere in the evidence of the Defendant No. 2 of any pressing need, privation or discomfort. The performance of the sradh at Gaya and visit to Benares once the sapindakaran had been performed and so soon thereafter looks like the creation of a necessity to justify the sale. In my opinion therefore no legal necessity has been established such as would justify the sale.

This brings us to a consideration of the last question that arises in the case, viz., that relating to the appellant's bona fides. According to the rule as enunciated by the Privy Council an alienee has to show either that there was a necessity for the alienation or at least that he was led on reasonable grounds to believe that there was necessity for the alienation. As regards the former condition the appellant has failed to discharge the onus that lies on him. As regards the latter, I am not prepared to accede to the respondent's contention that the price was not fair or that no consideration passed. But these are not sufficient ; according to their Lordships of the Privy Council due inquiry by an alienee and his bona fides are the two requisites for constituting a transaction a binding one. The appellant omitted, for reasons which have not been explained by him, to make an enquiry of the only source to which he should have gone, namely, the plaintiff whom he admits he knew from before ; and in this respect his omission seems to me deliberate. He must have, as a man of ordinary prudence, known that the plaintiff could have given him important information, true or false, relating to the circumstances of the Defendant No. 2, the expenses actually incurred by her and the object of the intended sale. Of course the plaintiff might have declined to give him any information or might have given him informaton which was not fit to be acted upon ; but I cannot conceive why, if any real enquiry was to be made, the appellant should have refrained from approaching the plaintiff. In this respect too the appellant has failed to satisfy me that he acted bona fide or that he made any reasonable enquiries.

I am accordingly of opinion that the decree passed by the Subordinate Judge is right and that this appeal should be dismissed with costs.

**Greaves, J.**—I agree.

*Appeal dismissed.*

(1) [1856] 6 M.I.A. 393=18 W.R. 81=2 Suther. 29=1 Sar. 552 (P.C.).

(2) A.I.R. 1922 P.C. 356=1 Pat. 741.

## A. I. R. 1927 Calcutta 163

SANDERSON, C. J., AND RANKIN, J.

*Rustomjee Dorabjee*—Appellant.

v.

*K. D. Brothers* and *another*—Respondents.

Appeal No. 28 of 1925, Decided on 30th April 1926, from the original order of Buckland, J., in Insolvency Case No. 10 of 1924.

(a) *Presidency Towns Insolvency Act, S. 45 (2)—Adjudication by two Courts—Conditional order postponing discharge by one without stay in the other is bad.*

Where a firm was adjudicated insolvent in two Courts, Bombay and Calcutta, and a conditional order postponing the discharge on the insolvent's agreeing to a decree in favour of Official assignee was passed without obtaining a stay of Bombay proceedings and before public examination of partners.

*Held* : that the order is bad and should not have been made : 42 *Mad.* 121, *Foll.*

[P 165 C 2, P 166 C 1]

(b) *Presidency Towns Insolvency Act, S. 8—"Person aggrieved."*

A person whose right to recover his debt or part of his debt from the insolvents may seriously be affected, is a "person aggrieved" within the meaning of S. 8: *Ex parte Ditton, re Woods,* (1879) 11 *Ch. D.* 56, *Dist.* [P 166 C 1. 2]

*B. K. Ghosh, P. Ardesher* and *J. N. Mazumdar*—for Appellant.

*Langford James* and *S. C. Mitter*—for Respondents.

**Sanderson, C. J.**—This is an appeal by Rustomjee Dorabjee against an order of the learned Judge sitting in insolvency on the Original Side, dated the 13th January 1925. The order is headed as follows :

Numbers 10 and 27 of 1924, re Krishna Das and Brij Mohan Das both residing and carrying on business in co-partnership in bioscope films with Jug Mohan Das at No. 150, Lower Chitpur Road, in the town of Calcutta, under the name and style of K. D. Brothers and re Messrs. K. D. Brothers a firm carrying on business in cinema films and as exhibitors of cinema shows at 150, Lower Chitpur Road, in the town of Calcutta and atthe Goverdhone Buildings, Charni Road, in the town of Bombay and at Sule Pagoda Road in the town of Rangoon.

The order recited that Mr. Langford James appeared for the insolvent firm; Mr. A. Sen, advocate for Rustomjee Dorabjee, one of the creditors of the insolvent firm ; and another learned advocate for another creditor of the said firm.

It was further recited that the insolvent's assets were not of a value equal to four annas in the rupee on the amount of their unsecured liabilities. and it was ordered that

the discharge of the said insolvents Krishna Das, Jugo Mohan Das and Brij Mohan Das be and the same is hereby suspended for three months. And it is further ordered, that the said insolvents do before the signing of this order consent to a decree being passed against them in this Court in its ordinary original civil jurisdiction in favour of the said Official Assignee for the sum of Rs. 10,000 being part of the balance of the debts provable in insolvency which are not satisfied at the date of this order.

The report of the Official Assignee of Calcutta was dated the 2nd September 1924. From that it appears that Jugo Mohan Das, one of the partners of the firm, was adjudicated insolvent by the Bombay High Court on the 19th December 1923. It appears further that an order of adjudication in insolvency was made by this Court against Krishna Das and Brij Mohan Das, two of the partners of the firm on their own application on the 12th January 1924. It was stated by the learned advocate, who appeared for the appellant, that the members of the firm were adjudicated insolvents by the Bombay High Court on the 24th January 1924. The learned advocate who apeared for the respondents did not admit that date. It is clear from the Official Assignee's report that there was an adjudication made against the members of the firm by the Bombay High Court but the Official Assignee did not state in his report what was the date of that order, and therefore this Court at present is not aware of the actual date of the adjudication order which was made by the Bombay High Court against the members of the firm.

On the 28th of January 1924 there was an order of adjudication made by the Calcutta High Court against the members of the firm of K. D. Brothers. That adjudication order was made at the instance of a creditor. The two adjudications in the Calcutta High Court which were numbered 10 and 27, were consolidated and were dealt with by one order, as I have already mentioned, on the 13th January 1925.

It seems to me that the order for the conditional discharge dated the 13th January 1925 must have been made upon the assumption that the two orders of adjudication made by the Calcutta High Court had vested the assets of the members of the firm in the Official Assignee of Calcutta; otherwise I do not understand how

the order of conditional discharge could have been made. The question arises whether the order of conditional discharge of the 13th January 1925 should have been made. I am clearly of opinion that that order should not have been made. It is material to consider what would be the effect of the order of the 13th January 1925. S. 45 of the Presidency Towns Insolvency Act is the section which deals with the effect of an order of discharge. But before I deal with that section I think it advisable to refer to S. 17 of the Act. That section provides :

> On the making of an order of adjudication, the property of the insolvent wherever situate shall vest in the Official Assignee and shall become divisible among his creditors,

It is not necessary for me to read the remainder of the section.

Sub-section (1) of S. 45 deals with certain debts, from which an order of discharge shall not release the insolvent. The first sub-section is not applicable to the case which is now under consideration. Sub-section (2) provides as follows :

> Save as otherwise provided by sub-Section (1) an order of discharge shall release the insolvent from all debts provable in insolvency.

The result of the order of the 13th January 1925, therefore, would be that when the insolvents had consented to the decree for Rs. 10,000, in accordance with the order, the discharge would operate at the end of the three months specified in the order and the members of the insolvent firm would be released from all debts provable in insolvency. The insolvents did consent to the abovementioned decree being entered against them on the 18th of February 1925.

I draw attention to the words " all debts provable in insolvency " for I think the order, which is now under consideration, can only have been made upon the assumption that it would not affect the proceedings in insolvency in Bombay. One of my reasons for saying so is this. There is passage at the bottom of page 5 of the paper-book in the Official Assignee's report which runs as follow s:

> The insolvent Jugo Mohan Das, who stays at Bombay, was examined before the Registrar in Insolvency under S. 36. He has joined in the schedules filed by his brothers of the Calcutta and Rangoon branches. The schedules of the Bombay business not having been filed, it is impossible to say how the position of the Bombay business stands.

I fail to understand how the conditional order of discharge dated the 13th January 1925, could be made in view of that report, which means that the Official Assignee was not able to give the Court any information as to the position of the insolvents' business in Bombay. Bombay was the head office of the firm and the business there was evidently an important part—it may be the most important part of the firm's business.

If it had been appreciated that the effect of the learned Judge's order would be to discharge the insolvents from all debts provable in insolvency, I feel sure that the order would not have been made without some investigation as to the assets and as to the liabilities of the insolvents in Bombay. There are several other matters which go to show that the order should not have been made.

Section 38 provides as follows :

> An insolvent may at any time, after the order of adjudication, apply to the Court for an order of discharge, and the Court shall appoint a day for hearing the application, but save where the public examination of the insolvent has been dispensed with under the provisions of this Act, the application shall not be heard until after examination has been concluded.

I have already referred to the statement in the Official Assignee's report that the schedules of the Bombay business had not been filed at the time the Official Assignee made his report on the 2nd September 1924. It appears further that the public examination of the insolvents had not been concluded at the time the application for the discharge was made. From the report of the Official Assignee it appears that only one of the insolvents, viz., Krishna Das, had been subjected to a public examination. It seems to me that if this fact had been brought to the attention of the learned Judge, the order of the 13th January 1925 would not have been made.

Section 27, sub-Section (2) contemplates schedules being filed by the the insolvents before the public examination of the insolvents. It appears, however, that the public examination of Krishna Das, the only insolvent who was publicly examined, was concluded before the schedules relating to the Bombay business were filed.

There are other matters to which learned advocate for the appellant referred ; but which, in my opinion, I need not mention in detail, because the matters which I have already mentioned are, in my opinion, sufficient to show

that the order complained of cannot be allowed to stand. The Official Assignee in his report stated as follows:

It appears that the firm was also adjudicated by an order of the Bombay Court. There are therefore orders against the firm pending both here and in Bombay but no creditor so far as I am aware has taken any steps under S. 22 of the Presidency Towns Insolvency Act either here or at Bombay to have the proceedings taken in one Court only.

From this I assume that the Official Assignee, having stated what I have just read, felt that there was no duty upon him to take any further steps in that respect.

I am not able to agree with that proposition. In my opinion, it was the duty of the Official Assignee to take steps in the first place to ascertain whether the property of the insolvents had vested in him or in the Official Assignee of the Bombay Court. I cannot find any trace of his having made any effort to get information upon that important matter. If he had ascertained that fact, it would have been open to him to take such steps as he would have been advised. I am not in a position to say what steps he could or should have taken for the simple reason that I do not know the facts which, in my opinion, the Official Assignee ought to have ascertained and laid before the Court.

On this question I will refer to a judgment of Sir John Wallis, when he was the Chief Justice of Madras, in the case of *The Official Assignee of Madras* v. *The Official Assignee of Rangoon* (1) which clearly states the position when adjudication orders were made by two Courts, namely, the High Court of Madras and the Chief Commissioner's Court of Lower Burma. In that case the insolvent firm carried on business in Madras and Rangoon, and on the 23rd April 1917 an order of adjudication of the members of the firm was made by the High Court of Madras on a petition of creditors.

On the 10th May 1917, the same firm was again adjudicated insolvent by the Chief Court of Lower Burma in respect of acts of insolvency found to have been committed in or about the month of February of the same year. The Official Assignee of Rangoon moved on the 10th April 1918, before the High Court of Madras, for annulment of, and stay of further proceedings under, the adjudication of the Madras High Court. I draw attention to the fact that it was the Official Assignee who moved in that case.

The learned Judge who heard the application made an order for stay of proceedings in the Madras High Court. On appeal the learned Chief Justice and Mr. Justice Seshagiri Ayyar dismissed the appeal. There are two passages in the learned Chief Justice's judgment to which I wish to refer. At page 125 the learned Chief Justice is reported to have said:

The provisions in S. 17 that on the making of an order of adjudication the property shall vest in the Official Assignee is express, and there is no provision in the Act divesting the property so vested in that Official Assignee and transferring it to another Official Assignee under a later adjudication.

At page 126 the learned Chief Justice referred to a case which was decided by the House of Lords and to a passage in Mr. Dicey's Conflict of Laws and stated as follows:

As observed by Mr. Dicey citing this case, priority depends on the date of adjudication and not on the date of commission of the act of bankruptcy.

Then the learned Chief Justice made the following observations with which I entirely agree:

In British India we have not only four insolvency jurisdictions under the Presidency Towns Insolvency Act, but also the very numerous jurisdictions under the Provincial Insolvency Act, so that cases like the present may not infrequently arise. In all such cases it should, we think, be recognized that the vesting depends on priority of adjudication, and that steps should at once be taken to annul the prior adjudication where it is convenient that the estate should be administered by another jurisdiction. Great confusion might ensue if competing assignees or receivers were to have concurrent authority to realize the insolvent's estate independently of one another, instead of the insolvency being in one jurisdiction only at a time and the other jurisdictions being required to act in aid of it, if necessary.

In my judgment in this case, the Official Assignee, as I have already stated, should have ascertained the material facts relating to the adjudication in Bombay and should have taken such steps as he was advised and obtained the directions or orders of the Court with a view to prevent the confusion and difficulties referred to by the learned Chief Justice of Madras, which would be caused by the estate being administered by competing Official Assignees. I am of

(1) [1918] 42 Mad. 121=35 M. L. J. 533=49 I. C. 210=9 L. W. 36.

opinion, therefore, subject to the preliminary point taken by the learned advocate who appeared for the respondents, to which I will presently refer, that the learned Judge's order of the 13th January 1925 must be set aside.

The learned advocate for the respondents argued that the appellant had no right of appeal. S. 8 of the Presidency Towns Insolvency Act is the section which deals with this matter, and it is provided in sub-S. (2) of that section that

> orders in insolvency matters shall, at the instance of any person aggrieved, be subject to appeal, as follows.

The question is whether the appellant is a "person aggrieved" by the order which was made by my learned brother on the 13th of January 1925. In the first place, it should be noted that the appellant was allowed to appear before the learned Judge and he is referred to in the order as appearing in the capacity of a creditor. There was no objection to his so appearing.

It was urged in this Court that he had no right to appear and therefore no right to appeal on the ground that he had not filed a proof. There is no finding on this point, and the objection was not taken at a time when evidence could have been given, if necessary, as to the question of the appellant's right to appear.

Section 40 is the section which deals with the right of a creditor to be heard by the Court upon an application by the insolvent for discharge. I am not prepared at present to hold that the appellant had no right to appear before the learned Judge, but I do not think it necessary in this case to give any definite decision upon the question for the following reasons:

There is no doubt that the appellant is a creditor of the firm. It was stated that some time or other (the date is not certain) the appellant had filed a proof in respect of his debt in the insolvency.

If the order of the 13th January 1925 is allowed to stand, in my opinion, it is obvious that the right of the appellant to recover his debt or part of his debt from the insolvents may be seriously affected, as I have already pointed out, by reason of S. 45 of the Presidency Towns Insolvency Act.

I am therefore of opinion that the appellant is a "person aggrieved" within the meaning of S. 8 of the Act whether he had a right to appear before the learned Judge or not and consequently he has a right to appeal to this Court.

The appeal will be allowed and the learned Judge's order of the 13th January 1925 will be set aside. We give the appellant liberty to add the amount of his taxed costs in this appeal to his secured debt.

**Rankin, J.**—I entirely agree. It is well settled as regards the practice under the English Acts, which are for this purpose repeated in the Presidency Towns Insolvency Act of 1909, that there is no rule that a person to be entitled to appeal must have been a respondent below. The test whether the appellant is "a person aggrieved" for the purpose of S. 8 is entirely independent of the question whether under the particular arrangement (which in England is represented by S. 26, sub-S. (7), and the English Bankruptcy R. 227) which in our Act is represented by S. 40, which is enlarged by our Insolvency R. 152, he was or was not entitled to take part in the proceedings before the learned Judge.

In this case what has happened is that two insolvencies have been going on in respect of the same firm in Calcutta and in Bombay just as though one set of proceedings had been in Calcutta and the other set of proceedings had been in Berlin. Each Court appears to have carried on the proceedings to some extent. This Court at the time when the Official Assignee presented his report upon the insolvent's application for discharge had apparently done a certain amount of administration. It got in a list of creditors and it got in apparently certain statements as to the assets in Calcutta and in Rangoon, but as regards the position of the Bombay business there was no information as to its assets; and it does not appear that any real attempt was made to administer anything except such assets as were not being administered in Bombay. The appellant was a creditor in Bombay. He was a secured creditor and in the list of creditors which was supplied to the Calcutta Assignee his name appeared.

It is true that the insolvent represented that he was over-secured and that there was, therefore, an asset in the

equity of redemption. However, the appellant appears to have taken no part in the proceedings in Calcutta, but at some stage to have taken some part—tendering a proof—in the proceedings in Bombay. While that was the position he was given notice of the public examination and of the application for discharge in the Calcutta proceedings. Apparently all the Bombay creditors were given these notices. The appellant apparently thinking that the proceedings with which he was concerned were those in Bombay took no steps in the matter until a late stage when he came to the conclusion that under the Presidency Towns Insolvency Act a discharge in Calcutta would be a discharge from all liability provable in insolvency and therefore would put an end to his own claim except in so far it was against the security. Thereupon he appeared before the learned Judge and asked for a stay and attempted to raise the question whether double bankruptcy under the same Act in India should be allowed to be pushed to this extreme.

The learned Judge, being doubtless very familiar with the habit of creditors who have taken no interest in the insolvency and given no assistance in the administration to come in at the last moment upon the insolvent's application for discharge in a state of high excitement wanting to begin all over again, very properly looked upon the belated application with some suspicion. Had he, however, appreciated that the case before him was a case of a kind that has never been intended by the Act at all, namely, the case of two Courts each claiming to be administering the whole assets of the same firm, each claiming that all the creditors should apply to it for a dividend and each claiming to have a right to release the members of the firm from all liability in respect of the debts provable in insolvency,—had he relised that, the learned Judge would, I think, have seen that whatever the merits of the particular application, it was necessary in the interest of the Court and in the interest of public order, to have this matter dealt with and to refuse to go on with the discharge.

The question now is whether the appellant in these circumstances is a "person aggrieved" by an order which purports to release the insolvents from all liability from any debt provable in bankruptcy, and it is said that unless he had tendered a proof in this insolvency the case law is against him. That is quite true. Where the appeal is against an order which merely affects the fund applicable for dividend in this Court it is doubtless quite right to insist that the appellant should at least have tendered a proof before going to appeal about the distribution or the quantum of the fund.

This case is not to my mind on all fours with the case *Ex parte Ditton, re Woods* (2), cited to us, because here the matter may be tested in this way: suppose the Official Assignee in Bombay had applied to this Court as a "person aggrieved" by this order on the ground that its operation was to sweep away the Bombay insolvency altogether. It must be that he could have done so in the interest of the Bombay creditors. To my mind, not in his capacity as a creditor who has proved in this insolvency, but in his capacity as a creditor taking part in the other insolvency the appellant has a right to come to this Court and to say that the order made by this Court is one which should not have been made. The insolvents actually applied to the Bombay Court to terminate its proceedings on the ground of the order of the learned Judge.

With regard to the merits of that order I would add that it appears to have been an oversight, if not on the part of the officers of the Court at least on the part of the Official Assignee, that this application was allowed to be presented at all at the time at which it was presented. Apart altogether from the fact that the assets of the Bombay business had not been disclosed under a proper schedule of affairs no proper public examination had really taken place. Two of the insolvents have not yet undergone public examination. In these circumstances, this application ought never to have reached the learned Judge. If it could not be stopped in the office, the first thing which should have appeared in the report of the Official Assignee was a strong objection against its being heard at all.

*Appeal allowed.*

(2) [1879] 11 Ch. D. 56=27 W. R. 401=40 L. T. 297.

## A. I. R. 1927 Calcutta 168

SANDERSON, C. J., AND B. B. GHOSE, J.

*Saroda Prosad Pakrasi* and *others*—Plaintiffs.

v.

*Umasankar Sanyal* and *others*—Defendants—Respondents.

Appeals Nos. 2385 to 2390 of 1922, Decided on 4th June 1926, from the Appellate Decrees of the Addl. Dist. J., Pabna and Bogra, D/- 28th July 1922.

(a) *Civil P. C., O. 7, R. 18—Court refusing to admit document—Appellate Court will interfere only when discretion is wrongly exercised.*

Rules of procedure are not made for the purpose of hindering justice. Wide discretion has been given to the Court with regard to matters of reception of evidence although the documents have not been entered in the list of documents filed by the parties, and this discretion should be exercised for the furtherance of justice : *A.I.R* 1923 *P. C.* 128, *Rel. on.* But where the lower Court has refused to admit a document in the exercise of his discretion the Court of appeal will interfere only when it is shown that the lower Court has exercised its discretion wrongly in deciding that the document ought not to be admitted. [P 169 C 2, P 173 C 2]

(b) *Bengal Regulation* (44 *of* 1793), *S.* 5—*Talukdar made to pay enhanced rent under S.* 5—*Original term as to fixity of rent is not affected.*

Section 5 deals with an exception to the provisions of S. 4. The mere fact that the talukdar had to pay enhanced rent by reason of the provisions of S. 5 does not show conclusively that the rent was not fixed. The revenue sale would not affect the terms of the contract which there might have been between the parties at the time of the creation of the tenure.[P 170 C 2,P 172 C 1]

(c) *Landlord and tenant—Rent—Grant to putni.*

The grant of a putni connotes that the rent is fixed : 24 *C. W. N.* 874, *Dist.* [P 172 C 1]

(d) *Landlord and tenant — Putni taluq—Fixity of rent.*

Where a tenure has not been held from the time of the Permanent Settlement the landlord is prima facie entitled to enhancement of rent, unless there is anything to prevent him from doing so : 13 *M. I. A.* 248 (*P. C.*), *Rel. on.* [P 171 C 2]

Where although the tenure had not been held from Permanent Settlement, in the document the word " putni " was used in respect of the taluk and it was stated that Regulation 8 of 1819 should be had recourse to for the purpose of recovering arrears of rent and although a long series of years extending to a century had elapsed when the value of the property had gone up at least 500 p. c. no attempt had been made during all this period to claim any enhancement of rent.

*Held* : a legitimate inference can be made that the original contract was that the rent should be fixed for ever. [P 172 C 2, P 173 C 1]

*Ram Chunder Mazumdar* and *Kali Kinkar Chakravarti*—for Appellants.

*Sarat Chandra Roy Chowdhury* and *Bireswar Bagchi*—for Respondents.

**Sanderson, C. J.**—In this matter there are six appeals arising in six rent suits, which were disposed of in the first Court and in the lower appellate Court by one judgment in each Court. The plaintiffs are three batches of co-sharer landlords and the tenants defendants are the same in each suit. The remaining co-sharer landlords are the pro forma defendants. The plaintiffs claimed rent and a right to enhance the rent in each case. In the trial Court the plaintiffs succeeded and the learned subordinate Judge of Pabna decreed the suits and assessed the rent at double the existing rent in the respective cases.

The tenants defendants appealed to the Additional District Judge and the learned Judge came to the conclusion that the rent was not enhanceable but that it was fixed in perpetuity and consequently he allowed the appeals. The plaintiff landlords appealed to this Court.

The first point to which it is necessary for me to refer is the argument which was addressed by the learned advocate for the respondents, that the plaintiffs were not entitled to maintain the suits by reason of the provisions of S. 188 of the Bengal Tenancy Act. I see no reason to differ from the conclusion at which the learned District Judge arrived in that respect having regard to the terms of the kabuliyat, which is printed at page 80 of the paper-book containing the additional papers, and having regard to the other facts of the case. I need say no more than that I agree with the conclusions of the learned District Judge and the learned Subordinate Judge, namely, that the plaintiffs were entitled to maintain the suits.

The next point relates to the rejection of a certain document which was described by the plaintiffs as the " Likhan " in respect of the Pattani Majkuri Taluk granted by the Maharajadhiraj Ram Krishna Roy Bahadur to be called for from witness. The name of the witness given was Khirod Lall Pakrasi. The learned Subordinate Judge did not allow that document to be put in evidence. The learned District Judge stated that if he had been trying the suits as a Court

of first instance he might have been inclined to admit the document, but that he was unable to say that the learned Subordinate Judge, in the circumstances, had exercised his discretion wrongly. The document in question was alleged to be a certified copy of a document dated the 11th Chaitra 1201 B. S. (corresponding to 24th March 1795), and it was alleged that by that document the Maharajadhiraj Ram Krishna Roy had created a non-permanent Majkuri Taluk at a rent of Rs. 4,891 in favour of Ganga Gobinda Sanyal, who was alleged to be the predecessor in title of the defendants in these suits.

On the question whether the rent is liable to be enhanced it cannot be doubted that that document was material and the question, which arises in connexion with that document is whether by reason of the provisions of O. 7, Rr. 14 and 18 of the Civil P. C., the document is admissible or not. R. 14 is as follows :

(1) Where a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint.

The part of the rule does not apply to this case. Sub-R. (2) provides :

Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.

The provision is specific, and it is clear that the plaintiffs did not enter this particular document in a list which was added or annexed to the plaint. The result therefore was that O. 7, R. 18 came into operation. That rule provides as follows :

A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

In this case therefore inasmuch as the plaintiffs did not comply with the provisions of O. 7, R. 14, the document in question could not be admitted unless the plaintiffs succeeded in obtaining the leave of the learned Subordinate Judge. The question in this appeal with regard to that matter is, in my opinion, whether the learned Subordinate Judge had sufficient materials before him, which would justify him in the exercise of his judicial discretion in refusing the admission of that document. I am inclined to agree with the learned District Judge. If I had been trying these cases I should have been inclined to admit the document on terms and I would have given the defendants ample opportunity of substantiating their allegation, which was that this document was not a genuine document. But I am sitting in a Court of appeal and it is for the appellant to show that the learned Subordinate Judge exercised his discretion wrongly in deciding that the document ought not to be admitted.

The material facts, in my opinion, are these : In March 1914 the plaintiffs filed a list of documents in Court and referred to this document in these terms :

The likhan in respect of the Pattani Majkuri Taluq granted by Maharajadhiraj Ram Krishna Roy. The certified copy to be filed afterwards of the said likhan through witness Kshirod Lal Pakrasi.

The plaintiffs in July 1914, gave notice to the defendants to produce the original patta. The defendants in the same month of the same year stated that they had no such document. Then in the following year 1915 in the month of June the case was tried.

One of the points at the trial was whether the plaintiffs were entitled to sue having regard to the provisions of S. 188 of the Bengal Tenancy Act, and it was on that ground that the learned Judge who tried the cases dismissed the suits. But it is clear from what was read to us today by the learned advocate for the defendants that one of the issues was whether the rent was enhanceable. It is clear that evidence was produced in respect of that issue and from the learned Judge's judgment it is clear that although he decided the case upon the preliminary point, that the plaintiffs were not entitled to sue by reason of the provisions of S. 188, he had evidence upon the other issues. If that be so, I do not understand how it was that the plaintiffs did not call upon the witness, who was supposed to have this document in his possession to produce it at the trial in 1915. There was an appeal to the lower appellate Court and then an appeal to the High Court. The case was remanded sometime in 1919 for further trial. Then it was that the plaintiffs for the first time endeavoured to give evidence in respect of that document in 1920, and the learned Subordinate Judge rejected it. Having regard to the circumstances, I

think it is impossible to say that the learned Judge did not exercise his discretion in a judicial way. I think it is impossible. to say that there were not materials before him which would justify him in coming to the conclusion that the document should not be admitted. The result therefore is that on this point the appeal must fail.

The other question, with which I have to deal, is whether the learned District Judge was right in his conclusion that the rent, in respect of the taluk, was fixed in perpetuity. In spite of the argument which was addressed to us by the learned advocate who appeared for the appellants (to which it was a pleasure to listen) I am not convinced that the learned District Judge was wrong. I think the learned District Judge's conclusion as regards the origin of the taluk is right on the evidence which was before him. In the first place he held that the taluq could not have been in existence at the time of the Decennial Settlement. That I understand was in 1789. In my opinion there is no doubt about that.

The learned District Judge then held that it must have come into existence between 1789 and 1801. There is no doubt about that, because it was not in existence in 1789 and it clearly was in existence in 1801, because the revenue sale by which the Pakrasi brothers became the owners was in 1789 and there was a partition between these two brothers by metes and bounds in 1800. It was either in 1799 or 1800 that the men taluqdar was dispossessed by the purchasers at the revenue sale. Therefore I agree with the learned Judge so far. The learned District Judge then proceeded to say "whether before or after 1793 there is no indication whatever." If the document, to which I have already referred is excluded from evidence, I agree with the learned District Judge that there is nothing to show whether the taluq was created before or after the Permanent Settlement of 1793. It must have been created, in my opinion, about that time. It may have been shortly before or shortly after.

The learned advocate, who appeared for the appellants, argued that even if the taluk had been created before the Permanent Settlement the fact that the rent was enhanced in 1803 is sufficient to show that the rent was not fixed in perpetuity. Here again I agree with the learned District Judge's conclusion. The rent came to be enhanced in 1803 by reason of the fact that Ganga Gobinda Sanyal, the then talukdar, who had been dispossessed, brought a suit. As the result of that suit a decree of the Court was made, as I understand, to the effect that he should be restored to possession on his undertaking to pay the rent in accordance with that which was customary at that time in the pergana. That order was made in pursuance of S. 5 of Regulation 44 of 1793. It is obvious that S. 5 deals with an exception to the provisions of S. 4 of that Regulation. I need not read the terms, inasmuch as the section has often been the subject of judicial consideration. I cannot agree with the contention of the learned advocate for the appellants as to the effect of S. 5. In my opinion it is this. It means that the talukdar was entitled to stay in or get possession of the subject of the tenure, provided that he was prepared to comply with the demand, which the purchaser was entitled to make under the section, which was to collect:

> whatever the former proprietor would have been entitled to demand according to the established usages and rates of the pargana or district in which such lands may be situated, had the engagement so cancelled never existed.

The fact that the talukdar had to pay enhanced rent by reason of the provisions of S. 5, in my opinion, does not show conclusively that the rent was not fixed. The question, therefore, remains to be considered upon the main facts of these cases.

The learned District Judge in a careful and well-considered judgment, weighed the facts which were undoubted and came to the conclusion that, although in the first instance the onus was upon the defendants to show that the rent was a fixed one in perpetuity, that onus had been removed by reason of the main facts of the case which had been proved. In the first place the tenure which was undoubtedly vested in the defendants' predecessor was described as a patni, it undoubtedly had the other ordinary incidents which were attached to a patni tenure, and there was no reason why it should not have the usual incidents of a fixed rent. In the next place there is the fact that the rent was at the same rate for about 100 years and there is no doubt that the value of the tenure must have increased to a very large extent

having regard to the remarks which were made by the learned Subordinate Judge in his judgment. He considered from the calculations which had been put forward that "the existing jama was liable to be enhanced to even 5 times in certain cases." In order to be on the safe side and having regard to the circumstances he contented himself by increasing the jama to double the existing jama in the respective cases. The value having increased to such an extent and there having been no variation of rent for so many years and having regard to the undoubted nature of the tenancy, I am not satisfied that the learned District Judge was wrong in arriving at the conclusion that the rent in this particular tenure was fixed in perpetuity.

The appeals are dismissed with costs.

**B. B. Ghose, J.**—(After setting out the facts his Lordship proceeded:) The main contention is whether the rent payable, as I have already stated, is liable to enhancement. I may here add that we had a very elaborate and interesting argument attacking the judgment of the learned District Judge, but after carefully considering the argument, I am of opinion that the judgment of the learned District Judge must be supported.

The first contention that is raised is with regard to S. 6 of the Bengal Tenancy Act; and it is argued that this particular tenure was not held from the time of the Permanent Settlement and that, therefore, there was nothing to prevent the landlord from asking for enhancement of rent.

In support of this contention it was urged that a copy of a certain document was wrongly refused by the Subordinate Judge in the trial Court and that, although the learned Additional District Judge, on appeal, expressed the opinion that if he had been sitting as a Court of first instance he would have accepted the document, he declined to admit it as the Subordinate Judge, in his opinion, had given sufficient reasons for exercising his discretion in not accepting it. It is urged that it should have been admitted in evidence, and it would show that the tenure was created after the Permanent Settlement.

I will deal with this point later on. For my present purpose I will proceed on the assumption that this tenure was not held from the time of the Permanent Settlement. Assuming that to be so, the contention of the learned advocate for the appellants was that his clients were entitled to enhancement of rent under S. 7 of the Bengal Tenancy Act which commences thus:

> Where the rent of a tenure-holder is liable to enhancement, it may, subject to any contract between the parties, be enhanced up to the limit of the customary rate payable by persons holding similar tenures in the vicinity.

The argument in substance appears to be that where a tenure has not been held from the time of the Permanent Settlement the landlord is prima facie entitled to enhancement of rent. There is a large body of authority in support of this contention; for instance, the case of *Bamasoondery Dassyah* v. *Radhika Chowdhrani* (1), which lays down that the zemindar has a prima facie right to ask for enhancement of rent of under-tenures from time to time unless there is anything to prevent him from doing so. The question, therefore, resolves itself into this: whether having regard to the circumstances of the case as found by the learned Judge, there is anything to prevent the landlord from asking for enhancement of rent; and in deciding this question regard must first be had to the rights of the parties in these cases with reference to the provisions of S. 5 of Reg 44 of 1793. The plaintiffs in these cases claim title by succession from the auction-purchasers at a revenue sale of the zemindari and it is urged that they are not bound by any contract as to fixity of rent if the tenure was created after the Permanent Settlement. The question with regard to the construction of this section, the terms of which appear to be very drastic, is res integra. This section was construed by the Judicial Committee in the case of *Rance Surnomoyee* v. *Maharajah Suttees Chunder Roy Bahadoor* (2); it was observed by their Lordships:

> Now looking at what follows in the same clause, it is obvious that no such absolute cancellation was intended, for the power expressly and affirmatively given to the purchaser supposes the talookdars and the ryots to remain in all respects as before, except that they became liable to a certain limited increase of rent, according to the established usages and rates.

At page 147 their Lordships observed:

(1) [1869] 13 M. I. A. 248=13 W. R. 11=4 B. L. R. 8=2 Suther. 293=2 Sar. 524 (P.C.).

(2) [1864] 10 M. I. A. 123=2 W. R. 13=1 Suther. 548=2 Sar. 60 (P.C.).

The conclusion at which their Lordships have arrived as to the construction of the section is this—that a power was given by it to the purchaser at a Government sale for arrears to avoid the subsisting engagements as to rent, and to increase the rent to that amount at which, according to the established usages and rates of the pergana, or district, it would have stood had the cancelled engagement so avoided never existed. This gives it a just and reasonable operation, and virtually it would have had none, when the existing rent was already according to the usages and rate of the pergana.

The revenue sale, therefore, did not affect the other terms of the contract which there might have been between the parties at the time of the creation of the tenure.

We have no direct evidence as to what the actual terms were as regards the enhanceability of the rent. This must, therefore, be inferred from the other circumstances in the case, and the other circumstances from which an inference may be drawn have been very carefully stated by the learned District Judge from whose judgment these appeals are preferred. I need refer to only a few of them. The first is the statement in the document to which I have already referred that the tenure was a putni. In my opinion the grant of a putni connotes that the rent is fixed and I say this as I may claim a certain amount of experience with regard to what putni taluks are.

A case has been cited on behalf of the appellants reported in *Bhupendra Chandra* v. *Harihar* (3), where it seems to have been observed that the expression "putni taluk" did not import fixity of rent. The judgment however is not based on that ground as will appear from the following observation :

> But it is perfectly plain that this document does not create a putni taluk, in other words, a taluk subject to the summary procedure for realization of rent provided by Reg. 8 of 1819.

The learned Judge in the Court below has, in my opinion, rightly distinguished this case in his judgment where he observes :

> In that case the tenants relied on the description of the taluk as a putni, but it was found to be liable to enhancement.

Lower down he says :

> It was conceded that the document did not create a putni taluk in the technical sense, and there was no reference to the terms of the putni Regulation.

The only thing that may be said is that the mere mention of a taluk as a putni taluk does not create a putni taluk. There may be other terms in the document which may show that although the word "putni" was used it was not really a putni taluk; and in the case referred to above it woald appear that it was conceded by the party claiming under thekabuliyat that it was not a putni taluk. This case is, therefore, of very little authority in favour of the contention that the use of the word "putni" does not connote fixity of rent.

On the other hand, by a reference to the preamble under Reg. 8 of 1819 it would be found that tenures with a right of heritability and fixity of rent were being created in spite of the prohibition under the regulations for a considerable number of years known as putni taluks, and that regulation was enacted for the purpose of regulating the rights of the parties as regards realization of rent and so on. Further, in the documents which were executed so late as 1897 there is a reference to the fact that the tenures would be liable to sale under the provisions of Reg. 8 of 1819. Taking these facts together into consideration it would require a very strong circumstance to show that the rent was not fixed in perpetuity.

Having regard to the facts to which I have referred I need not refer in detail to the use of the word "majkuri" in that documents relating to this tenure. As the District Judge has pointed out the word "majkuri", according to Mr. Field in his well-known introduction to his edition of the Bengal Regulations under note (2) of S. 35, was an older name of a sikmi taluq, which means older than the Decennial Settlement, and the definition of the word in Wilson's Glossary is much more favourable to the position of tenants, because it shows that tenure-holders holding a majkuri taluq were only to pay the revenue through the zamindars. We may accept the contention on behalf of the appellants that these words were not used according to their true significance but were loosely used in those documents. But, apart from that, the use of the word "putni" and the fact stated that Regulation 8 of 1819 should be had recourse to for the purpose of recovering arrears of rent are sufficient to establish the fact of the fixity of rent. One other case was relied upon by the learned advocate for the appellants. It was the case of *Mukbul*

---

[1920] 24 C. W. N. 874=58 I. C. 867.

*Ali Chowdhury* v. *Jogesh Chandra Roy* (4), where it was observed that the mere fact that there was a stipulation in the kabuliyat that Regulation 8 of 1819 might be resorted to for the purpose of recovery of rent did not import fixity of rent. There cannot be any dispute with regard to that question whatsoever, because in that case the tenure was an etmam created with reference to lands which were situated in a temporarily settled estate, and with regard to such a tenure the mere fact that the parties had agreed that resort might be had to the Putni Regulation to recover arrears of rent could not mean that the rent was permanently fixed.

Then, I would further observe that having regard to the lapse of a long series of years extending to a century, when the value of the property has gone up at least 500 per cent. according to the estimate of the Subordinate Judge, and no attempt having been made during all this period to claim any enhancement of rent, a legitimate inference can be made that the original contract was that the rent should be fixed for ever. I may refer here to the observations made by their Lordships of the Judicial Committee in the case of *Dhunput Singh* v. *Gooman Singh* (5). At page 466 their Lordships observe:

> Upon this second point, the evidence of the subsequent acts and conduct of the zamindars is material only in so far as the receipts and proceedings above referred to show that both Aghum Singh and his successors were described as Mocurreredars. Their Lordships are not prepared to say that, from this evidence, a Court or jury might not legitimately infer, as against the first zamindar and his successors, either that the rent had been always fixed, or that by subsequent contract, that which had been originally variable had been made invariable.

**The circumstances of these cases all lead to the legitimate inference that even assuming that this tenure was created after the Permanent Settlement the rent was originally fixed or it might have been fixed at some other time about which there is no evidence.**

**I must next shortly deal about the reception of the copy of a potta about which the appellants have made a grievance before us. There cannot be any doubt that the plaintiffs have been guilty of gross laches in the production** of this document, and in these particular cases it cannot be said that the Subordinate Judge was entirely wrong in rejecting the acceptance of the document in the exercise of his discretion. I need not recapitulate the facts again, but the argument on behalf of the appellant gains support from the observations made by the learned Additional District Judge on appeal. I should myself have thought that where there was no reasonable ground for suspicion that a document might have been fabricated after the filing of the plaint such as documents obtained from public offices or copies obtained from Court and with regard to which the other side might not be prejudiced as being taken by surprise not having any opportunity of adducing rebutting evidence, the Court may properly, in the exercise of its sound discretion, receive such documents in evidence and then decide as to their probative value giving every opportunity to the other side to rebut the effect of those documents if they were believed. In these cases the document was alleged to have been a copy obtained from some Court where the original was alleged to have been filed, and under these circumstances, if the plaintiffs had not been so negligent in the production of the document in Court, it might reasonably have been accepted by the Court. I would only impress upon the trial Court the fact, as observed by the Judicial Committee in the case of *Indrajit Pratap Sahi* v. *Amar Singh* (6) that:

> rules of procedure are not made for the purpose of hindering justice.

Wide discretion has been given to the Court with regard to matters of reception of evidence although the documents have not been entered in the list of documents filed by the parties, and this discretion should be exercised for the furtherance of justice.

The last point that remains is with regard to the application of S. 188 of the Bengal Tenancy Act to these cases. The learned advocate for the respondents endeavoured to support the judgment of the learned Judge on the ground that the suits for enhancement of rent were not maintainable having regard to S. 188 of the Bengal Tenancy Act. I need only say that, having regard to the terms of the kabuliyat of 1897 there is no doubt

(4) [1920] 30 C. L. J. 140=54 I. C. 850=23 C. W. N. 945.

(5) [1867] 11 M. I. A. 433=9 W. R. 3 (P. C

(6) A. I. R. 1923 P. C. 128=2 Pat. 676.

in my mind that the interest of the tenants as well as the interest of the landlords have been separated. It cannot be said that the plaintiffs still remain the joint landlords of the tenants.

On the grounds I have stated I agree that the appeals must be dismissed with costs.

*Appeals dismissed.*

---

## A. I. R. 1927 Calcutta 174

NEWBOULD AND PEARSON, JJ.

*Santosh Kumar Roy* and *others*—Plaintiffs—Appellants.

v.

*Rakhal Chandra Hazra* and *others*—Defendants—Respondents.

Appeal No. 1782 of 1922, Decided on 14th May 1925.

*Bengal Tenancy Act* (8 *of* 1885)—*S.* 50 (2) *does not apply to suit not under the Act—But presumption may arise in case of uniform rate of rent for more than* 20 *years.*

Sub-S. 2 of S. 50 has no application in suits, which are not suits under that Act but are suits under the general law for ejectment of an alleged trespasser : 44 *Cal.* 555, *Foll.* But though this special presumption does not apply, it may arise apart from the Act where there has been a uuiform payment of rent for more than 20 years, when the original contract was a contract to hold at fixed rates coupled with the fact that other-cosharer landlords by recognizing the transfer not only admitted the transferability of the holding but also the fixity of the rent.

[P 174, C 1, 2]

*Sarat Chandra Bose* and *Panchanan Chowdhury*—for Appellants.

*Charu Chandra Biswas* and *Narendra Krishna Bose*—for Respondents.

**Judgment.**—The plaintiffs who are the appellants before us brought a suit for khas possession of what they alleged to be a non-transferable occupancy holding. It is unnecessary to state all the facts of this case since it is conceded that the suit must fail if we hold that the holding was transferable and there was a valid transfer to the principal defendant.

It is not disputed that the holding has been held at an unchanged rate of Rs. 9-6 for more than 20 years. It is contended, however, that the lower Court, was wrong in applying the presumption under Cl. (2) of S. 50 of the Bengal Tenancy Act in the present case. So far as that argument goes it appears to us to be sound. It seems hardly necessary to quote authorities in support of the proposition that sub-S. 2 of S. 50 of the Bengal Tenancy Act, has no application in suits which are not suits under that Act but are suits under the general law for ejectment of an alleged trespasser. We may cite, however, the case of *Jagabandhu Saha* v. *Magnamoyi Dasi* (1), where this statement of the law is made as an undoubted proposition. Further also we cannot agree with the learned Subordinate Judge that that the fact that the operation and effect of S. 22 Cl. (2) of the Bengal Tenancy Act has to be considered makes this suit in ejectment a proceeding under the Act. But although the lower appellate Court was wrong on this point of law he has based his finding that the tenancy in suit is an occupancy holding at fixed rent on other grounds which cannot be assailed in second appeal. Though this special presumption of Cl. 2 of S. 50 does not apply, it has been frequently held that in cases not under the Bengal Tenancy Act a presumption may arise apart from the Act that where there has been a uniform payment of rent for more than 20 years the original contract was a contract to hold at fixed rates. The learned Subordinate Judge has considered the case from this point of view and he has considered that in addition to there being evidence of no change of rent for a fixed period there is also the fact that the pro forma defendants who are also landlords of a considerable share by recognizing the transfer not only admitted the transferability of the holding but also the fixity of the rent as he points out this is something more than a mere forbearance on the part of the landlords to enhance the rent. Sitting as a Court of second appeal we are not prepared to hold that the lower appellate Court was wrong in drawing this presumption.

The only other point urged on our expressing our opinion that the tenancy was transferable is that the interest transferred was that of a Hindu widow and expired after her death. We hold that this contention which was not raised in either of the lower Courts cannot be raised in second appeal. It is pointed out that there is some reference to this made in the plaint. But issues were framed in the presence of parties and none of the issues framed raised this question. The result is that the appeal is dismissed with costs.

*Appeal dismissed.*

---

(1) [1917] 44 Cal. 555=22 C. W. N. 89=36 I. C. 884=24 C. L. J. 363.

## A. I. R. 1927 Calcutta 175 (1)

SANDERSON, C. J., AND RANKIN, J.

*Subal Chandra Kar* and *another*—Defendants—Appellants.

v.

*Jatindra Mohan Ghose* and *another*—Plaintiffs—Respondents.

Appeal No. 20 of 1926, Decided on 26th April 1926, from the original order of Buckland, J., in Suit No. 959 of 1911.

*Civil P. C., O. 40, R. 3—Application for accounts against Receiver should be by a suit.*

An application against a Receiver for accounts to be taken on the basis of wilful default and neglect should be by way of a suit : 5 *C. W. N.* 223, *Ref.* [P. 175, C. 2]

*C. Bagram*—for Appellants.

*S. N. Banerjee* and *H. C. Majumdar*—for Respondents.

**Rankin, J.**—This is an appeal by two defendants in a suit against the Receiver, Mr. B. N. Mitter, and the ground of their controversy with the Receiver is that they say that he has improperly dealt with certain portions of the premises under his management ; has failed to exercise reasonable diligence for the recovery of certain rents in respect of certain premises ; has failed to let them out and has been guilty of breach of his duty. The matter came before Mr. Justice Buckland upon a summons in Chambers and that summons was supported by a somewhat lengthy petition.

It appears that the application was not made in connexion with any accounts which the Receiver had filed or which were in course of being passed in Chambers of the Court under Ch. 21 of the Original Side Rules. It came on, therefore, as an independent motion or summons, and the learned Judge took the view that the ruling of Mr. Justice Sale in the case of *Coomar Sattya Sankar Ghosal* v. *Ranee Golapmonee Debee* (1) was to the effect that such an application, first of all, could not be entertained when the Receiver was passing his accounts and, secondly, should be made by a suit.

Learned counsel, Mr. Bagram, for the appellants, has contended before us that while it may be true that this question of wilful default does not arise when a Receiver is passing his accounts in the office of the Court on an ordinary occasion, nevertheless on principle the right of a party is to seek his remedy from the Court which appointed the Receiver and that the learned Judge ought not to have relegated him to a suit or ought to have treated this application as a suit.

With respect to the second part of that contention I confess I have no difficulty in disagreeing with him. If a suit has to be brought it is much better that it should be brought in the ordinary way. The question is whether in this particular case the learned Judge's order should be interfered with. In my judgment the rule that an application of this character should be made by a suit, whether it be right or wrong, has been recognized for a long time in this Court. In my judgment, it is at any rate, a good general rule in cases of any complication because there is manifest inconvenience, as this case shows, in dealing with complaints of this character without a properly framed plaint and without a suit being brought in a regular manner. In the present case the applicants seem to have rather misstated or misconceived what the order was which they wanted, and their application seems to be not without a good deal of complication and to have a good deal of material which requires a very thorough sifting. I do not think that this is a case in which one would be on strong ground in ignoring what Mr. Justice Sale has said in the case of *Coomar Sattya Sankar Ghosal* v. *Ranee Golapmonee Debee* (1). It has been pointed out to us that in a suit in this Court the procedure was followed and that the Court of appeal entertained it and considered that procedure to be correct.

For these reasons, it seems to me that the learned Judge has made an order which we ought not to interfere with. The appeal is dismissed with costs.

**Sanderson, C. J.**—I agree.

*Appeal dismissed.*

(1) [1900] 5 C. W. N. 223.

---

## A. I. R. 1927 Calcutta 175 (2)

C. C. GHOSE AND DUVAL, JJ.

*Akshoy Kumar Chakraburty*—Petitioner.

v.

*King-Emperor*—Opposite Party.

Criminal Revision No. 1019 of 1925, Decided on 12th Jan. 1926, from an order of Sub-Divil. Mag., Bishnupur, D/- 9-10-25.

*Penal Code, S.* 211—*Report by police as to complaint being false—Trial under S.* 211 *without giving accused opportunity to prove truth of complaint is bad.*

A trial for an offence under S. 211, merely on the report of the police that the information given by the accused was false, without giving the accused an opportunity to prove the truth of the information given by him, is bad.

[P 176 C 2]

*Satindra Nath Mukerji*—for Petitioner.

*Khundkar*—for the Crown.

**Judgment.**—The facts giving rise to this Rule shortly stated are as follows: The petitioner before us is a postal peon. On the 30th June 1925, he addressed a complaint to the police through the postmaster of the Raj Khamar Post Office against a person named Bhujendra Nath Bhattacharjee charging him with having abused and assaulted him and with having misappropriated a number of postcards and envelopes and cash belonging to Government which were in the possession of the petitioner. The complaint was forwarded to the Sub-Inspector of Police who reported to the Magistrate on the 13th July 1925 that the charges against Bhujendra Nath Bhattacharjee were false. The petitioner was informed on the 15th July 1925, by the Sub-Inspector of Police that the petitioner's charges against Bhujendra Nath Bhattacharjee were false. This information it would appear was given to the petitioner under the provisions of S. 173 (b), Criminal P. C. On the 16th July 1925, it appears from the order-sheet, that the petitioner was called upon to appear before the Magistrate on the 29th July 1925 to prove his case against Bhujendra Nath Bhattacharjee. Instead of a notice going to the petitioner in terms of the order of the Magistrate, dated the 16th July 1925, it appears that a summons was issued against him as an accused person to answer a charge under S. 211, I. P. C. The petitioner did not appear before the Magistrate on the 29th July 1925 and the case against the petitioner was adjourned to the 13th August 1925. A second summons, again under S. 211, being issued on the 13th August 1925, the petitioner appeared and was admitted to bail. Thereafter the petitioner was tried with having committed an offence punishable under S. 211, I. P. C., and was sentenced to one year's rigorous imprisonment on the 9th October 1925.

The petitioner's complaint before us is this that he got no opportunity whatsoever to prove his case against Bhujendra Nath Bhattacharjee, the police having reported the case to be false on or about the 15th July 1925, and the petitioner being called upon to answer a charge under S. 211, I. P. C.. immediately thereafter, although the Magistrate by his order, dated the 16th July, had required him to appear before him on the 29th July 1925, to prove his case against Bhujendra Nath Bhattacharjee. It appears to us on an inspection of the record that the petitioner's complaint is well founded. We think, having regard to the facts of this particular case the Petitioner not having been afforded any real opportunity whatsoever to prove his case against Bhujendra Nath Bhattacharjee he should not have been called on to stand his trial under S. 211, I. P. C., without being given such opportunity. The learned Magistrate was of opinion that the petitioner should be afforded an opportunity to prove his case against Bhujendra Nath Bhattacharjee and to that end he adjourned the matter from the 16th July to the 29th July 1925. As it turned out, however, by reason of some mistake or otherwise this opportunity was not given to the petitioner and as stated above the petitioner was straight-way called upon to answer a charge under S. 211, I. P. C., though there was no order that he should be summoned to answer a charge under S. 211, I. P. C.

On these facts we are of opinion that the conviction and sentence under S. 211 of the petitioner must be set aside. This order is made without any prejudice whatsoever to the adoption of any subsequent proceeding under S. 211, I. P. C,, or any other section of the Indian Penal Code against the petitioner should it appear after he had been afforded an opportunity such as is hereinbefore referred to that his charges against Bhujendra Nath Bhattacharjee are false. The Rule is accordingly made absolute. The petitioner will be discharged from his bail-bond.

*Rule made absolute.*

# A. I. R. 1927 Calcutta 177

GREAVES AND MUKERJI, JJ.

*Debendra Lal Khan*—Defendant 2—Appellant.

v.

*Pitambar Bera*—Plaintiff — Respondent.

Appeal No. 291 of 1924, Decided on on 26th May 1926, from the appellate decree of the Dist. J., Midnapur, D/- 9th August 1923.

*Custom—Proof of—Family custom—Particular rule of succession followed for a series of years is not necessarily binding on family—Immemorial existence must be shown.*

The most cogent evidence of custom is not that afforded by the expression of opinion as to its existence but the examination of instances in which the alleged custom has been acted upon and by the proof afforded by judicial or revenue records or private records or receipts that the custom has been enforced. Though judicial decisions are not indispensable, the acts required for the establishment of Customary Law ought to be plural, uniform and constant.

Even if a particular rule of succession has been actually followed in a family for a series of years, it cannot be treated as binding upon the family unless it has ripened into a family custom. it must be shown that the custom existed from time immemorial and where the custom set up is peculiar only to a single family this rule is more strictly enforced than ever : 1 *All.* 440 ; 3 *M. H. C.* 50 ; 17 *W. R.* 316 and 45 *Cal.* 835, *Appl.* [P. 178, C. 2, P. 179, C. 1]

*S. C. Bose* and *Kshirode Narayan Bhuiya*—for Appellant.

*Sarat Chandra Basak* and *Santosh Kumar Pal*—for Respondent.

**Mukerji, J.**—The plaintiff's case, shortly stated, is as follows : In mouza Maida there were 61 bighas 15 cottas of nishkar lands which were included in old Register No. 115 and present Register Nos. 105-B and 4171-C of the Midnapur Collectorate. The said lands are included in Chak No. 1 of the thak map of Mouza Gaighatta with which Mouza Maida was measured at the time of the thak. The lands on actual measurement were found to be 64 bighas. At one time these lands, together with other lands, were the nishkar properties of one Ram Narain Pal and they were confirmed as lakheraj under a sanad dated 1876. Under some sort of compromise, the details of which are neither clear nor material eight annas of the said lands came to be in the possession of one Raja Sree Narayan Pal and the other eight annas in the possession of one Narayan Pal and one Darpa Narayan Pal. Sree Narayan's wife Kshirode Mohini purchased the eight annas interest of Nara Narayan and Darpa Narayan under a kobala and in auction sale in Magh 1281 A. S. In Falgun 1281 A. S. she took a maurasi mokarrari lease from her husband in respect of the eight annas share of the latter. She remained in possession of the lands, eight annas in lakheraj right and eight annas in maurasi right till her death in Assar 1299 A. S.

On her death, in accordance with the custom obtaining in the famify of Raja Sree Narayan Pal under which the eldest son succeeds to the estate of the father and the other sons to the exclusion of the daughter succeed to the estate of the mother, the two younger sons of Sree Narayan, namely, Monmatha and Pramatha, inherited their mother's interest in the said lands to the exclusion of the eldest son and an infant daughter. Monmatha and Pramatha sold their interest in the lands to the plaintiff by kabalas dated 1322 A. S. and 1327 A. S. respectively and the plaintiff has since then been in possession of the lands, on getting his name registered in the Collectorate and by realizing rents from his tenants. Sree Narayan was also the zemindar of Mal Mehal Hariharpur, and he sold the said mehal to the Defendant No. 2 and obtained a patni settlement from the latter in respect of the same. This patni right was subsequently acquired by the Defendant No. 1. The Defendant No. 2 has also acquired the lakheraj right in eight annas of the lands which Sree Narayan had therein. The result of these transactions is that while the Defendant No. 1 is the patnidar under the Defendant No. 2 in respect of the Mal Mehal Hariharpur, the plaintiff has lakheraj rights in eight annas of the aforesaid lands in mouza Maida and maurasi rights in the remaining eight annas thereof under the Defendant No. 2 who has lakheraj rights in the said eight annas.

In the record of rights the said lands have been entered as being included in the Mal Mehal Hariharpur and as being the patni of the Defendant No. 1 under the Defendant No. 2 and, the Defendants Nos. 3 to 43, the tenants, have been recorded as the tenants of the Defendant No. 1 The plaintiff's case

is that the aforesaid entry is wrong. He, therefore, instituted the suit out of which this appeal arises for a declaration as to the incorrectness of the entry and for certain other declarations, viz., that the lands are the lakheraj lands of old Register No. 115 and present Register Nos. 105-B and 4171-C, that he has got eight annas malikar right and eight annas maurasi rights in the lands, that the Defendant No. 1 has no patni right to the lands under the Defendant No. 2 as appertaining to his Mal Mehal Hariharpur, that the tenants Defendants Nos. 3 to 43 are tenants in respect of the said lands under him.

The Defendant No. 2, who is the only appellant before us and with whose defence only we are concerned here, pleaded in the first place that the lands, with the exception of certain specified plots were the lakheraj lands included in the registers as stated in the plaint. He next traversed the allegations in the plaint as to the acquisition of the eight annas interest by Nara Narayan and Darpa Narayan. He impugned the factum and validity of the transactions under which Kshirode Mohini acquired lakheraj interest in eight annas of the land from Nara Narayan and Darpa Narayan and the bona fides of the maurasi lease obtained by her from Sree Narain in respect of the remaining eight annas.

He denied the truth of the allegation regarding the custom of inheritance which was said to obtain in the family of Sree Narain. He challenged the plaintiff's title both upon the ground that the transactions upon which it rests are invalid, inoperative and insufficient and also upon the ground that neither he nor his predecessors, with the exception of Sree Narain had ever any possession. He asserted his own title to the sixteen annas of the lakheraj under the purchase of his father at an auction sale in execution of the decree which the latter had obtained against Sree Narain upon a mortgage of the lands by Sree Narain in his favour. He asserted that the fictitious transactions had been entered into by Sree Narain in order to save his interest from being sold away under the mortgage. He averred also that the lands were in his possession and that he had got his name entered in the Collectorate in respect of them. The Courts below have granted the plaintiff a decree embodying the declarations prayed for and set out above but in respect of the plots mentioned in the plaint with the exception of some specified plots, viz., with the exception of Plots Nos. 14, 15, 16, 17, 18, 28, 31 and 35 and half of Plots Nos. 13 and 129. The Defendant No. 2 has preferred this appeal, and the decree has been challenged on his behalf upon two broad grounds.

The first ground is to the effect that the plots in respect of which the plaintiff has obtained the decree have not been proved to appertain to the lakheraj grant under which the plaintiff claims. This contention, however, has no substance as the appellant in his written statement expressly admitted that all the plots mentioned in the plaint with the exception of Plots Nos. 14, 15, 16 and 17 and halves of Dags Nos. 13 and 129 which appertain to the Mal Mehal, were the nishkar lands of Sree Narain Pal. These plots as well as a few more which were proved in the suit to appertain to other lakheraj interest have been excluded from the decree.

The next contention of the appellant relates to the question of title. It has been urged that the plaintiff has failed to make out his title and that the appellant has, on the other hand, succeeded in showing that he is in possession of the lands under the purchase made by his father. So far as the question of title is concerned the plaintiff appears to have, by production of certified copies of kobalas Exs. 4 and 4 (1)—the originals of these documents being alleged to have been lost, proved that Kshirode Mohini purchased a half of the interest of Nara Narayan and Darpa Narryan in the lands and as regards the other half of the interest of these two persons there is no document under which that share passed to Kshirode Mohini. As regards the custom which was alleged on behalf of the plaintiff under which in the family of Raja Sree Narayan his eldest son and the daughter were excluded from inheriting Kshirode Mohini's estate with the result that her whole interest devolved on Monmatha and Promatha, the evidence that has been adduced falls far short of what is requisite to prove such a singularly uncommon family custom.

The most cogent evidence of custom is not that afforded by the expression of

opinion as to its existence but the examination of instances in which the alleged custom has been acted upon and by the proof afforded by judicial or revenue records or private records or receipts that the custom has been enforced. *Luchman Bai* v. *Akbar Khan* (1) Though judicial decisions are not indispensable, the acts required for the establishment of Customary Law ought to be plural, uniform and constant. *Tara Chand* v. *Reeb Ram* (2). In *Maharanee Heeranath Kooer* v. *Baboo Burm Narain Singh* (3) it was laid down that to establish a family custom of descent, one at least of two things must be shown : either a clear distinct and positive tradition in the family that such custom exists in the family, or a long series of instances of anomalous inheritance from the family custom may be inferred. In the case of *Ambalika Dasi* v. *Arpana Dasi* (4) it was held that even if a particular rule of succession has been actually followed in a family for a series of years, it cannot be treated as binding upon the family unless it had ripened into a family custom ; that it must be shown that the custom had existed from time immemorial and where the custom set up is peculiar only to a single family this rule is more strictly enforced than ever.

Judged by these tests the evidence by which the particular custom which is alleged in the present case has been sought to be proved falls hopelessly short of the requisite, and it must be held that the custom has not been established. It follows, therefore, that plaintiff has succeeded in proving his title only to a moiety of the interest which belonged to Kshirode Mohini and no more.

The learned District Judge appears to have been of opinion that the lacuna in the plaintiff's title is made up by the evidence relating to his possession and that of his predecessors-in-interest. Such possession, the learned Judge has observed, has been proved as regards the whole of the property and not merely a share thereof. If the plaintiff or his predecessors-in-interest had title not to the whole but to a share, their possession of the whole would only mean that their co-sharers were not in possession ; but that would not enable the plaintiff to acquire a title to the whole unless the possession was to the exclusion of the co-sharers or adversely to them. There is no finding, however, that the possession of the plaintiff or his predecessors-in-interest was adverse or exclusive. The result then is that the plaintiff's title has been made out in respect of a half of maurasi rights in eight annas of the lands and one-fourth of the lakheraj rights in the other eight annas. (The judgment after considering an argument on facts proceeded.) The appeal thus succeeds in part but in the circumstances no order is made as to costs in this Court. The plaintiff will be entitled to the costs awarded to him by the decrees of the Courts below.

**Greaves, J.**—I agree.

*Appeal partly allowed.*

(1) [1876] 1 All. 440.
(2) 3 M. H. C. 50.
(3) 17 W. R. 316=9 B. L. R. 274.
(4) [1918] 45 Cal. 835=29 C. L. J. 264=47 I. C. 402=23 C. W. N. 160.

---

## A. I. R. 1927 Calcutta 179

GREAVES AND MUKERJI, JJ.

*Ashutosh Lahiri* — Plaintiff—Appellant.

v.

*Chandi Charan Mitra*—Defendant—Respondent.

Appeal No. 179 of 1924, Decided on 10th June 1926, from the appellate decree of the Sub-J., Rungpur, D/- 13th September 1923.

*Lease—Construction — Grant for indefinite period enures at least for lifetime of grantee unless otherwise intended.*

The general rule of construction is that if a grant is made to a man for an indefinite period, it enures, generally speaking, at least for the lifetime of the grantee unless there were some words showing the intention that a heritable grant was made. [P. 181, C. 2]

The terms of the lease were as follows : "You having applied to get settlement of land for the purpose of constructing your basha, I hereby fix annual rent for the said land and settle the same with you ; you shall enjoy and possess the said land by constructing your basha and residing therein, regularly paying the rent. To this effect I execute this pottah."

*Held* : that the tenancy under the lease is not a tenancy at will or a yearly tenancy : *A. I. R.* 1926 *Cal.* 558, *Dist.* The lease would enure for the lifetime of the lessee.

[P. 180 C. 2, P. 181 C. 2]

*Rishindra Nath Sarkar* and *Abani Nath Bose*—for Appellant.

*Girija Prasanna Sanyal* and *Indu Prokash Chatterjee*—for Respondent.

**Mukerji, J.**—This appeal arises out of a suit which was instituted by the plaintiff who is the appellant before us for recovery of khas possssion in respect of a piece of land ejecting the defendant who had been holding the same. The suit was instituted after service on the defendant of a notice to quit on the footing that the tenancy which forms the subject-matter of the suit was a tenancy-at-will or a tenancy from year to year. The suit has been dismissed by both the Courts below. It is necessary to state quite shortly some of the facts relating to this case in order to appreciate the contention that has been urged on behalf of the appellant in this appeal.

The plot of land belonged to one Uma Charan Majumdar who transferred his rights therein to one Chandi Charan Ray Choudhury in 1313 B. S. and Chandi Charan Ray Choudhury in 1319 in his turn transferred the rights which he had acquired to one Ashutosh Lahiri who is the plaintiff-appellant before us. Prior to the transfer in favour of Chandi Charan, Uma Charan had by a pottah settled the disputed land with one Rajbullubh in 1304 B. S. Rajbullubh transferred the rights which he had obtained from Uma Charan to one Chandi Charan Mitra the defendant-respondent in this appeal. The Courts below, as I have stated, have dismissed the plaintiff's suit holding that the notice which had been served on the defendant was a valid one and had been properly served if it be taken that the plaintiff was entitled to eject the defendant as a tenant at-will-or a tenant from year to year. They were, however, of opinion that the tenancy that was created by the document of 1304, to which I have referred, was not a tenancy at will or a tenancy from year to year and it was a tenancy which in any event could enure for the. lifetime of the grantee, the aforesaid Rajbullubh.

The principal contention urged on behalf of the appellant before us is to the effect that upon a proper construction of the lease of 1304 it should have been held by the Courts below that the interest of the defendant was nothing more than that of a tenant at will or a tenant from year to year. This contention is sought to be supported by reference to a number of decisions of this Court and also to the terms of the document itself. Reference has also been made to another case between the parties in respect of a piece of adjoining land. The question as to the nature of the interest which had been conveyed by this last-meutioned document came up for consideration before this Court and was decided in one of the reported decisions upon which reliance was placed on behalf of the appellant. The document of 1304 purports to run in these words :

> You having applied to get settlement of 6 kanis of land, as described in the schedule below for the purpose of constructing your basha, I hereby fix annual rent for the said 6 kanis of land at Rs. 3 and settle the same with you ; you shall enjoy and possess the said land by constructing your basha and residing therein, regularly paying the rent. To this effect I execute this pottah.

It is clear therefore that the lease was not for any fixed term. There was no term of inheritance and it was a lease neither for a definite term nor one expressly for perpetuity. Having regard to the terms of the document which in themselves are not very clear it is competent to us to look into the surrounding circumstances, and the surrounding circumstances, as they were found by the Courts below, appear to have been these : that the lessee was to build his dwelling house on the land ; that at the time when the lease was granted a substantial sum was paid by the lessee to the lessor as nazarana or premium for the grant ; that after the execution of the lease the lessee erected, though, it is stated, with the permission of the lessor, some substantial structures upon the land and thereafter there were two transfers of the lessee's interest with regard to one of which at least the landlord's fees were paid by the transferee at the time when the kobala in respect of the transfer was registered.

The findings of the Courts below on the question as to whether there was acquiescence on the part of the lessor, with regard to the execution of the substantial structures on the land, are not clear ; and I do not propose to rest my judgment on any finding with regard to that matter. Reading the lease, and taking into consideration the other matters which arise upon the findings to which I have referred, it seems to me that the intention of the parties was to make a grant in favour of the lessee which would enure for the lifetime of the lessee and so long as the lessee would regularly

pay the rent in respect of the premises. Reliance has been placed on behalf of the appellant upon a number of decisions of this Court, to the more important of which I shall now refer. The first one is the case of *Mohim Chandra Sarkar* v. *Anil Bandhu Adhikary* (1). That, however, was a case where there was a stipulation in the lease prohibiting the lessee from erecting masonry building or cutting down trees, and in this respect the lease in that case seems to have been of an entirely different nature from the lease now before us.

Another case referred to on behalf of the appellant is that of *Abdul Hakim Khan* v. *Elahi Baksha* (2) in which upon a review of most of the earlier decisions on the question as to the circumstances under which the permanency of a grant may be inferred or not, this Court laid down certain principles on which such permanency might be inferred. It may be that, judged by the test laid down in that case, the lease in question will fall short of the requisites necessary to show that in point of fact it was a permanent lease granted to the predecessor of the defendant, namely, Rajbullubh. That, however, is not the question for our consideration in the present appeal. The whole question here is as to whether the plaintiff has succeeded in showing that the interest of the defendant is only that of a tenant at will or of a yearly tenant.

Another case has been referred to before us on behalf of the appellant and that is the case of *Chandi Charan* v. *Ashutosh* (3), in which, as I have already said the question as to the nature of another lease between the parties relating to an adjoining plot of land was considered by this Court. That lease ran in these words :

> Within the aforesaid jote, 6 kanis, by guess of land mentioned in the boundaries below, being contiguous to your basha, you want the same for making it a part of the compound of your basha. Hence Rs. 3 being fixed as annual rent, I lease out the same to you. You will continue to possess and enjoy the aforesaid land after making the same part of the compound of your basha and paying rent regularly.

It was held in that case by this Court that even if the lease with which we are now dealing in this appeal might have created a permanent right to the plot of land covered by it, it did not necessarily follow that the same right was created in the other plot of land which adjoined the basha and to which the lease in that case related. It was held in that case that the plot of land was leased out to the defendant to be treated as a part of his compound ; that it came within the purview of S. 106 of the Transfer of Property Act or rather the latter part of that section, and it was held that no permanent right was created by that lease. The terms of the document before us are different from those of the document which was considered by this Court in the case to which I have just referred: there the land was leased out for the purpose of being treated as a part of the compound of a basha ; whereas in the present case it was leased out for the purpose of making a basha or homestead. The decision in that case, therefore, does not assist us in determining the question as to what are the rights of the parties under the lease which is the subject-matter for consideration here.

On behalf of the respondent it has been pointed out in the first place that the notice that was served upon him was not a valid one ; but it is not necessary to go into that question in the view that I take of the lease that we have got to consider. It is not necessary to go further and find what are the exact rights of the parties under this lease. It is enough to say that it is not possible on a consideration of the terms of the lease or the circumstances to which I have already referred to hold that the lease had created only the interest of a tenant at will or of a yearly tenant. And in view of the terms of the lease it would be right, in my opinion, to apply to it the general rule of construction which is to the effect that if a grant is made to a man for an indefinite period it enures generally speaking at least for the life-time of the grantee unless there were some words showing the intention that a heritable grant was made. It is enough for our purpose to say that we agree with the view taken by the Courts below to the effect that this tenancy under the lease is not a tenancy at will or a yearly tenancy. It is not necessary to decide the question as to whether the tenancy is a permanent tenancy or not because it is quite clear that the tenancy enures at

(1) [1909] 13 C. W. N. 513=1 I. C. 66=9 C. L. J. 362.
(2) A. I. R. 1925 Cal. 309=52 Cal. 43.
(3) A. I. R. 1926 Cal. 558=53 Cal. 95.

least for the lifetime of the grantee Rajbullubh who appears to be alive at this time.

In this view of the matter I am of opinion that the decrees passed by the Courts below are correct and I dismiss the appeal with costs.

**Greaves, J.**—I agree.

*Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 182

CUMING AND PAGE, JJ.

*Raja Promode Nath Roy* and *others*—Decree-holders—Appellants.

v.

*Secretary of State for India* and *others*—Respondents.

Appeals Nos. 260 and 264 of 1923, Decided on 9th June 1926, from the orders of the Sub-J., Krishnagar, D/- 13th and 20th March 1923 respectively.

(*a*) *Decree—Construction.*

A Court construing the decree may look at the term of the plaint itself. [P 183 C 2]

(*b*) *Decree—Construction — Mesne profits allowed but period not mentioned—Plaint not expressly restricting prayer for profits up to date of suit—Profits must be deemed to be allowed up to date of delivery of possession.*

Where in a suit at the commencement of the plaint valued at..., increased by order of Court, and the amount mentioned covered only the mesne profits up to the date of the suit, the final prayer was: "A decree may be given for the mesne profits claimed with interest till date of realization," and there was also a general prayer for any other relief that the Court deemed plaintiffs to be entitled to, and the decree was silent as to the period up to which mesne profits were allowed:

*Held:* that the plaintiffs must be deemed to have asked for mesne profits demandable under law, viz., up to the date of delivery of possession and the decree must be deemed to grant the same: 8 *Cal.* 178 (*P. C.*), *Rel. on.* [P 184 C 1, P 186 C 2]

(*c*) *Civil P. C., S. 2 (12)—Mesne profits should be calculated on the basis of the profits the trespasser might have made and not what the rightful owner was receiving before eviction—Joint trespassers are severally and jointly liable for whole of the profits.*

*Per Cuming, J.*—Mesne profits must be assessed according to the express provision of the statute with reference to what the wrong-doers might or might not have realized and not with reference to what the rightful owner was receiving before eviction. [P 185 C 1]

Where more persons than one are concerned in the commission of a wrong, the wronged person has his remedy against all or any at his choice. Every wrong-doer is liable for the whole damage and it does not matter whether they acted as between themselves as equal or one as agent of the other. Therefore a trespasser is liable jointly with his lessees for the entire amount of mesne profits and not merely to the extent of the rents realized by him. Each case must be determined on its own facts. [P 185 C 1]

Everything is to be presumed against the wrong-doer, and therefore where it has been proved that some of the land has been let out at a produce rent, the Court is entitled to assume that all the land was let out at a produce rent and it is for the tort-feasor to show that it was not. [P 185 C 2]

*Per Page, J.*—The foundation of the cause of action for mesne profits is the wrongful possession of the defendant, and the question to be determined in each case is the amount of the profits which the wrong-doer, while in possession received or if he had used ordinary diligence ought to have received, out of the property. The sum which represents the mesne profits is invariable and indvisible, and is payable in solidum by each and every person who is in wrongful possession of the property. [P 189 C 1]

Although mesne profits are measured by the profits of the wrong-doer in actual occupation, and he is the person from whom prima facie mesne profits are to be recovered, yet, if some other person has so conducted himself in connexion with wrongful possession of the person in actual occupation that he is regarded in law as being jointly in possession with the person in actual occupation, such other person is jointly and severally liable with the person in actual occupation for the whole of the mesne profits which have accrued: 37 *Cal.* 559, *Diss. from.* [P 189 C 1]

*S. C. Basak, Rupendra Kumar Mitter, Dharmadas Set* for *Pasupati Ghose, Ram Ch. Majumdar* and *Peary Mohan Chatterjee*—for Appellants.

*Dwarka Nath Chakraverti, Surendra Nath Guha, Gunada Charan Sen, Bhupendra K. Ghose, Trailokya Nath Ghose, Promedo Kumar Ghosh* and *Prosanta Bhusan Gupta*—for Respondents.

**Cuming, J.**—These two appeals arise out of certain execution proceedings.

It would appear that so long ago as 1904 two suits were brought by the two decree-holders Kumar Basanta Kumar Roy and Bibi Jaroa Kumari Saheba for recovery of khas possession of their respective 5 annas share in certain char lands.

The suits were brought against the Secretary of State for India in Council, Srish Chandra Sanyal and a number of other persons among whom may be noted the parties who may be described as the Kundu defendants. With regard to the suit of Kumar Basanta Kumar Roy the suit was decreed with costs and mesne profits against the principal defendants and the defendants added, which included

Defendants Nos. 1—15 and 18. A similar decree was passed in the suit of Bibi Jaroa Kumari against the same defendants. Both suits were fought up to the Privy Council with varying success in the different Courts. The decision of the Privy Council was in favour of the plaintiffs in both suits.

In these execution proceedings the main points contested were the period for which mesne profits had been decreed by the trial Court, the basis on which the mesne profits were to be assessed and who was liable to pay those mesne profits. The executing Court held that mesne profits had been decreed only up to the date of the institution of the suit and not up to the date of delivery of possession as contended by the decree-holder. With regard to the basis on which the mesne profits were to be assessed the executing Court held that the correct basis was the rental basis. The Court also apportioned the liability among the different defendants. The deeree-holders have appealed in both the cases and on appeal have challenged the findings of the executing Court on all the points I have mentioned. The first point to be determined is for what period the decree-holder is entitled to mesne profits.

The decree states no period. It states that the suit is decreed with costs and mesne profits. The respondent contends that all that the decree-holder asked for was mesne profits up to the date of the suit and that frcm that fact it is clear that in using the expression "mesne profits" the Court clearly intended mesne profits only up to the date of suit. He contends that the Court cannot be held to have given the decree-holder a relief which he never asked for. The point for our decision is the correct construction of the decrees.

The sheet-anchor of the decree-holder's case is the decision of the Privy Council in the case of *Fakharuddin Mahammad Ahsan Chaudhury* v. *Official Trustee of Bengal* (1). In that case the terms of the decree were that the plaintiff be declared entitled to possession with wasilat from the commencement of Sraban. Their Lordships, in considering the plaint, held that it was at all events open to the construction that the plaintiff did intend to claim wasilat up to the time of delivery of possession, although for the purpose of valuation of the suit only so much was valued as was then due. They pointed out that under the law wasilat could be given up to the date of possession and concluded their judgment by saying that it appeared to their Lordships that the more reasonable construction of the document is that the Court intended to give with possession that wasilat which was claimable up to the time of possession.

Finally, their Lordships referred to a number of cases and pointed out that this was not a case in which the decree was silent on the subject of wasilat but that it expressly mentioned wasilat and that the expression "wasilat with possession" might reasonably be held to have the construction put upon it by the High Court, viz., wasilat up to the time of delivery of possession. Now, I do not propose for one moment to attempt to construe the present decree by the decree in the suit which was being dealt with by the Privy Council, but in construing the present decree I propose to apply the same principles which their Lordships applied in construing the decree before them. It is clear from the judgment I have just referred to that a Court construing the decree may look at the term of the plaint itself.

Now in the decree the Court has set out the major portion of the plaint. In the plaint the plaintiff in Appeal No. 260 claimed Rs. 7,545 made up as follows: Rs. 6,159-9-0, the value of the land and Rs. 1,231-5-9, the mesne profits for three years and finally asked for possession and mesne profits claimed. The respondent argues that clearly the plaintiff made definite prayer therefore for the mesne profits claimed, viz., Rs. 1,231-5-9 and therefore by implication he claimed these mesne profits and these only and intended to get the reminder by a separate suit.

The appellants contend that the expression "mesne profits claimed" means the mesne profits claimed in the heading to the suit where the suit is described as a suit for recovery of immovable property and mesne profits, and that the value of mesne profits up to the date of suit had to be given for the purpose of valuation of his suit.

(1) [1881] 8 Cal. 178=8 I. A. 197=10 C. L. R. 176=4 Sar. 270 (P. C.).

After a careful consideration of the decrees I hold that the reasonable construction to be put on them is that the value of the mesne profits was given up to the date of suit for the purposes of valuation and that what the Judge intended to give and has given in his decree were mesne profits up to the date of delivery of possession.

As far as can be seen this was the interpretation that was put on the decrees by the parties themselves up to the execution proceedings. The Kundus themselves in their objections to execution contended that all that the decree-holders are entitled to get is mesne profits from 5th December 1903 to 13th February 1918. No doubt this would not prevent the judgment-debtor from contending that they had misunderstood the decree. In paragraph 9 of the plaint in which the value of the mesne profits is given as Rs. 1,389, it is, I think, clear that the amount was stated for the purposes of assessing stamp-duty. That is I think evident from the fact that the paragraph goes on to state :

> So the plaintiffs bring their suit on paying the proper Court-fees on a valuation of Rupees 7,545-11-8, being the total of the aforesaid two sums.

The judgment-debtors have laid much stress on sub-Cl. (b). The words used in the clause are : "A decree may be given for the mesne profits claimed with interest till date of realization." The judgment-debtors strenuously contend that the expression "mesne profits claimed" can only refer to the mesne profits of which the valuation has already been set out in para. 9.

I do not think that it is necessary to give this meaning to the expression "mesne profits claimed." The plaintiffs described their suit as one for mesne profits and the expression "mesne profits claimed," I think, may reasonably be considered to refer to the general claim for mesne profits and not only to the mesne profits up to the date of suit, the value of which it was necessary to state for the purposes of assessing the stamp-duty. I am therefore of opinion that the decree-holders in these two appeals are entitled to mesne profits down to the date of delivery of possession.

The next question to be considered is what is the basis on which the mesne profits are to be assessed. The executing Court has allowed mesne profits on what is called a rental basis, that is to say, the amount of profits which have been received by the decree-holders if he had been in possession and had let out the land at a money rental to raiyats. The decree-holders contend that the Court should have gone into the nature of possession of the land exercised by the judgment-debtor. They contend that the judgment-debtors were in khas possession of some of the lands and that some of the other lands they let out to bhag tenants, in which case they received half the produce of the land. They contend that the defendant Srish Chandra Sanyal was on his own admission in actual possession by actually cultivating the land himself or through bhag tenants.

The Kundu defendants, who alone are really contesting these appeals, contend that they let out the land in putni to Srish and that all they are liable for is the amount of rent that they obtained from Srish as sub-lessee under them. They contend that the decree-holder being a zamindar would have let out the land in putni. Now mesne profits are defined in the Code as those profits which the persons in wrongful possession of such property actually received or might with ordinary diligence have received therefrom together with interest on such profit, but shall not include profits due to improvement made by the person in wrongful possession. Now in this case the person or rather persons in wrongful possession were mainly the Kundus and Srish.

The principle which the learned Judge has followed in his judgment is this: If the person kept out of possession is a cultivating raiyat he would be entitled to mesne profits on a produce basis, that is to say, the net value of the produce received after he has paid the necessary cost of cultivation, etc., but that if he happens to be a tenure-holder, that is, a rent-receiver from the raiyats on the land he should get the mesne profits on a rent basis, viz., the amount he would have received by way of rent from the raiyats.

In support of this contention he has cited a number of rulings. It perhaps is not easy to deduce any general principle from the decisions. They really each of them, apply to the particular facts of of the particular case they were dealing

with. For instance, in the case of *Surja Pershad* v. *Reid* (2), it was held that where a decree-holder was in constructive possession by letting out the lands to tenants before ouster, the mesne profits should be measured by what would be a fair and reasonable rent for the land if they had been let out to tenants during the period of dispossession. At the same time the learned Judges remarked that there was no general principle which could be made applicable to every case.

They consider that the Judge in the particular case before them should have ascertained what was the nature of the possession of the decree-holder before he was dispossessed. In the case of *Bireswar Dutt Chaudhury* v. *Baroda Prosad Roy* (3) the learned Judges held and with the greatest respect I consider rightly that mesne profits must be assessed according to the expresss provision of the statute with reference to what the wrong-doers might or might not have realized and not with reference to what the rightful owner was receiving before eviction. Further they held—and here again I entirely agree—that where more persons than one are concerned in the commission of a wrong, the wronged person has his remedy against all or any at his choice. Every wrong-doer is liable for the whole damage and it does not matter whether they acted as between themselves as equal or one as agent of the other. Therefore a trespasser is liable jointly with his lessees for the entire amount of mesne profits and not merely to the extent of the rents realized by him. As I have already remarked each of these decisions must be considered in the light of the particular fact of the particular case. So long as we have the express word of the statute we can hardly hold that any general principle is laid down by any of them; for we have the statute itself to guide us and the principle to be followed is obviously the principle laid down in the statute itself. Now, what are the facts of the present case? The land is char land; it had been under water for some 40 years; and there is not the slightest evidence to show even if it were a factor to be taken into consideration how the plaintiff decree-holders used the land before diluvion. We are not, I think, entitled to assume, even if it were a factor to be taken into consideration, that the zamindar would have let out the land in putni as the Kundus allege they themselves did.

The decree-holders are entitled to get the profits actually received by the person or persons in wrongful possession. If Srish let out any of the land in bhag or kept any of the land in his khas cultivation the decree-holders are entitled to get what Srish actually got.

The decree-holders state that Srish had an area of some 600 bighas in khas or bhag cultivation. The Commissioner finds that Srish had no land in either khas or bhag cultivation. It is difficult to see how the Commissioner arrived at the conclusion in the face of Srish's own written statement in which he stated that the plaintiffs could not get khas possession as he Srish had been in possession for more than 12 years by cultivating the land himself or in partnership with tenants and by selling grass and jungle and by receipt of rents. Further we have the fact that in pattah granted by Srish the boundaries are sometimes given as the sarkari or zamindar's khas land.

No doubt Srish in his evidence later on denied all these and gave a more or less untruthful explanation. The Commissioner seems to have accepted the statement though it is difficult to understand why Srish produces none of his papers. There is a well-known principle that everything is to be presumed against the wrong-doer.

Where on Srish's own statement and from his evidence supplied by his own pattah it is clear that some of the land was held on a produce rent, the Court is entitled to presume that it was all so held and the burden of proof is on the wrong-doer to show that it was otherwise.

The principle which I think is to be followed in the present case is that it having been proved that some of the land has been let out at a produce rent, the Court is entitled to assume that all the land was let out at a produce rent and it is for the tort-feasors to show that it was not. They have their papers and by the production of their papers can at once prove how they actually dealt with the land.

(2) [1902] 29 Cal. 622=6 C. W. N. 409.
(3) [1910] 15 C. W. N. 825=11 I. C. 504.

The case will have to go back to the executing Court now to ascertain what is the amount of mesne profits up to the date of delivery of possession and in arriving at the amount the Court should be governed by the above principles.

With regard to the next point, who are the persons liable to pay the mesne profits, that has already been decided in the decree of the trial Court.

The trial Court gave a decree with costs, interest and wasilat against the principal and added defendants. The amount was left to be decided in the execution department but it is clear from the decree that all the defendants are jointly and severally liable for the whole amount of mesne profits.

The only defendants, the extent of whose liability had to be determined by the executing department, were Defendants Nos. 1 and 5. The executing Court has found that Defendants Nos. 1 to 5 are liable for a certain amount in each case.

Reading, however, the judgment as a whole I think it is quite clear (see pages 155-156) that the learned Judge must have meant Defendants Nos. 1 and 5. He only discusses the case of Defendants Nos. 1 and 5, and as a matter of fact that was the only case open to him to discuss in view of the decree of the trial Court. If, however, he has found that Defendants Nos. 1 to 5 are liable for mesne profits in one case to the extent of Rs. 645-10 as. and in the other to the extent of Rs. 564-14, he is obviously wrong. The decrees were against all the defendants.

Only the liability of Defendants Nos. 1 and 5 had to be separately assessed.

So far as all the other defendants are concerned the decree makes them all jointly and severally liable for the whole amount.

One other small matter remains to be decided. The representatives-in-interest of Jaroa Kumari who has died and whose interest has devolved on a number of persons ask the Court that the executing Court should apportion the mesne profits among the five decree-holders. Obviously this is not a question that can be determined in the present proceedings.

The appeals must succeed and be decreed and the case go back to the executing Court to determine the amount of mesne profits payable by the defendants bearing in mind the direction given above.

As it is clear from the learned Judge's judgment whether he correctly assessed the liabilities of Defendants Nos. 1 and 5, this point should also be determined by the executing Court. The appellants are entitled to their costs from the Kundu defendants who have contested these appeals. We allow 20 gold mohurs in each appeal.

The cross-objections not being pressed are dismissed, but without costs.

**Page, J.**—(After setting out the facts his Lordship proceeded.) It is common ground that under these decrees the plaintiffs are entitled to mesne profits for a period of three years prior to the date when the suits respectively were instituted. The respondents, however, contend, and the learned Subordinate Judge has held, that the plaintiffs are not entitled to mesne profits pendente lite or thereafter until the defendants gave up possession of the land, inasmuch as such additional mesne profits were neither claimed in the plaint nor expressly decreed by the Court. I am of opinion that there is no substance in this contention, and that the plaintiffs-appellants are entitled under the decrees to mesne profits until delivery of possession. This appears to be clear from the form of the decrees. Ex concessis part of the plaintiffs' claim was for mesne profits up till the date when the suit was instituted, and since the claim in each suit was decreed with mesne profits it follows that the mesne profits which were decreed in addition to the claim must be mesne profits other than and in addition to the mesne profits up till the date of the suit which formed part of the claim.

But it is urged that as the plaintiffs did not claim to recover future mesne profits in their plaint the Court could not have intended to award them some relief for which they did not pray. I do not think, however, that the plaintiffs limited their claim in the plaint to such mesne profits only as accrued prior to the institution of the suit. At the commencement of the plaint in Suit No. 425 of 1904, it is stated to be a

> suit for declaration of title to and for recovery of possession of immovable property and mesne profits valued at Rs. 7,545-14-8, increased by order of Court, dated 7th June 1906.

A similar statement appears at the commencemet of Suit No. 5 of 1905.

No doubt in para. 9 of the plaint in each suit the mesne profits up till the date of suit are valued at a specified sum; but that was done because it was incumbent upon the plaintiffs to value the mesne profits then due for the purpose of the assessment of Court-fees, and it is not reasonable to presume that they did so because they sought only to recover such prior mesne profits in the suit. Further, in each suit the plaintiffs prayed for any other relief to which the Court might think them entitled, and that prayer would cover mesne profits subsequently accruing, for in respect of such mesne profits there is no cause of action at the time of the commencement of the suit, and it is only by means of statutory provisions framed with the obvious purpose of shortening litigation that they can be awarded in the suit; *Bhupendra Kumar Chakravarty* v. *Purna Chandra Bose* (4), Code of Civil Procedure, 1882, S. 211.

The construction which we put upon the decrees in these suits is that which found favonr with the Judicial Committee of the Privy Council in *Fakharuddin Muhammad* v. *Official Trustee of Bengal* (1). Their Lordships after expressing the opinion that the plaint in that case was

> at all events open to the construction that the plaintiff intended to claim wasilat up to the time of delivery of possession, although for the purpose of valuation only so much was valued as was then due,

added that:

> be that as it may . . . . wasilat by law is demandable up to the time of possession, and the question is whether the Court intended to give to the plaintiff that amount of wasilat to which he was undoubtedly entitled by law in this action, or whether they intended to cut his claim for wasilat into two, and to give him in this suit so much only as accrued up to the time of the commencement of the suit, and to leave him to bring a separate suit for the rest. It appears to their Lordships that the more reasonable construction of this document—which undoubtedly might have been clearer—is that the Court with a view to carrying out the object of the legislature, namely, the prevention of unnecessary litigation and multiplication of suits, intended in this suit to give with possession that wasilat which was by law claimable up to the time of possession. The view which their Lordships take of the decree is much confirmed by two cases of *Dhurm Narain* v. *Bundhoo Ram* (5) and *Bunshee Sing* v. *Nuzuf Ali Beg* (6), to which their attention has been called, wherein it would appear that the High Courts have, dealing with words identical or extremely similar, given them the interpretation that possession with wasilat means wasilat up to the time of possession being delivered. Their Lordships cannot but fear that, if they were to hold the contrary, they would throw doubt upon any cases which have been decided and acted upon in India.

Their Lordships do not feel at all pressed by the authority of several cases to which their attention has been called, the doctrine of which has been confirmed by this Board, namely, that where a decree is silent on the subject of interest or wasilat, interest or wasilat cannot be added in the course of execution. But here the decree is not silent on the subject of wasilat. On the contrary, it is expressly mentioned; and the term 'possession with wasilat' appears to them reasonably to bear the construction which has been put upon it by the High Court not only in this but in many other cases.

For these reasons, I am of opinion that under the decrees in the present suits the plaintiffs are entitled to mesne profits not only for three years prior to the institution of the suits respectively, but also pendente lite and until the 13th February 1919 when they obtained delivery of possession. Moreover, it is to be borne in mind that, although no ground of appeal based upon estoppel is set forth in the memorandum of appeal, and no oral evidence was adduced to prove that the plaintiffs had altered their position by reason of the reliance which they had placed upon any representation by the defendants to the effect that they admitted that under the decree the plaintiffs were entitled to future mesne profits, nevertheless for twenty years the litigation proceeded upon that assumption, and as late as 1919 the Kundu defendants in their petition of objection filed in the present execution proceedings admitted that the plaintiffs were entitled to recover future mesne profits, although they disputed the plaintiffs' estimate of what those mesne profits were. In these circumstances if it was incumbent upon the Court at this late stage in the litigation to hold that the plaintiffs were not entitled to future mesne profits, the result, to adopt the language used by Sir James Colville in *Sadasiva Pillai* v. *Ramalinga Pillai* (7), would be "discreditable to the administration of justice.

(4) [1916] 43 Cal. 650=15 C. W. N. 506=8 I. C. 34=13 C. L. J. 132.
(5) [1869] 12 W. R. 75.
(6) [1874] 22 W. R. 328.
(7) [1875] 2 I. A. 219=15 B. L. R. 383=23 W. R. 193=3 Sar. 519 (P. C.).

In my opinion, however, there would be no justification for placing upon the decrees the construction which the respondents have pressed upon us. I am further of opinion that under the decrees the judgment-debtors are jointly and severally liable for the mesne profits which have accrued during the period for which the mesne profits are recoverable, or for such part thereof as accrued during that portion of the period in which each of them respectively has been in possession of the lands in suit.

The second question now arises for consideration, namely, upon what basis are such mesne profits to be ascertained? In this connexion the respondents have relied upon two main contentions: (1) that the plaintiffs are entitled to recover from the defendants only snch profits as the plaintiffs using reasonable diligence could have made if they had been in possession of the lands, and inasmuch as the plaintiffs are either zamindars or putnidars and would not themselves have worked as cultivators of the land, they are only entitled to recover mesne profits upon a rental basis; (2) that each of the judgment-debtors is liable only for the portion of the mesne profits that he actually received or with reasonable diligence might have received during the period in which he was in wrongful possession; that is to say, the person in actual possession is liable only for the net profit which he received after deducting expenses, and the rent that he paid to his landlord, while the landlord is liable only for the rents which he received less the cost of collection. Many authorities, both Indian and English, have been cited to us upon this subject some of which admittedly are conflicting, while in others it is not always easy to discover the ratio decidendi upon which the decisions proceeded. If I refrain from discussing these authorities in detail I do not do so because I have failed to appreciate the skill and care with which the arguments on behalf of the parties have been presented to us, or, indeed, because to do so might be to make "confusion worse confounded," but because the basis of assessment is laid down in S. 211 of the Civil Procedure Code, 1882, which runs as follows: 'Mesne profits' of property mean those profits which the person in wrongful possession of such property actually received, or might, with ordinary diligence, have received therefrom, together with interest on such profits.

Now, this definition of mesne profits clearly is fatal to the first contention urged on behalf of the respondents,; for the basis of assessment prescribed is not what the plaintiff might have made out of the land if he had been in pessession, but the profit that the person in wrongful possession actually received, or with ordinary diligence might have received out of it. No doubt, in certain cases the profit which the plaintiff had made in the past while in possession of the land may be evidence of value in estimating the profit which the wrong-doer while in possession ought to have made; but the basis of assessment in all cases remains the same, namely, that provided in the statutory definition.

Now, what is the foundation in law of a cause of action for mesne profits? It has been stated to be in consimili casu with a cause of action for trespass. But mesne profits are not the sole or the normal form in which damages are awarded for trespass to land. One person may trespass upon the land of another without depriving that other of the possession to which he is entitled; for instance, he may walk over the land, or project missiles thereon from without or again. by violence or threats he may prevent the person entitled to possession from remaining on the land, although the wrong-doer himself does not take possession. In such cases, no doubt, the wrong-doer is liable to an action on the case for such damages as the Court may think it right to award, and if more persons than one combine to commit the tort, each of such persons is jointly and severally liable for the entire damages which have been sustained by the person whose legal rights have been invaded. In cases of this description the damages are at large, and the Court awards a sum which it deems to be commensurate with the injury that the plaintiff has suffered. But in such cases the wrong-doers are not liable for mesne profits; for mesne profits in the eye of the law are damages to be ascertained upon a definite basis that are recoverable against a person, because he has been in wrongful possession of land of which the plaintiff is entitled to be in possession.

The foundation of the cause of action for mesne profits is the wrongful possession of the defendant and the question to be determined in each case is the amount of the profits which the wrong-doer while in possession received, or if he had used ordinary diligence ought to have received, out of the property. The sum which represents the mesne profits, in my opinion, is invariable and indivisible, and is payable in solidum by each and every person who is in wrongful possession of the property.

But, as Lord Mansfield, C. J., asked in *Burne* v. *Richardson* (8):

Must not the Defendant in an action for mesne profits be the person in actual possession and trespassing?

The answer would seem to be that although mesne profits are measured by the profits of the wrong-doer in actual occupation, and he is the person from whom prima facie mesne profits are to be recovered, yet, if some other person has so conducted himself in connexion with the wrongful possession of the person in actual occupation that he is regarded in law as being jointly in possession with the person in actual occupation, such other person is jointly and severally liable with the person in actual occupation for the whole of the mesne profits which have accrued: *Doe* v. *Harlow* (9); *Doe* v. *Challos* (10); *Powell* v. *Aiken* (11); *Campbell* v. *Leader* (12); *Bireswar Dutt Chaudhury* v. *Baroda Prosad Roy Chaudhury* (3); *Madan Mohan Singh* v. *Ram Das Chakravarti* (13); *S. A. No.* 4101 *of* 1910, *S. A. No.* 465 *of* 1916 and *S. A. No.* 2293 *of* 1923.

With respect to the doctrine propounded by Mookerjee and Teunon, JJ., in *Ram Ratan Kapali* v. *Aswini Kumar Dutt* (14) that persons who are found to be jointly in wrongful possession of the plaintiff's land and liable for mesne profits, are entitled to have the sum awarded to the plaintiff for mesne profits apportioned as between them and the plaintiff if the Court is of opinion that the joint tort-feasors remained in wrongful possession in the bona fide belief that they were entitled to be in possession, and with a conscience void of offence I confess, with all due respect for those learned Judges, that I can find no principle or authority in support of it; while the speeches in *Palmer* v. *Wick Steam Shipping Co.* (15) upon which their Lordships rely, and in the course of which the House of Lords had occasion to discuss the question whether there could be contribution between joint tort-feasors, appear to me to be incompatible with any such doctrine. I am of opinion, however, having regard to the facts in the present case, that neither the Kundu defendants nor Defendant No. 2 can be brought within the category of persons to whom this doctrine could in any event be made applicable; and that such a doctrine, if applied in this case, would work considerable hardship upon the plaintiffs; for the Kundu defendants (who are really the contesting respondents, and who, in my opinion, have rightly been held jointly liable for mesne profits with the Defendant No. 2 who was in actual possession), are men of substance, while the Defendant No. 2 is wholly without means with which to liquidate the judgment-debt.

For these reasons, I agree that the appeal must be allowed, and the case sent back for re-consideration as proposed by my learned brother.

*Appeal allowed.*

(8) [1818] 4 Taunton 720=14 R. R. 647.
(9) [1840] 12 A. & E. 40.
(10) 18 Q. B. 224.
(11) 4 K. & J. 348.
(12) 8 H. & C. 520=34 L. J. Ex. 50=11 L. T 608=11 Jur. (N. S.) 286=13 W. R, 348.
(13) [1880] 6 C. L. R. 357.
(14) [1910] 37 Cal. 559=11 C. L. J. 503=6 I. C. 69=14 C. W. N. 849.
(15) [1894] A. C. 318=71 L. T. 163=6 R. 245.

## A. I. R. 1927 Calcutta 189

GREAVES AND MUKERJI, JJ.

*Upendra Nath Chattopadhya* and *others*—Defendants—Appellants.

v.

*Radha Govinda Bandopadhyay*—Plaintiff—Respondent.

Appeals Nos. 1184, 1185, 214 and 215 of 1925, Decided on 10th May 1926, from the appellate decree and orders of the Dist, J., Bankura, D/- 17th December 1924.

(a) *Evidence Act, Ss. 83 and 13—Chittas made by Government for private use in connexion with resumption proceedings are not admissible either under S. 83 or S. 13.*

Chittas made by Government for its own private use in connexion with resumption proceedings are nothing more than documents prepared for the information of the Collector, and are

not evidence against private persons for the purpose of proving that the lands described therein are or are not of a particular character or tenure. They are admissible neither under S. 83 nor under S. 13 where it is not known whether they were acted on for the purpose of the resumption proceedings or if in fact reliance was placed upon them by Government for the purpose of resumption proceedings ; 9 *Cal.* 741, *Rel. on.* [P 190, C 2]

(*b*) *Record of Rights—Presumption—Record that lands are rent-paying lands—Presumption is rebutted if there is no evidence that rent was ever paid.*

The presumption arising from any entry in the Record of Rights that the lands are not rent free lands, but are liable to pay rent is rebutted when there is no proof that rent was ever paid. [P 191, C 1]

*Rupendra Coomar Mitra* for *Panchanon Ghose* and *Gunendra Krishna Ghose* —for Appellants.

*Nagendra Nath Ghose*—for Respondent.

**Greaves, J.**—These appeals arise out of a decision of the District Judge of Bankurah reversing the decision of the Assistant Settlement Officer of the same place. The appeals arise out of proceedings under Ss. 105 and 105-A of the Bengal Tenancy Act. The entry in the Record of Rights was that the lands in question were not rent-free tenures, but were liable to pay rent. The defendants contended that the lands in fact were rent-free and the application was dismissed by the Judge in the first Court who held that the tenures were rent-free tenures.

Three points have been urged in this appeal on behalf of the appellants. Firstly, it is said that the District Judge was wrong in relying on certain evidence namely, a chitta and jamabandi prepared in connexion with the resumption proceedings in 1843, but prepared before such resumption proceedings ; Secondly, it is said that the appellate Court has not considered the presumption which arises from the fact that there is no evidence that rent has ever been paid in respect of these lands. Thirdly, it is said that the question of onus has not been properly considered by the lower appellate Court.

Now, as I have already stated, the first point relates to the chitta and the jamabandi. The resumption proceedings are not in evidence and in my opinion that being so the chitta and jamabandi should not have been considered by the Court below. That is in accordance with the decision in *Ram Chander Sao* v. *Bunsee-dhur Naik* (1). The head-note is as follows :

Chittas made by Government for its own private use are nothing more than documents prepared for the information of the Collector and not evidence against private persons for the purpose of proving that the lands described therein are or are not of a particular character or tenure.

The learned Chief Justice Garth, in delivering the judgment of the Court states at page 743 that having regard to the object of the chitta and to the way in which it was prepared it cannot be made evidence under S. 83 of the Evidence Act. The chitta there was prepared by the then Collector with a view to resumption proceedings being taken. It seems to me that the facts there are on all fours with the facts of the present case. Towards the end of his judgment he states that

if the resumption proceedings had been put in, and it had been shown that the defendants' ancestors claimed the land as lakheraj and were defeated, I agree that the chitta coupled with the resumption proceedings, would have been admissible to prove that the land was not rent free.

I think that the chitta per se is not evidence in this suit. On behalf of the respondent various decisions were cited to us and it was urged that although the chitta may not have been admissible under S. 83 it was admissible under S. 13 of the Evidence Act. The case most relied on on behalf of the respondent was the case of *Upendra Nath Ghose* v. *Chairman of the Calcutta Corporation* (2). The document there that was in question was the map of Mr. Billon, and the learned Chief Justice, in delivering the judgment of the Court, states that in his opinion the map was admissible if not under S. 83 still under S. 13 of the Evidence Act. I do not know the circumstances under which Mr. Billon's map was prepared' and it may have been prepared under circumstances which would have made it admissible in evidence under S. 13 of the Evidence Act. But I do not think that this decision can be taken as an authority that the chitta in the case before us is admissible under the provisions of S. 13. The chitta was merely a document produced from the Collectorate. We do not know if it was acted on for the purpose of the resumption proceedings or if in fact reliance was placed upon it by Government for the

(1) [1883] 9 Cal. 741.
(2) [1912] 16 C. W. N. 116=13 I. C, 332.

purpose of resumption proceedings. In the absence of some such evidence I cannot see how it can be taken as an assertion of right by Government which would entitle it per se to be admissible under S. 13. I do not think for the reasons I have indicated that the chitta and jamabandi were admissible in evidence in the circumstances of this case or that they should have been relied on by the learned Judge in the Court below for the purpose of arriving at a decision as to whether the lands were lakheraj ornot.

So far as the other two questions are concerned no doubt the entry in the Record of Rights is in favour of the respondent, and this being so, although the initial onus lay on the plaintiff in the suit that onus has been removed by the entry in the Record of Rights. But so far as the entry in the Record of Rights is concerned there is this to be said against it, namely, the fact that there is no evidence whatever on the record that rent has ever been paid in respect of the the lands in suit. This seems to me to be sufficient to rebut the presumption arising in the plaintiff's favour by reason of the entry in the Record of Rights. The learned Judge, as already appears from my judgment, has been guided in his decision by evidence which we hold to be inadmissible.

I think the proper course will be that the matter should now go back to the Court below in order that the learned Judge should re-consider the question after excluding the evidence of the chitta and the jamabandi prepared in connexion with the resumption proceedings of 1843 and he will accordingly re-hear the appeal upon the evidence on the record excluding these documents and arrive at a decision and finally dispose of the matter.

This judgment will govern all the four appeals which are before us S. A Nos. 1184 and 1185 of 1925 and M. A. Nos. 214 and 215 of 1925.

The costs of the appeals S. A. Nos. 1184 and 1185, to this Court will abide the result of the remand to the Court below. We assess the hearing-fee in each appeal at one gold mohur.

We allow no costs in M. A. Nos. 214 and 215 of 1925.

**Mukerjee, J.**—I agree.

*Cases remanded.*

---

## A. I. R. 1927 Calcutta 191

B. B. GHOSE AND GRAHAM, JJ.

*Chandra Mohan Banikya* and *others* —Plaintiffs—Appellants.

v.

*Srimati Meherjan Banu* and *others*—Defendants—Respondents.

Appeal No. 1329 of 1924, Decided on 17th May 1926, from the appellate decree of the Dist. J., Noakhali, D/- 14th March 1924.

(a) *Bengal Tenancy Act, Ss. 182 and 49—Under-raiyats holding homestead along with other lands as part of their tenancy—Landlord can eject from whole of demised premises by service of notice.*

Where the under-raiyats hold the homestead along with other lands as part of their under-raiyati tenancy and, if the landlord is entitled to eject them from the lands held by them by service of notice, there is nothing under the law which prevents them from ejecting the tenants from the whole of the demised premises—S. 182 does not apply to such a case : *A. I. R.* 1926 *Cal.* 662, *Rel. on.* [P. 192, C. 1]

(b) *Landlord and tenant — Ejectment—Partial ejectment can be allowed only under special circumstances.*

Partial ejectment can be allowed only under special circumstances, and cannot be decreed as a rule. Either the landlord is entitled to eject the tenant or is not ; some strong case must be made out for the purpose of holding that the landlord can eject a tenant from only a part of the tenancy. [P. 192, C. 2]

*Jogesh Chunder Roy* and *Jatindra Nath Sanyal*—for Appellants.

*Mohendra Kumar Ghose*—for Respondents.

**Judgment.**—This is an appeal by the plaintiffs arising out of a suit for ejectment of the defendants from lands which are alleged to be held by them as under-raiyats under the plaintiffs. The suit was brought after service of notice to quit under S. 49 of the Bengal Tenancy Act. The lands consist of certain arable lands, a piece of land on which the defendants have got their homestead and certain Bhita lands comprised within certain settlement dags. The trial Court passed a decree in favour of the plaintiffs. On appeal by the defendants, that decree has been modified by dismissing the plaintiffs' suit for *khas* possession of the Bhita lands as well as the land on which the defendant's homestead stands. With regard to the arable lands the decree of the Munsiff has been affirmed. The plaintiffs contend that this decision of

the lower appellate Court is erroneous and that they are entitled to khas possession of all the lands in question. The first thing that strikes us with regard to the decision of the District Judge is that he has made a decree for partial ejectment from the lands held by the under-raiyats under S. 49 of the Bengal Tenancy Act. The reason for his so doing is that S. 182 of the Bengal Tenancy Act applies to the Bhita lands. The learned Junge has held that in the present case the homestead is not held by the defendants who are also raiyats of the village as a part of their raiyati jote, but is held as a part of the under-raiyati and, therefore, in his opinion, the tenants can claim the protection of S. 182 of the Bengal Tenancy Act and cannot be ejected from the said land on notice under S. 49, although they are under-raiyats, also in respect of the same. But the principal ground for not accepting the decision of the District Judge is that, when a particular tenancy falls within the provisions of S. 49 of the Bengal Tenancy Act, it is difficult to understand how S. 182 of the Act can be invoked in determining the status of the tenants.

The learned vakil for the respondents relies upon the case of *Krishna Kanta Ghosh* v. *Jadu Kasya* (1) in support of his contention that the defendants are protected under the provisions of S. 182 of the Bengal Tenancy Act. In that case, however, the postion was that the defendants tenants held the homestead land only under the plaintiff as their landlord and it was held that, as the homestead was not held by the tenants as part of their holding as raiyats, the incidents of the homestead were to be regulated under the provisions of S. 182 of the Bengal Tenancy Act. In the present case the under-raiyats held the homestead along with other lands as part of their under-raiyati tenancy and, if the plaintiffs are entitled to eject them from the lands held by them by service of notice, there is nothing under the law which prevents them from ejecting the tenants from the whole of the demised premises. In our opinion, S. 182 of the Bengal Tenancy Act does not apply to the present case. We find that the same view was take- in the case of *Rahimuddi Meaji* v. *Srimati Amina Bibi* (2). Partial ejectment can be allowed only under special circumstances, and cannot be decreed as a rule. Either the landlord is entitled to eject the tenant or is not; some strong case must be made out for the purpose of holding that the landlord can eject a tenant from only a part of the tenancy. In our opinion, the landlords in this case are entitled to recover possession of the whole of the lands held by the defendants under them as under-raiyats.

The next contention advanced on behalf of the respondents is that the plaintiffs having an eight anna share only with regard to certain lands are not entitled to khas possession. The point, however, was rightly decided against the defendants by the lower appellate Court as the District Judge held that he did not see any reason why the plaintiffs would not be able to determine the tenancy under them if the tenancy was otherwise terminable. It also does not appear why the learned Jndge held that the plaintiffs would not be entitled to khas possession or even joint possession with regard to the lands in which they had only an eight anna share. The plaintiffs let out only eight annas of these lands to the defendants and, if the tenancy is terminated, they are entitled to possession of the lands which they had let out. As in the present case it was found that the tenancy was terminated by proper service of notice to quit, the plaintiffs are entitled to recover possession of all the lands for which they brought the suit.

The result, therefore, is that the appeal is decreed. The decree of the District Judge is set aside and that of the Munsif restored with costs in this Court and in the lower appellate Court.

The cross-objection is not pressed and is dismissed without costs.

*Appeal decreed:*
*Cross-objection dismissed.*

(1) [1914] 21 C. L. J. 475=28 I. C. 839=19 C. W. N. 914.

(2) A. I. R. 1926 Cal. 662.

## A. I. R. 1927 Calcutta 193

GREAVES AND MUKERJI, JJ.

*Rajtilak Narayan Sur*—Appellant.

v.

*Mufizuddi Topadar* and *others*—Respondents.

Appeal No. 348 of 1925, Decided on 27th May 1926, from the appellate order of the Addl. Sub-J., Noakhali, D/- 1st June 1925.

(a) *Limitation Act, S. 20—Mortgagor selling equity of redemption but remaining liable for the debt—Payment by him saves limitation—Decree passed on mortgage before payment does not make any difference as against purchaser.*

Payment of interest by the mortgagor, who remained liable ex contractu to pay the debt though he had alienated the equity of redemption is sufficient to save limitation, and as against the purchaser of the equity of redemption the fact that before payment a decree had been passed on the mortgage, does not make his payment ineffective ; (*Case Law Ref. to.*).

[P 194 C 2]

(b) *Limitation Act, S. 21 (2)—The word "only" does not interfere with the operation of Ss. 19 and 20 but would restrict their application.*

The word "only" in S. 21 (2) is not a mere surplusage and if effect be given to the word the sub-section would not in any way interfere with the operation of Ss. 19 and 20, but would restrict the application of those sections to cases which strictly satisfy their requirements.

[P 195 C 1]

*Atul Chandra Gupta* and *Nagendra Chandra Choudhury*—for Appellant.

*Monmotho Nath Roy* for *Upendra Chandra Banerjee*—for Respondents.

**Mukerji, J.**—This appeal arises out of certain execution proceedings. One Osman Ali and another held a mortgage from one Abdul Sobhan. The appellant before us is the purchaser of the equity of redemption in the mortgaged properties. The mortgagees obtained a decree nisi on the mortgage on the 11th July 1921, and then a final decree for sale on the 11th August 1921. They then transferred the decree to one Mofizuddi Tapadar. The latter applied on the 15th November 1924, for execution of the decree. The appellant objected inter alia on the ground of limitation. The decree-holder relied upon a payment by the mortgagor in respect of the principal and interest alleged to have been made in June 1924, an endorsement whereof had been made on the back of the copy of the decree nisi. The Munsif in whose Court the decree was sought to be executed held in favour of the appellant upon his other objections, viz., that the kobala by the mortgagees in favour of Mofizuddi was a benami transaction and that the decree had been satisfied by the payment of the decretal debt by the mortgagor to the mortgagees, and did not go into the question of limitation. On appeal the Subordinate Judge held that the assignment in favour of Mofizuddi was bona fide and for consideration and that the plea of satisfaction was not made out, and further that the execution was not barred by limitation. The appellant has then preferred this appeal, and his substantial contention relates to the question of limitation.

The payment upon which the assignee of the decree relies has, upon the finding of the learned Subordinate Judge, been proved. It was a payment made for principal as well as for interest. There can be no question, therefore, that there was payment of interest as such of the decretal debt before the expiration of the period of limitation prescribed for an application for execution. Nor is there any question that the payment was made at a time when the mortgagor was liable to pay the decretal debt. The whole question before us is whether this payment by the mortgagor saves the operation of the statute as against the mortgagor only or also as against the appellant who is the purchaser of the equity of redemption.

If the question had arisen as between the parties before any decree was passed it could have been treated as being concluded by authority, at least so far as this Court is concerned. In *Krishna Chandra Saha* v. *Bhairab Chandra Saha* (1), there was an acknowledgment as well as a payment made by a mortgagor ; and it was held that as regards the acknowledgment it was made by the person, namely the mortgagor, through whom the purchaser of the equity of redemption derived his title and the language of S. 19 of the Act, covered the case ; and as regards the payment it came within the wording of S. 20 and that the action was not barred as against the property in the hands of the purchaser. Maclean, C. J., in this judgment referred to the case of *Chinnery* v. *Evans* (2), and observed that the principle deducible

(1) [1905] 32 Cal. 1077=9 C. W. N. 866.
(2) [1864] 11 H. L. C. 115= 10 Jur. (N.S.) 855 =4 N. R. 520=13 W. R. 20=11 L. T. 68.

from that case was applicable, namely, that a mortgagee cannot by the act of the parties entitled only to the equity of redemption be deprived of his right to resort to any estate comprised in his mortgage so long as that mortgage is legally kept alive.

In the case of *Domi Lal Sahu* v. *Roshan Dobay* (3), in which also the same question arose, Maclean, C. J., referring to the language of S. 20 observed thus:

> It is contended that the section only creates a new period of limitation as against the person actually paying the money, and that as the respondent had purchased before this payment was made the new period of limitation cannot take effect as against him. There is nothing in the language of the section to support that view and there is nothing to warrant us in introducing words into the section which would authorize that view. The words of the section are general and plain. When the Legislature intends that a fresh period of limitation is to operate as against certain persons only, it says so in distinct terms. See S. 18 of the Act. There is nothing in the section to indicate that the extension is only to operate against the person making the payment.

It appears that during the arguments in this case reference was made to the case of *Newbould* v. *Smith* (4), but it was held that that decision has no application as the question must be decided upon the terms of the Statute of Limitation prevailing in this country. The principles underlying these two decisions of this Court have been adopted as correct in the cases of *Raushan Lal* v. *Kanhaiya Lal* (5) and *Velayudam Pillai* v. *Vaithyalingam Pillai* (6). In the latter of the aforesaid two cases it has been said that it is wrong to construe the words 'person liable to pay the debt or legacy' as meaning the persons liable to pay, in a case where there are several persons liable on one and the same debt, so as to make the payment by one of them useless as against the others.

The question as to what is the legal effect of payment of an interest made by a person who is liable ex contractu for payment of a mortgage-debt while he possesses no estate in the equity of redemption, that is to say, whether the Legislature intends to confer on him the power of suspending the operation of the statute while it was in the process of conveying an estate in fee-simple to the person in possession of the land subject to the lien of the mortgage so far as the English Statutes of Limitation are concerned, seems yet an unsettled question. The Judicial Committee of the Privy Council in *Lewin* v. *Wilson* (7), answered it in the affirmative, it being held that payment of interest by A on money advanced on a joint and several mortgage-bond of A and B and secured by a mortgage upon the land of A and a mortgage upon the land of B was sufficient to preserve the lien of B's mortgage, although B and his devisee had occupied the mortgaged premises without acknowledgment of the mortgage for more than 30 years. The question was answered in the negative by the Court of appeal in *Newbould* v. *Smith* (4) it being held that payment of interest by the mortgagor, who remained liable ex contractu to pay the debt though he had alienated the equity of redemption was held insufficient to preserve the lien on the mortgage. This last mentioned case went up to the House of Lords in *Newbould* v. *Smith* (8), and though the decision of the Court of appeal was affirmed on some other point no opinion was expressed on this question. Lord Macnaghten observed:

> With regard to the important point on which the Court of appeal principally founded their judgment, I desire to say that I express no opinion on it

and Lord Herschell described the question as:

> a serious question and one of general importance.

The decision of the Judicial Committee in the case of *Lewin* v. *Wilson* (7) must be taken to have settled the law of the colonies, while there seems to be a strong current of judicial opinion in favour of the view of the Court of appeal in the case of *Newbould* v. *Smith* (4). The case of *Chinnery* v. *Evans* (2) was the case of payment of interest by a receiver who had been appointed over several mortgage estates but who had entered into possession of one estate only and it was held that such payment was sufficient to preserve the lien on all the estates, even if they have passed into the hands of bona fide purchasers for value. It is not necessary to consider the effect of the

(3) [1906] 33 Cal. 1278=11 C. W. N. 107.
(4) [1866] 33 Ch. D. 127.
(5) [1919] 41 All. 111=47 I. C. 845=16 A.L.J. 790.
(6) [1912] 24 M. L. J. 66=17 I. C. 619=12 M. L. T. 610.
(7) [1886] 11 A. C. 639=55 L. J. P. C. 75=55 L. T. 410.
(8) [1889] 14 A. C. 423=61 L. T. 814.

Statutes 3 and 4 Will c. 27, and 1 Vic. C. 28, upon which the aforesaid cases were decided, for the question here must be decided with reference to the provisions of the Indian Limitation Act, and at least so far as this Court is concerned, must be regarded as concluded by the decisions of this Court to which I have referred.

As regards the payment made by the mortgagor judgment-debtor after decree the effect of it again has to be considered with reference to the provisions of the Indian Statute. Reliance has been placed on behalf of the appellant upon S. 21, sub-S. (2) for the broad proposition that payment by one judgment-debtor cannot operate to prevent the statute running against the other. The word 'only' in that sub-section is not a mere surplusage and if effect be given to the word the sub-section would not in any way interfere with the operation of Ss. 19 and 20, but would restrict the application of those sections to cases which strictly satisfy their requirements. There is no reason also why words appearing in S. 19 should be read into S. 20 in which they do not appear. If S. 20 is thus construed the money payable under the decree was a debt, and if interest thereon has been paid when the mortgagor judgment-debtor was still liable to pay the debt a fresh period of limitation has arisen. That fresh period upon the wide language of the section, must be held to have accrued to the benefit of the judgment-debtor. There is nothing in the section to suggest that it accrues to the detriment of the payer only. The case of *Chandra Kumar Dhar* v. *Ramdin Poddar* (9) was a case of acknowledgment and not of payment.

I am accordingly of opinion that the decree was not barred and the order of the learned Subordinate Judge is correct. The appeal, in my opinion, fails and must be dismissed with costs hearing-fee being assessed at two guineas.

**Greaves, J.**—I agree.

*Appeal dismissed.*

(9) [1912] 15 C. L. J. 251 = 18 I. C. 702 = 16 C. W. N. 493.

## A. I. R. 1927 Calcutta 195

B. B. GHOSE AND PANTON, JJ.

*Muktakeshi Pal*—Decree-holder—Appellant.

v.

*Ramani Mohan Bhattacharya* and *others*—Judgment-debtors—Respondents.

Appeal No. 447 of 1924, Decided on 2nd February 1926, from an order of the Addl. Dist. J., Tipperah, D/- 1st December 1924.

*Transfer of Property Act, S. 60—Splitting up—Mortgagee relinquishing his claim on a portion cannot throw whole burden on remainder—Mortgage.*

Mortgagee after relinquishing his claim on a portion of the mortgaged property cannot throw the whole burden of the mortgaged debt on the remainder of the property: 40 *Mad.* 968, *not Foll.*; 1 *C. L. J.* 337, *Foll.* [195, C, 2]

*Birendra Chandra Das*—for Appellant.

*Sasadhar Roy*—for Respondents.

**Judgment.**—The sole question that arises in this appeal is whether the mortgagee, after relinquishing his claim on a portion of the mortgaged property, can throw the whole burden of the mortgaged debt on the remainder of the property. The learned Judge has held that he cannot. It is contended on behalf of the appellant that the mortgagee is entitled to pursue his remedy for the entire mortgaged property. What happened in this case was that the mortgagee did not desire to proceed against certain portions of the mortgaged properties which were purchased by her husband and her husband's brother at sales by which only the equity of redemption passed to them.

The only relevant authority that has been cited in favour of the contention of the appellant is that of the Full Bench case of *Perumal Pillai* v. *Raman Chetty* (1) in which the Madras Court differed from the decisions of this Court holding a contrary view upon their construction of the provisions of the Transfer of Property Act. We are, however, bound by the series of decisions of this Court commencing with *Surjiram Marwari* v. *Barhamdeo Persad* (2) in which it has been invariably held that the rule which has been adopted by the District Judge

(1) [1917] 40 Mad. 968=6 L. W. 450=33 M L. J. 211=42 I. C. 352=(1917) M. W. N. 752 (F. B.).
(2) [1905] 1 C. L. J. 337.

in this case is the equitable rule to follow in such cases. The appeal, therefore, must be dismissed as regards this contention raised before us.

Another contention was raised that one of the mortgagors has become insolvent and his interest has vested in a Receiver and he cannot raise any objection to the execution of the decree. This question need not be decided as there is another person who has obtained the equity of redemption in the properties which are sought to be sold by transfer from the mortgagors and at her instance the question may be gone into.

On these grounds the appeal must be dismissed with costs. We assess the hearing fee at three gold mohurs.

*Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 196

CUMING AND GREGORY, JJ.

*Gopal Krishna Saha* and *others*—Accused—Petitioners.

v.

*Mati Lal Singh*—Complainant—Opposite Party.

Criminal Revision No. 763 of 1926, Decided on 25th November 1926, from an order of the Dy. Mag., Barisal, D/- 7th June 1926.

*Criminal P. C., S. 242—Omission to comply with provisions of S. 242 is not an irregularity curable under S. 537.*

The omission to state to the accused the particulars of the offence with which he is charged when he appears or is brought before the Court is an omission to comply with an express provision of the Code as to the mode of trial, and is more than a mere irregularity and cannot be cured by S. 537 : 25 *Mad.* 61 (*P. C.*), *Rel. on.*

[P. 196, C. 2 ; P. 197, C. 1]

*S. K. Sen* and *Sures Chandra Talukdar*—for Petitioners.

*N. Sen* and *Asita Ranjan Ghose*—for Opposite Party.

**Cuming, J.**—The Rule which was granted by my learned brothers Rankin and Mukerji, JJ., was argued before us on four grounds :

(1) That the provisions of S. 242 were not complied with.

(2) That no charge was drawn up and so accused was prejudiced in his defence as the case was treated as a warrant case.

(3) The provisions of S. 360 were not complied with.

(4) An order under S. 522 was passed without notice to accused.

I propose to deal first of all with the first ground. The first point to be decided is what was the procedure followed by the Magistrate. Did he treat the case as a summons case or a warrant case. This is not easy to determine. Admittedly the Magistrate did not apply the provisions of S. 242 and so it may be argued he treated the case as a warrant case.

But he also drew up no formal charge from which it might be inferred that he dealt with the case as a summons case. An examination of the record, however, would show that the two sections under which summons was issued against the accused are summons cases and from this I think we must hold that the case was treated as a summons case. That being so, the provisions applicable to a summons case would apply. These will be found in Chap. 20 of the Code of Criminal Procedure. S. 242, which is one of the sections contained in the chapter, provides that

> when the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him and he shall be asked if he has any cause to show why he should not be convicted ; but it shall not be necessary to frame a formal charge.

Admittedly this was not done and the first question to be determined is whether this omission is an illegality or merely an irregularity curable by S. 537. In the well-known case of *Subhramania Aiyar* v. *King-Emperor* (1), the Privy Council held that the disobedience to an express provision as to a mode of trial cannot be regarded as a mere irregularity. Such a disregard is obviously then an illegality.

The question then to be decided is whether the omission to state to the accused the particulars of the offence with which he is charged is an omission to comply with an express provision of the Code as to the mode of trial. It seems to me that it is. That being so, the whole trial is vitiated. The finding and sentence must therefore be set aside and the accused persons be ordered to be re-tried. The order under S. 522, Criminal

(1) [1901] 25 Mad. 61=28 I. A. 257=11 M. L. J. 233 (P. C.).

P. C., must also be set aside. The fine, if paid, will be refunded.

**Gregory, J.**—I agree that the omission to comply with the provisions of S. 242 is more than a mere irregularity in procedure. The first step in a summons case is to take the plea of the accused which has to be carefully recorded. The Magistrate then decides whether he will proceed under S. 243 or S. 244. S. 243 empowers the Magistrate to convict on an admission, while S. 244 provides that if the offence is not admitted, the evidence for the prosecution shall be taken. It is apparent, then, that as the plea of the accused cannot be taken unless (under the provisions of S. 242) the particulars of the offence are first stated to him and he is asked why he should not be convicted, the procedure under that section, which is laid down in express terms, is a material and inseparable part of the procedure in the trial of a summons case.

I agree that the Rule must be made absolute.

*Rule made absolute.*

---

## A. I. R. 1927 Calcutta 197

SUHRAWARDY AND GRAHAM, JJ.

*Nasib Ali*—Defendant 1—Appellant.

v.

*Wajed Ali*—Plaintiff—Respondent.

Appeal No. 801 of 1924, Decided on 14th July 1926, from the appellate decree of the Offg. Sub-J., Sylhet, D/- 8th January 1924.

(a) *Mahomedan Law—Gift—Essentials are declaration, acceptance and delivery of possession—A written instrument is not one creating gift but a mere evidence not requiring registration—Registration Act, S. 17.*

The essentials of a gift under the Mahomedan Law are a declaration of heba by the donor an acceptance, express or implied, of the gift by the donee, and delivery of possession of the property, the subject-matter of the gift, according to its nature. A simple gift can only be made by going through the above formalities and no written instrument is required : 38 *All.* 627 *(P. C.)*, *Rel. on.* [P. 209, C. 2]

The position under the Mahomedan Law is this that a gift, in order to be valid, must be made in accordance with the forms stated above ; and even if it is evidenced by writing, unless all the essential forms are observed, it is uot valid according to law. This being so, a deed of gift executed by a Mahomedan is not the instrument effecting, creating or making the gift, but a mere piece of evidence and does nct require registration within the meaning of S. 17, Registration Act. [P. 209, C. 2]

*Hemendra Kumar Das* for—Appellant.

*Satyendra Kishore Ghose* for—Respondent.

**Suhrawardy, J.**—The plaintiff-respondent brought the present suit for khas possession basing his title upon a gift by the admitted owner of the property, Etim Meah, in favour of the plaintiff's vendors. The defendant denied the gift and claimed title under purchase from some of the heirs of Etim. The trial Court, on the evidence, found that the gift was not proved and dismissed the plaintiff's suit. On appeal the learned Subordinate Judge found upon the evidence on the record that the oral gift coupled with delivery of possession as alleged by the plaintiff, was satisfactorily proved and made a decree in his favour. This gift was made by Etim Miah on the eve of his departure for Mecca, where he subsequently died. The donees were the daughter's son of Etim. They were fatherless and were brought up from their childhood by him. Etim had a son to inherit his properties ; and before he left for Mecca he made a gift of some of his properties in favour of his grandsons. About that time Etim also executed a deed of gift in favour of his grandsons, viz., on the day before his departure ; but for some reason or other it was not registered. The learned Subordinate Judge is of opinion that the gift was complete as soon as there was delivery of possession by Etim and that the unregistered deed of gift should be left out of consideration as it could not he received in evidence under S. 49 of the Registration Act. I think that the view taken by the lower appellate Court is substantially correct and in perfect accord with the Mahomedan Law.

It is argued before us on behalf of the appellant that the deed of gift, not being registered under the Registration Act, is not admissible in evidence and no other evidence of the fact of the gift can be admitted under S. 92 of the Evidence Act. This argument is based upon the fallacious assumption that the gift was created by the deed. Under S. 123 of the Transfer of Property Act a gift must be made by an attested, registesed instrument.

But that section is not applicable to Mahomedans. That being so, the law that we have to follow in the present case is the Mahomedan Law. The essentials of a gift under the Mahomedan Law are a declaration of heba by the donor, an acceptance, express or implied, of the gift by the donee, and delivery of possession of the property, the subject-matter of the gift, according to its nature. A simple gift can only be made by going through the above formalities and no written instrument is required. In fact no writing is necessary to validate a gift; and if a gift is made by a written instrument without delivery of posession, it is invalid in law: see the case of *Sudik Husain Khan* v. *Hashim Ali Khan and others* (1). The position under the Mahomedan Law is this: that a gift in order to be valid must be made in accordance with the forms stated above; and even if it is evidenced by writing, unless all the essential forms are observed, it is not valid according to law. That being so, a deed of gift executed by a Mahomedan is not the instrument effecting, creating or making the gift but a mere piece of evidence. It may so happen after a lapse of time that the evidence of the observance of the above forms might not be forthcoming, so it is sometimes thought prudent to reduce the fact that a gift has been made into writing. Such writing is not a document of title but is a piece of evidence.

The law with regard to the gift being complete by declaration and delivery of possession is so clear that in a case before their Lordships of the Judicial Committee [*Kamarunnissa Bibi* v. *Hussaini Bibi* (2)], where a gift was said to have been made in lieu of dower, their Lordships held that the requisite forms having been observed it was not necessary to enquire whether there was any consideration for the gift or whether there was any dower due. The case of *Karam Ilahi* v. *Sharfuddin* (3) is similar in principle to the present case. There also a deed relating to the gift was executed. The learned Judge held that if the gift was valid under the Mahomedan Law it was none the less valid because there was a deed of gift which, owing to some defect, was invalid under S. 123, Transfer of Property Act, and could not be used in evidence.

The next question that calls for consideration is whether a document like the present one executed by a Mahomedan donor after he made a gift to show that he had made it in favour of the donee is compulsorily registrable under the Registration Act. Under S. 17 of the Registration Act an instrument of gift must be registered. By the expression 'instrument of gift of immovable property' I understand an instrument or deed which creates, makes or completes the gift, thereby transferring the ownership of the property from the executant to the person in whose favour it is executed. In order to affect the immovable property, the document must be a document of transfer; and if it is a document of transfer it must be registered under the provisions of the Registration Act.

The present document does not affect immovable property. It does not transfer the immovable property from the donor to the donee. It only affords evidence of the fact that the donor has observed the formalities under the Mahomedan Law in making the gift to the donee. I am prepared to go so far as to hold that a document like the present one is not compulsorily registrable under the Registration Act, or the Registration Act does not apply to a so-called deed of gift executed by a Mahomedan. But for purposes of the present case it is not necessary to go so far because I hold that this document is only a piece of evidence, and conceding that it should have been registered, the effect of its non-registration is to make it inadmissible in evidence under S. 49 of the Registration Act. Apart from this piece of evidence the lower Court has found upon oral evidence on the record that a valid gift was made by Etim in favour of his grandsons Monohar and Habijali, the plaintiff's vendors. This being the principal issue in the case, and it being decided against the appellant, the appeal must fail. It is argued that some other issues were raised at the trial in the first Court, but they have not been decided by the lower appellate Court. Though these issues were decided against the appellant by the trial Court there was

(1) [1916] 38 All. 627=36 I. C. 104=43 I. A. 212 (P. C.).
(2) [1880] 3 All. 266=4 Sar. 185 (P. C.).
(3) [1916] 38 All. 212=35 I. C. 14=14 A. L. J. 119.

no cross-appeal and the judgment does not show that they were raised in the lower appellate Court.

The appeal is dismissed with costs.

**Graham, J.**—I agree.

*Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 199

RANKIN AND DUVAL, JJ.

*King-Emperor*

v.

*Monmotha Nath Mitter* and *others*—Accused.

Criminal Reference No. 214 of 1926, and Cri. Rev. No. 846 of 1926, Decided on 25th August 1926, made by the 5th Addl. S. J., 24-Pergannahs, D/-16th August 1926.

*(a) Criminal P. C., S. 282—S. 282 gives discretion either to postpone trial or discharge jury.*

There is a discretion in the Judge whether to postpone the trial to a date on which the juror should be able to attend or to discharge the jury or have another jury. If a juror is going to be able to attend in a very short time, it is a wrong exercise of discretion to discharge the jury. [P 200, C 1]

*(b) Criminal trial—Sessions Case—Withdrawal of charges triable by Sessions—Commitment should not be set aside in respect of charges not triable by Sessions.*

After the accused have been committed to the Sessions—a perfectly good commitment—the fact that graver charges triable by the Sessions have been withdrawn is no reason at all why the commitment order should be set aside in respect of the charges triable by a Magistrate and the accused's right to a trial by jury should be taken away from them without their consent. [P 200, C 1]

*(c) Criminal trial—Jury trial—Jury discharged for a long time should not be resummoned but for strong reasons.*

It would require very strong circumstances indeed to pass an order for the re-summoning of a jury that have been discharged and have been at large for a long time. [P 200, C 2]

*B. L. Mitter, Kundkar* and *Nagendra Nath Banerjee*—for the Crown.

*N. C. Sen, Probodh Chandra Chatterjee, Rabindra Nath Ghose, Bireshwar Chatterjee, Langford James, A. C. Mukerjee, Kiran Kumar Bhuttacharji* and *Indu Bhusan Ghose*—for Accused.

**Rankin, J.**—There are two matters before us. One is a Reference by the learned 5th Additional Sessions Judge of the 24-Pergannahs. It appears that the learned Judge was trying a case in which all the seven accused were charged under S. 147 and also under S. 302 read with S. 149 of the Indian Penal Code; but, in addition, three of them were also charged under Ss. 326, 325 and 323.

The case had been committed for trial. I may say at once that it does not appear to me that there was any illegality about the order of commitment. The committing Magistrate in his order has quite properly dealt with the question whether the accused should be committed for trial on a charge under S. 302 read with S. 149. In these circumstances his order of committal was perfectly good.

The case began on the 4th of August and it was tried on the 4th, 5th, 6th, 7th and the 9th of August. Then, on the 10th a juror fell ill. On the 11th he was absent and the case was adjourned to the 16th. As a matter of fact, on the 16th this particular juror was present, but another juror was ill and sent a medical certificate. Apparently by the medical certificate, if carefully scrutinized, it would have been discovered that another four days' time might have sufficed to get that juror's attendance. However, the learned Judge, after discussing the question, whether to fix the case for the 13th of September or a subsequent day, finally made up his mind to discharge the jury and he discharged the jury. Having discharged the jury the next step that took place before him was that the prosecution appeared before him and withdrew the charges under S. 302 read with S. 149 against all the accused. Those charges having been got rid of, the learned Judge has referred the matter to this Court for an order that the remaining charges, that is to say, of rioting and hurt against the accused should be sent to be tried before a Magistrate; in other words, that the order of committal to the Sessions Court should be set aside.

Taking these matters in their chronological order, the first thing to be decided is whether or not the order discharging the jury was a good order. In my opinion, it was a perfectly good order. If one looks at S. 282 which deals with this matter, it says this:

> If any juror, from any sufficient cause, is prevented from attending throughout the trial.

Whether a jurior is prevented from attending throughout the trial depends, among other things, on the days during which the trial is going to take place. In

this particular case the question was whether or not an adjournment should be given for a certain length of time. No adjournment was given, so the juror who was ill was prevented from attending throughout the trial. However much the language of S. 282 may be scrutinized, it is abundantly evident that in such a case there is a discretion in the learned Judge whether to postpone the trial to a date on which the juror should be able to attend or to discharge the jury or have another jury. If a juror is going to be able to attend in a very short time, it is a wrong exercise of discretion to discharge the jury. In this particular case, taking one thing with another, the learned Judge thought that he was not likely to be able to get on with this case until the lapse of a good many more days; and, taking the circumstances as a whole, he elected to discharge the jury. In view of the fact that a good deal of evidence had been taken before the jury it may be that he exercised his discretion in a manner which was a little hard upon the accused. It may be that some day early in September, if it could have been managed, would have been quite a suitable day for going on with the trial; but the learned Judge did not think so. The result is that the order in this case discharging the jury is one with which it would, in my opinion, be quite improper for us to interfere.

Then the question whether since the charges under S. 302 read with S. 149 have gone, this Court should make an order that the remaining part of the case should be tried before a Magistrate and should set aside the commitment. On that I am very clear indeed that such an order would be entirely wrong. I will not here discuss the question whether the power of reference given by the Code embraces this particular reference which has been made; but dealing with the merits of the matter it does seem to me that after the accused have been committed to the Sessions—a perfectly good commitment—the fact that graver charges have been withdrawn is no reason at all why the commitment order should be set aside and the accused's right to a trial by jury should be taken away from them without their consent. In my judgment it would be wholly wrong to do anyth'ng of th at sort, and the correct course is that this case must go back for trial in the ordinary course as regards the remaining charges by the Sessions Judge and a jury.

As it is desirable to give a ruling on the matter, we think it right to say that as the accused persons by their counsel appear to desire that they should have a jury of the same number as the jury by whom they were being previously tried, we give a direction that in this case the re-trial shall take place before a jury of nine persons.

With reference to the question, whether, had we thought that the discharge of the jury was illegal, we would have ordered a re-summoning of the old jury, I only desire to say for myself that it would require very strong circumstances indeed to make me give an order for the re-summoning of a jury that have been at large since the 16th of August. Taking one thing with another, it would require some little further time before the case possibly could be re-started and I quite agree with the learned Advocate-General that it would be improper and inconvenient for persons to be re-summoned who have been released from their oath as jurors by an order of discharge and who, therefore, have been perfectly entitled in the interim to discuss the matter either with their friends or with the accused or with anybody they like. Such an order as that, I hope, will never be made by this Court except in very exceptional circumstances.

For these reasons, the Reference of the learned Sessions Judge will not be accepted and for the same reasons the Rule which was granted at the instance of the accused persons will be discharged subject to the order which we have made as regards the jury of nine persons.

Let the record be sent down at once.

**Duval, J.**—I agree.

*Reference not accepted.*

---

## A. I. R. 1927 Calcutta 200

RANKIN AND DUVAL, JJ.

*Isu Sheikh*—Accused—Appellant.

v.

*King-Emperor*—Opposite Party.

Criminal Appeal No. 292 of 1926, Decided on 17th August 1926.

(a) *Criminal P.C., Ss. 236 and 237—Trial on charge under S. 366, Indian Penal Code, for kidnapping—Conviction for abduction under same section is bad.*

Where the accused was charged with the offence of kidnapping only, and the Judge left it to the jury to convict the accused of the offence of abduction under the same section, namely, 366, Indian Penal Code.

*Held* : that notice of the charge of kidnapping is not a fair, proper or sufficient notice of the charge of abduction. [P 201 C 2]

(b) *Criminal P. C., S. 297—Putting before jury matters not on record and those prejudicial to accused is misdirection.*

It is a misdirection to put before the jury matters which are not on the record and matters prejudicial, at all events, on a certain view, to the accused. [P 201 C 2]

(c) *Criminal P. C., S. 297—Summing up—Putting contested matters to jury is inappropriate.*

Where the Judge found the facts for himself and put the contested matters of fact to the jury, [P 202 C 2]

*Held* : that it is not at all appropriate in the summing up of a Judge.

*Debendra Narain Bhattacharjee*—for Appellant,

*Khondkar*—for the Crown.

**Rankin, J.**—In this case the accused who goes by the name Yusuf has been found guilty under S. 366, Indian Penal Code, of having on the 26th February 1925 taken part in an occurrence with reference to a girl called Pipuljan who seems to have been about 14 years of age and who had been married for some two years. There was also a charge under S. 323, Indian Penal Code. The prosecution story is that the girl with her husband's permission had gone to pay a visit to her mother and brothers who were living in the house that had been her father's. The girl's husband lived in the same village, and it is said that as the mother of the girl and the younger brother were all sleeping in the same room at midnight, the accused with other persons came in, seized the girl, took her outside in the yard and made off with her ; that she was taken from one place to another and was ravished and that she came back on the 8th March, the elder brother Daga having on the 3rd March in the meantime filed a complaint as to the incident. It appears that the prosecution was at first a private prosecution, but the Magistrate on the 17th March ordered the police to make an investigation and the prosecution was a police prosecution afterwards. It may be said that the girl was examined by a doctor on the 23rd March. He discovered certain scratches on her person and he estimated them to be some 10 or 12 days old.

Now the charge on which the accused was tried was a charge of kidnapping. It was brought against Yusuf and two others, reliance being placed on S. 34 of the Code. It ran thus : That you in furtherance of the common intention of all kidnapped Pipuljan Bibi for her defilment. An objection to the charge has been taken that it did not specifically mention the name of the guardian from whose keeping she was taken. It is not necessary for me to make any pronouncement as to that matter, but there are three objections taken to this trial, all of which appear to me to be good.

The first is that although the accused was charged with the offence of kidnapping only, the learned Judge left it to the jury to convict the accused of the offence of abduction under the same section, namely, 366 Indian Penal Code. When the matter is looked at carefully it appears that in order to prove the offence of kidnapping the prosecution have to show that the girl was taken away or enticed and in that case it might well be that the accused person would rely upon the fact that the guardianship could not be made out against him. As regards the charge of abduction, however, that is, the charge of taking the girl by force or by deceitful means it seems to me that notice of the charge of kidnapping is not a fair, proper or sufficient notice of the charge of abduction. That it has in the present case prejudiced the accused is a matter as to which there may be some room for difference of opinion. But I find it very difficult to hold that the learned Judge should, without taking proper steps to add an additional charge and taking the usual course consequent upon such action, leave to the jury, as he has done, the question of abduction as distinct from kidnapping.

The second matter which impresses me as a valid objection to the trial is that the learned Judge put before the jury matters which are not on the record and matters prejudicial, at all events, on a certain view, to the accused. The learned Judge put it to the jury that there was evidence that after the girl returned she was taken by her husband and made

over to the accused at the accused's house and the husband had received from the accused presents in consideration thereof. Mr. Khondkar for the Crown does not contest that what the learned Judge put to the jury is not borne out by the record as we find it. But he suggests that in view of the fact that the defence set up, among other things, that the accused might have done the acts alleged with the husband's consent, the Judge's action in putting these statements to the jury could not have prejudiced the accused. I am entirely against that contention. In this case the outstanding fact was that the prosecution was not by the husband—prima facie that was an important point for the defence, because unless the husband was satisfied that the accused was guilty the prosecution case would be distinctly weakened—the accused being able to say that this is a charge brought against me by the mother and the brothers and the husband does not even take part in bringing it. The way in which the learned Judge has put it to the jury is that the husband has been won over to the side of the accused. That may very well be true in this case. I express no opinion whatever as to that. But it ought to have been left properly and fairly to the jury; and for the learned Judge to put before the jury on that point that there was evidence of the girl being made over by the husband to the accused and of the husband getting presents from the accused is a most material misdirection.

The last ground of objection to the trial with which I shall deal is one which has to be expressed somewhat more generally. But the objection broadly comes to this : that the charge is not really a fair charge. It puts various matters which might quite well have been put fairly in a fashion which leaves to the jury at all events broad hints that the case for the defence as regards these particular matters requires but little consideration. The passages in which the learned Judge drives much too hard in favour of the prosecution are fairly numerous. It is quite true that he told the jury at the commencement of the charge; "You are the sole judge of fact and not bound by any opinion I might express," but that statement at the commencement is entirely overshadowed by the character of the charge which the learned Judge proceeded to deliver. He says :

> This much in any case may be accepted, that there was a hue-and-cry on the night of occurrence drawing these persons to Daga's house.

He says with regard to the husband :

> Curiously however, the husband is as indifferent as anything. This is very suspicious. Is not this situation consistent with the suggestion that he had been gained over by the accused ?

He says again :

> Any reasonable suggestion of any ill-will on her part or on the part of her mother and brothers ? Is not the accused a relation of these people and does not the statement of the woman that her husband had afterwards even kept her in the accused's house after accepting presents from him speak volumes ?

Again :

> Do you not think that the girl's story is corroborated in broad particulars ? The evidence of the medical officer has been read to you and I need not tell you what it shows. The defence made much of the fact that no complaint was made by the brothers. The sister had been carried away and kept concealed from place to place till many days afterwards and as such was not responsible for her brothers' acts and omissions.

The learned Judge in that passage failed to notice that the question was not whether the girl was responsible for her brothers' acts, but whether the conduct of the brothers tended to show that the story of the brothers and of the prosecution was improbable or untrue. He says again that there is no iota of evidence to indicate malice of the family against the accused. He states with reference to one matter that the girl was under a wrong impression in the circumstance that it was the younger brother who followed. He should have left it to the jury to say what the truth was and who it was that they thought followed. He described the mother and the brother as discrepant in trifling matters. The question to the jury ought fairly to have been put as to what was the discrepancy and whether it was trifling or not. Speaking generally, it cannot be said on this charge as was once said of the summing up of a learned Judge in England that he found the facts for himself and left the law to the jury. The learned Judge in this case has directed the jury on matters of law with great care, but he has to an extent, which is very noticeable, found the facts for himself and put the contested matters of fact to the jury in a manner which is not at all appropriate in the summing

up of a Judge to the jury in trying an accused.

For these reasons it seems to me that the conviction and the sentence cannot be allowed to stand and we must set them aside. It remains now to consider whether it is proper to order the accused to be re-tried. Having regard to the circumstances of the case it seems to be necessary in this case that the matter should not be allowed to stop where it is. In my judgment the correct course is to direct a re-trial. The trial will take place before the Sessions Judge or the Additional Sessions Judge. The fine, if paid, will be refunded. The accused will continue on bail to the satisfaction of the District Magistrate unless the Sessions Judge thinks fit to order otherwise.

**Duval, J.**—I agree.

*Re-trial ordered.*

---

## A. I. R. 1927 Calcutta 203

B. B. GHOSE AND COMMIADE, JJ.

*Syed Mahomed Maliha* and *others*—Defendants—Appellants.

v.

*Chowdhury Mahomed Ismail Khan* and *others*—Plaintiffs—Respondents.

Appeal No. 91 of 1925, Decided on 23rd July 1926, from the original decree of the 1st Sub-J., Bakargunj, D/· 10th June 1923.

(a) *Civil P. C., Ss.* 151 *and* 152—*Amending of decree—Evidence is not admissible to show that there is any arithmetical or clerical error in judgment.*

No evidence is admissible as regards the question as to the matter on which a Court of law based its judgment in order to consider whether there is any arithmetical or clerical error in the judgment, apart from what is contained in the judgment itself. [P 205 C 2]

(b) *Civil P. C., Ss.* 151 *and* 152—*Decree in accordance with judgment cannot be amended without the judgment being amended—Mistake in judgment can be corrected only by review or appeal.*

Where a decree as originally drawn up is quite in accordance with the judgment and there is nothing wrong in it, without the judgment being amended or set aside that decree cannot be amended or set aside by an indirect attack, and any mistake in the judgment can only be amended by appeal or review. [P 206 C 2]

*Sarat Chandra Basak, Mukund Behory Mullick* and *Dhirendra Krishna Roy*—for Appellants,

*Dwarka Nath Mitter, Surendra Nath Guha, Abinash Chandra Guha* and *Bhupendra Nath Das*—for Respondents.

**Judgment.**—This is an appeal by the defendants and it arises out of a suit for partition. The judgment in the trial Court was delivered on June 27, 1916. The defendants had no ground of complaint against the decree which was drawn up in accordance with it. Their grievance is against the decree which was prepared by amending the decree as originally made on March 24, 1925. The circumstances which gave rise to the appeal are somewhat novel in our experience.

There is no dispute as regards the shares of the parties. The plaintiff is entitled to two-thirds share and the defendants are entitled to one-third share of the property. Two commissioners were appointed to effect a partition. Each of them appeared, previous to their being appointed as commissioners, as pleader for one of the parties. These commissioners made a report, and after making elaborate enquiry they made a division of the properties in dispute, Their final report is dated the 17th June 1916. The properties consisted of superior rightes in certain mouzas and also tenures comprised within those mouzas and the joint properties were placed by the commissioners in five schedules, A, B and C, consisted of the superior interest in the mehals. Schedule A was left joint by consent of parties. Schedule B was allotted to the plaintiff and Schedule C to the defendants. Schedule D and Schedule E consisted of tenures. Schedule D was allotted to the plaintiff and it was arranged by consent of parties that plaintiff would grant a lease of tenures to the defendants. Schedule E was allotted to the defendants and it was similarly arranged by consent of parties that the defendants would execute a lease in favour of the plaintiff for those properties. The scheme prepared by the commissioners has been stated in detail at page 30 of the paper-book in the commissioners' report.

The question that will arise for our decision in this appeal is with reference to the rent that is payable by one party to the other with reference to the lands

in Schedules D and E. What was done by the commissioners was that they set off the rent payable by the plaintiff to the defendant and they directed that the excess of the rent payable by the defendant to the plaintiff should be the only amount which the defendant should pay to the plaintiff. They fixed the amount at Rs. 413-11 as-4p. after taking into account the rents payable on account of various items by the plaintiff to the defendants and by the defendants to the plaintiff and setting one off against the other. The matter then came before the Subordinate Judge who, by his judgment dated the 27th June 1926, modified the report of the commissioners as regards the amount of rent payable by the defendants to the plaintiff. The Subordinate Judge made certain calculations and came to the conclusion that the rent payable by the defendants to the plaintiff should be Rs. 129-2-0 in one kist in the month of Falgoon. With this variation he affirmed the report of the commissioners and directed that final decree should be prepared according to his judgment—the report and the maps of the commissioners were to be made part of the decree. A decree was drawn up in accordance with the direction of the Subordinate Judge and it was signed by the Subordinate Judge on the 31st July 1916. We are informed that from that date the defendants went on paying the rent fixed by the Subordinate Judge at the rate of Rs. 129-2-0 to the plaintiff.

Then about 3½ years subsequent to the judgment of the Subordinate Judge on the 19th January 1920 the plaintiff put in an application for amendment of the decree purporting to make the application under Ss. 151 and 152 of the Civil P. C. The Subordinate Judge then in office thereupon called for a report from his clerk who was in charge of the duty of preparing decrees. The clerk made two reports stating that the commissioners had made certain errors, and that is the matter which we shall have to consider. In the opinion of the clerk the error that the commissioners had made in their report, which had subsequently been acted upon by the Subordinate Judge in his judgment was that they had put down the rent realizable with regard to certain properties according to the record of rights prepared with regard to those properties. But in setting down the rent realizable for those properties they had made a mistake.

The plea of the defendants was that the commissioners did not set down the rent according to what was recorded in the record of rights. Their plea was that the plaintiff himself had submitted to the commissioners a khatian showing what were the actual realizations of the different mehals and of various other properties in question and the commissioners had either adopted the rents as given in those khatians or they came to their own conclusion as to the rents which should be considered payable with regard to certain properties. This last has reference to the question as to the amount of rent payable for lands for which rent in kind is actually realized.

The Subordinate Judge who, it may be stated in passing, was a different Subordinate Judge from the Subordinate Judge who passed judgment in the case, held that the commissioners were the agents of the Court and that he had the power to correct those mistakes. He came to the conclusion that there were the mistakes as pointed out by the clerk whom he asked to make a report. Apparently, the clerk prepared his report from the schedule attached to the petition filed by the plaintiff for amendment of the decree because in one instance we find that a certain error appeared in the same shape in the petition as in the report of the clerk. However that may be, the order was made by the Subordinate Judge that the decree should be amended as reported by the clerk.

The report of the clerk in the first instance was that the amount which the Subordinate Judge had decreed to be payable as rent by the defendants to the plaintiff should be increased from Rs. 129-2-0 to Rs. 246-13-6. Then the clerk made a further report and in that report he stated that the amount should be increased further, and in place of Rs. 129-2-0, as decreed by the Subordinate Judge, the amount should be Rs. 372. From this order of the Subordinate Judge accepting the report of the clerk the defendants moved this Court and some of our difficulties have been caused by the attitude the parties took at the hearing of the Rule in this Court.

One should have thought that the defendants might have taken the plea that the judgment of the Subordinate

Judge was not based upon any arithmetical or clerical error, and the decree was in accordance with the judgment. If there was any mistake in the judgment it could only be amended by way of review or appeal. But, unfortunately, it seems, for certain unexplained reason, that was not the attitude that was taken on behalf of the defendants. It seems, on the other hand, their case also was that there had been some errors in calculating the price of paddy and rice agreed upon by the parties. But it is apparent that the contention of the defendant was that the commissioners proceeded upon the khatian and that of the plaintiff was that they did so upon the settlement record. The order of this Court was, as we undersand it, that if there was any clerical error in the decree that might be amended and if it was more than a clerical error that was not a question of amendment of the decree. Whatever that may be, by the ordering portion of the judgment, the case was sent down to the lower Court for the purpose of considering whether the report of the commissioners and the partition proceedings were based upon the settlement record, or upon the khatian agreed to between the parties and then to dispose of the application according to law. The case went back accordingly to the lower Court and the matter was heard by a third Subordinate Judge, Mr. Rajendra Lal Sadhu, and judgment delivered on the 22nd February 1922.

It must be here stated that no amendment of the decree was actually made under the previous order of the Subordinate Judge dated the 6th December 1920. Before the third Subordinate Judge oral evidence was adduced by both parties as to how the commissioners proceeded to make their report, whether basing it upon the record of rights or upon the khatian as presented before them by the plaintiff. The Subordinate Judge says that it was not safe to decide the question on the oral evidence, but there were materials on the record to come to a correct conclusion. Here it must be stated that one of the commissioners who was originally a pleader for the plaintiff was dead at the time. The other commissioner who was a pleader for the defendants was alive and the regrettable thing is this: that he considered that it was not inconsistent with his position which he took as a commissioner to appear for the defendants as a pleader at the hearing of the matter before the Subordinate Judge. If evidence was admissible at all as regards the procedure adopted by the commissioners he would be a witness and the best witness with regard to the matter. But most unfortunately the pleader did not realize his position that he had acted in the matter in a quasi-judicial character, and he could not properly act as an advocate in the case. But, however, it seems that the Subordinate Judge himself did not point out the impropriety of the conduct of the pleader and he allowed him to appear as a pleader in the case, and that gentleman pointed out to the Subordinate Judge that long before the hearing in one of the reports by the two commissioners they had stated that they did not remember a certain matter as to what procedure they had adopted, and it was not likely that he would remember anything as to what was done in 1916, at the time when the matter was taken up before the Subordinate Judge in 1922. The learned advocate for the appellants asked us to call that gentleman as a witness before us; even if we were inclined to do so it would be useless, as what he did not remember in 1922 he could not possibly remember in 1926, and it would not be reasonable to ask him to remember things which happened ten years ago. That, however, is not a matter we need consider now.

The next thing it that the Subordinate Judge on certain grounds held that the commissioners proceeded upon the record of rights. The first observation that we must make with regard to the procedure adopted in this case is that we cannot approve of the procedure that evidence should be taken as regards the question as to the matter on which a Court of law based its judgment in order to consider whether there is any arithmetical or clerical error in the judgment, apart from what is contained in the judgment itself. Here it must be stated that it does not appear either in the report of the commissioners or in the judgment of the Subordinate Judge of June 1916 that the rent roll was given in accordance with what was recorded in the record of rights. It is contended

by the appellants that Mr. Sadhu was in error in holding that the commissioners took the rents from the record of rights. (After discussing the evidence the judgment continued). The obvious inference, it seems to us from these proceedings, is that although the record-of-rights might have been before the commissioners, which, however, is not on the record as it ought to have been if it was taken in evidence by the commissioners, that they did not proceed entirely with reference either to the record-of-rights or to the khatian. Then it appears, as we have already stated, that the plaintiff prepared these khatians and produced them before the commissioners evidently with the object that the actual rent realized should be taken from those papers. The plaintiff actually took the rent as fixed by the Subordinate Judge after consideration of the report in his judgment of June 1916 for about four years, and after a lapse of that period he professed to have discovered that the decree had been erroneously drawn up. This procedure suggests to us that the plaintiff was advised by some person whose business it is to make profit out of the litigation of others to take the course he has taken, and owing to the unfortunate way the proceedings have dragged on the adviser has got his reward.

Then another thing happened, which we should not omit in mentioning : that after the judgment of Mr. Rajendra Lal Sadhu, the third Subordinate Judge, who had dealt with this matter on the 22nd February 1922, there was another application before a fourth Subordinate Judge and his decision is dated the 10th of April 1923. The application before him was by both the parties. Defendants, of course, wanted to get rid of the effect of the decision of Mr. Sadhu and the plaintiff wanted something more, and by the decision of Mr. Upendra Nath Biswas in 1923 the plaintiff got something more, because there was some inconsistency in the judgment of Mr. Sadhu under which he directed that the rent payable by the defendents to the plaintiff, which was fixed by the original judgment to be Rs. 129-2-0, should be increased to Rs. 252-11-8 ; while at the end of his judgment he said that the decree should be amended as indicated in the report of the execution clerk which was made in 1920. Mr. Biswas, by his order, corrected this anomaly, agreeing with the rest of the judgment of Mr. Sadhu, and increased the amount of rent payable to the defendants to Rs. 372. The plaintiff appeals from the decree as amended by that order. The intermediate orders of the Subordinate Judges were not given effect to, but the decree was amended on the 24th March 1925 under the orders of Mr. Biswas. In our opinion the ground on which the Subordinate Judges other than the Subordinate Judge who delivered judgment in the suit held that there was an error in the decree cannot be sustained. The view taken by them that the commissioners had distributed the rent of the tenures with reference to the record-of-rights is baseless. Moreover the report of the commissioners was considered and modified as regards the amount of rent payable by the defendants, by the Subordinate Judge in his judgment of June 1916. There was no arithmetical or clerical error in the judgment of the Subordinate Judge which might have been corrected under S. 151 or S. 152 of the Civil P. C. If there was any error, that error ought to have been corrected on appeal ; or if there was any error apparent on the face of the record there might have been an application for review of judgment under O. 47, R. 1 of the Civil P. C. The Subordinate Judge after consideration of the facts came to the conclusion that the rent payable by the defendants was Rs. 129-2-0. The decree as originally drawn up was quite in accordance with the judgment and there was nothing wrong in it. Without the judgment being amended or set aside that decree could not have been amended or set aside by an indirect attack. On behalf of the respondent it was urged that we might amend the judgment under those sections of the Civil P. C., because some wrong has been done to his client. There is nothing in the judgment which comes within the purview of S. 151 or S. 152 of the Civil P. C. The proper remedy, as already indicated, was by way of review or appeal against the judgment if there was anything wrong in it.

The result, therefore, is that this appeal is allowed and the decree as amended must be set aside and it should be brought in accordance with the judgment delivered on the 27th June 1916. The only alteration that seems necessary to be made is that those lines which have

been struck off in the decree as originally framed in red ink should be restored and it must be set forth that the defendants would be liable to pay Rs. 129-2-0 as rent to the plaintiff.

The appellants are entitled to their costs in this Court and in the lower Court. We assess the hearing fee at five hundred rupees.

*Appeal allowed.*

---

## A. I. R. 1927 Calcutta 207

GREAVES AND MUKERJI, JJ.

*Ranmaya Gaorangini*—Petitioner—Appellant.

v.

*Betty Mahbert* and *others*—Respondents.

Appeal No. 66 of 1925, Decided on 14th July 1926, from the original decree of the Dist. J., Darjeeling, D/- 5th January 1925.

(a) *Minor—Decree against—Mother as guardian taking part in proceedings and doing nothing injurious—No formal order appointing her—Minors are properly represented.*

Where the mother of minors has taken part in the proceedings and has done nothing injurious to the interest of her sons:

*Held*: that despite the absence of a formal order appointing her guardian ad litem on behalf of the infants, the infants are effectively represented by her in the proceedings: 30 *Cal.* 1021 (*P. C.*), *Rel. on.* [P 208 C 1]

(b) *Succession Act* (1865), *S.* 199—*There is broad distinction between cases of Wills and of intestacy in matter of citation.*

There is a broad distinction between cases of Wills and cases of intestacy in the matter of citations; for in the former cases the proof of a Will in a majority of cases acts prejudicially to the legitimate rights of those who would inherit or be entitled to the properties in the absence of a Will, and omission to cite them is likely to affect such rights of theirs in their absence; while in the latter cases such omission only affects their preferential right to administer or prevents them from objecting to the personnel of the administrator or to like matters and it is not until there is any mal-administration that they are really affected. [P 209 C 1]

(c) *Succession Act* (1865), *Ss.* 234 *and* 199—*Citation should always issue to persons interested—Such persons not complaining for omission to cite them—Omission does not call for revocation—Succession Act, S.* 199.

Citations should always issue to parties who are known to the Court to be interested or to claim any interest in the estate of the deceased, but where the parties themselves have not complained of the proceedings having taken place in their absence, the omission to cite them does not call for revocation of the grant. [P 210 C 1]

*Sambhu N. Banerji, Bhupendra Nath Das* and *Shyama Das Bhattacharjee*—for Appellant.

*C. C. Biswas, Prafulla Chandra Chakravarti* and *Krishna Lal Banerji*—for Respondents.

**Mukerji, J.**—This appeal has been preferred from an order refusing to revoke a grant of letters of administration. One Mrs. Benjamin, a native Christian, died leaving three sisters, three nieces by a predeceased sister, and two nephews and three nieces by a predeceased brother. Betty Mahbert who is one of the daughters of the predeceased sister obtained letters of administration from the District Judge on the 3rd January 1924 and she is the principal respondent in this appeal. Ranmaya Gaorangini alias Koili alias Rasidunnissa who is a sister of the said Mrs. Benjamin, on the 23rd July 1924, applied for revocation of the grant and her application being refused has preferred this appeal.

The application for revocation filed on the 23rd July 1924 was based upon various grounds of which two only have been pressed in this appeal. The first of these grounds is to the effect that there were two minor sons of Rajman, the deceased brother of Mrs. Benjamin, named Dhan Bahadur and Harka Bahadur, living under the guardianship of their mother, Hiramaya; but no guardian ad litem had been appointed in respect of the said minors and the citation on Hiramaya that was issued by the Court was not sufficient as she was not a properly constituted guardian competent to represent the said minors.

The second ground asserts that Betty Mahbert in her affidavit of assets had fraudulently undervalued them by omitting to mention a sum of Rs. 541 which stood to the credit of the deceased in the Forest Department and by not showing the valuation of a certain jote which belonged to the deceased. To these a third ground has been added, drawn from a petition filed on the 16th September 1924 by the appellant when the revocation proceedings were pending in the Court below by which she amended or supplemented her original petition for revocation. This ground is to the effect that there were three daughters of Rajman named Mankala, Kamalmaya and

Sibey, and that the grant had been made without issuing any citation on them. A fourth ground has also been urged complaining of the propriety of the order passed by the District Judge by which he rejected the appellant's application for adjournment on the day that the case was heard and disposed of.

I shall deal with this ground first. The application for revocation came on for hearing on the 5th January 1925. The appellant was absent on that day and on her behalf was filed a petition unsupported by any affidavit in which it was stated that a son of hers had died a few days before and she herself was ill. I am unable to say that the Judge was wrong in refusing to adjourn the case on a petition of this sort. Moreover it is said here on behalf of the respondent Betty Mahbert that she had proved in some proceedings that were before this Court in connexion with the case that the statements in the aforesaid petition were not true, the appellant's son having in fact died long before and that she herself was not ill as was alleged. This argument of the respondent has not been controverted in reply. This ground therefore has no substance.

As regards the first ground what appears upon the record is this. In a petition filed on behalf of Betty Mahbert on the 1st September 1924 it was stated that the infants Dhan Bahadur and Harka Bahadur were away in Burma and their mother and next friend Hiramaya Gurangini was living at Gayabari. The notices addressed to Hiramaya Gurangini as mother and next friend of the said infants were sent to her. It is complained that only a post card notice was sent, but it matters little that it was so; for, in fact, she appeared in the proceedings and as such guardian. She appears to have taken part in the proceedings and put in a petition stating the shares which her sons would, according to her, be entitled to. She does not appear to have done anything injurious to the interest of her sons and nothing has been shown to us which may suggest that their interest was not properly looked after. It must under the circumstances be held, despite the absence of a formal order appointing her guardian ad litem on behalf of the infants, that the infants were effectively represented by her in the proceedings: [*Walian* v. *Banke Behari Pershad Singh* (1).] This ground accordingly must fail.

As regards the second ground it is sufficient to state that it was completely traversed in the objection that was filed on behalf of Betty Mahbert on the 16th September 1924 and there is nothing on the record to substantiate the appellant's assertion as to under-valuation.

The third ground now remains to be considered. So far as this ground is concerned it is the brevity of the learned Judge's order which has caused some difficulty. He has disposed of it in these words:

> Heard pleader. The only reason which can be considered 'just cause' is the failure to issue citations to the alleged sisters of the two minors. That objection was taken in the case and it is not open to the same parties to raise the objection. If those persons have any grievance, it is for them to appear and ask the Court for revocation.

The respondent seeks to support the order by contending that the appellant had taken this objection in the proceedings for the grant, bot notwithstanding that no issue had been raised therein relating to this objection and that she cannot be heard in support of this objection again as a ground for revocation of the grant. I am not prepared to attach much importance to this argument of the respondent. The appellant no doubt had brought this matter to the notice of the Court, but if in spite of that the daughters were not cited and letters were granted, there is no rule of res judicata nor any similar rule that I know of that would preclude the appellant from putting forward this omission as a ground for revoking the grant.

The respondent next urges that the fact that no issue was raised on the point and there is no discussion of it in the order granting the letters suggests that this objection was not seriously pressed. There again I must differ; for I do not find any materials on which it may be definitely said that the objection was taken otherwise than bona fide. The respondent further urges that the said daughters were made parties to the revocation proceedings and to the present appeal and they have not appeared till now, and that this fact suggests that they are not interested in questioning the validity of the grant. That undoubtedly is so, but still the question has to be considered

(1) [1903] 30 Cal. 1021=30 I.A. 182=7 C.W.N. 774=8 Sar. 512 (P.C.).

as to whether omission to cite necessary parties necessarily invalidates a grant and calls for its revocation. That the daughters of Rajman were necessary parties to whom citation ought to have issued is a position which cannot be disputed and indeed had not been disputed. For the broad proposition that such an omission of itself invalidates a grant reliance has been placed on behalf of the appellant on the decision in the case of *Akhileswari Dasi* v. *Hari Charan Mirdha* (2).

On behalf of the respondents it has been urged that S. 250 of the Succession Act gives a discretion to the Judge in the matter of issuing citation, and the only case where such omission amounts to a just cause for revocation under S. 234 of the Act is a case of an omission to issue a citation such as is mentioned in S. 193 or S. 199 of the Act and is compulsory; and in support of this contention reliance has been placed upon the case of *Digambar Keshev Srotri* v. *Narayan Vithal Ashtekar* (3). This last-mentioned case, which related to a Will and was under the Probate and Administration Act, it is true, lays down a distinction between compulsory citations and discretionary citations on reference to S. 16 and S. 69 of that Act; but I doubt very much whether the learned Judges intended to lay it down that it is only compulsory citations which would come within Ill. (b) to S. 50 of the Act as has been contended for before us. The judgment in that case to my mind is not inconsistent with the view that they held that both classes of citations come within the illustration, but that the question whether the grant should be revoked or not would depend upon the circumstances, that is to say, in the case of compulsory citations nothing else need be considered, while in the case of discretionary citations other considerations have to be taken into account. This precise contention which the respondent has now put forward was urged in this Court in the case of *Walters Rebells* v. *Maria Rebells* (4) and was not accepted as well founded (see the judgment of Banerjee, J., in that case) and I agree with what was said by the learned Judge in his judgment in that case.

In my opinion it must be held in the words of Ill. (b) to S. 234 of the Succession Act, that the grant was made without citing parties who ought to have been cited. The question then arises whether if the case comes within Ill. (b) the grant must necessarily be revoked or annulled. The appellant's contention is that it must be. The case *Akhileswari Dasi* v. *Hari Charan Mirdha* (2) and the case of *Dwijendra* v. *Golok* (5), *Rebells* v. *Rebells* (4) and *Shoroshibala* v. *Anandamayee* (6); and the case of *Nabagopal* v. *Srigopal* (7); upon which it proceeds are all cases of Wills, and omission to take steps for the proper representation of minors concerned therein. There is, in my opinion, a broad distinction between cases of Wills and cases of intestacy in the matter of citations: for in the former cases the proof of a Will in a majority of cases, if not in all, acts prejudicially to the legitimate rights of those who would inherit or be entitled to the properties in the absence of a Will, and omission to cite them is likely to affect such rights of theirs in their absence, while in the latter cases such omission only affects their preferential right to administer, or prevents them from objecting to the personnel of the administrator or to like matters and it is not until there is any mal-administration that they are really affected. These considerations lead to different results in different cases.

In the present case, in view of the fact that the daughters themselves have not yet complained of the proceedings having taken place in their absence, the omission to cite them does not, in my opinion, call for revocation of the grant. I wish to guard against suggesting in any way that the proceedings were not defective or that the District Judge exercised a sound judicial discretion in making the grant without issuing citations on the daughters. It has been repeatedly enjoined by this Court that citations should always issue to parties who are known to the Court to be interested or to claim any interest in the estate of the deceased. This ground, however, as a ground of revocation, fails in the circumstances of the case.

(2) A. I. R. 1925 Cal. 223.
(3) [1910] 13 Bom. L. R. 38=9 I. C. 354.
(4) [1897] 2 C. W. N. 100.
(5) [1914] 19 C. W. N. 747=28 I. C. 574=21 C. L. J. 287.
(6) [1906] 12 C. W. N. 6.
(7) [1915] 23 C. L. J. 79=33 I. C. 14.

The appeal accordingly must be, and is, dismissed with costs as against the Respondent No. 1, hearing-fee being assessed at three gold mohurs. The other respondents who have appeared and supported the appellant must bear their own costs.

**Greaves, J.**—I agree.

*Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 210

PANTON AND CHAKRAVARTI, JJ.

*Kiran Chandra Roy* and *others*—Plaintiffs—Appellants.

v.

*Srinath Chakravarti* and *others*—Defendants—Respondents.

Appeal No. 2124 of 1924, Decided on 26th August 1926, from the appellate decree of the Offg. Sub-J., 1st Court of Zillah Faridpur, D/- 28th July 1924.

(a) *Grant—Lost grant—Long possession without paying rent—Lost rent-free grant will be presumed—But possession must be as of right with notice to persons likely to be adversely affected.*

A person who claims to hold as a tenant land within the ambit of a zemindary must prove his right to hold it without payment of rent by a grant from the zemindar, but production of the grant itself is not the only way to prove such a grant. [P. 211, C. 2]

When long possession (here for 62 years) without paying rent has been proved by direct evidence, the Court not only might, but ought to presume that the claim was based upon a grant which is lost. Care must, however, always be taken to see in these cases that long possession is clearly established to have been enjoyed under a definite claim of right in such a manner that in the circumstances it was likely to have attracted the notice of the person or persons whose rights are adversely affected by such a claim. [P. 212, C. 1]

Whether a presumption of a lost grant should arise or not must depend upon the circumstances of each case: 42 *Cal.* 489 (*P. C.*); 6 *Cal.* 394 (*P. C.*); *A. I. R.* 1925 *Cal.* 309, *Rel. on.* [P.212,C.1]

(b) *Record of rights—Entry in, will be presumed to be correct unless proved to the contrary.*

An entry in record-of-rights must be presumed to be correct unless the contrary is proved, but when the matter is investigated by the civil Court, and the parties adduce their evidence on the point in controversy, the entry loses its weight when the evidence discloses no foundation for it. [P. 212, C. 2]

*Hemendra Chandra Sen* and *Surendra Nath Bose* (*Sr.*)—for Appellants.

*Manmatha Nath Roy* (*Jr.*) for *Upendra Chandra Banerji*—for Respondents.

**Chakravarti, J.**—This is an appeal by the plaintiffs against the judgment of the Officiating Subordinate Judge of Faridpur, dated the 28th July 1924, reversing that of the Munsif of the 2nd Court at Bhanga, dated the 17th March 1924.

The appellants brought the suit under S. 158 of the Bengal Tenancy Act for the assessment of fair and equitable rent for certain lands appertaining to their zemindari, Touzi No. 5557 of the Faridpur Collectorate in the possession of the defendants and also for arrears of rent for the years 1326 to 1329. In the course of a record-of-rights the lands in suit were recorded as brahmottar Prankrishna Bhattacharji liable to assessment with fair and equitable rent. The present claim of the plaintiffs was based on the said entry in the record-of rights.

The defence of the Defendants Nos. 1 to 14 was that the lands in suit appertained to brahmottar Prankrishna Bhattacharji, that these lands were enjoyed as such by the grantee and his successors from before the Permanent Settlement and that in execution of a decree, dated 1879, against a successor of the original grantee, the lands in suit were sold as rent-free brahmottar in 1882 and were purchased by Defendants Nos. 6, 7, 8 and 9. The defendants alleged that the purchasers were all along in possession of the lands as rent-free brahmottar without any payment of rent to the plaintiffs.

The Court of first instance held that the defendants had failed to rebut the presumption of the correctness of the record-of-rights by the documents relied upon by them. He further held that the presumption of a lost grant did not arise in the circumstances of the present case. The learned Munsif was not satisfied that the documents, Exs. A, B and C, relied on by the defendants did relate to the lands in suit, and he held that even assuming that these documents did relate to the lands in suit, they were not sufficient to rebut the presumption which arose from the record-of-rights.

On appeal by the defendants the learned Subordinate Judge found that Exs. A, B and C related to the brahmottar lands known as Prankrishna Bhattacharji. He further found that Harish and Parbati whose names were mentioned in Exs. A, B and C were descen-

dants of Prankrishna Bhattacharji. Ex. A is a hibanama, dated 1861, by which the lands in suit were dealt with as rent-free brahmottar, by the descendants of Prankrishna Bhattacharji. Ex. B was the sale certificate under which the defendants purchased the land at the sale of 1882; and Ex. C was the writ for delivery of possession to the purchaser in that execution sale. No question as to the admissibility of these documents was raised either in the Court of first instance or before the learned Subordinate Judge. The only ground upon which the plaintiffs contended that those documents were of no help to the defendants was that it was not established that the lands mentioned in those documents were the lands in suit. The learned Subordinate Judge found that, to use his own words:

> There is, therefore, no doubt that the defendants and their predecessors have been holding the said lands as rent-free brahmottar for at least 62 years. The plaintiffs-respondents cannot show that within this period they have realized any rent from the defendants in respect of the lands in suit. The defendants denied that they ever paid rent for the said land. That being so, it can be reasonably inferred that the defendants and their predecessors-in-interest have held the land under a rent-free title. The same can also be inferred from the description of the lands as brahmottar in the record-of-rights.

In this view the learned Subordinate Judge dismissed the plaintiffs' claim for assessment of fair and equitable rent.

The learned vakil who appears for the appellants urged two grounds in support of this appeal: first, that the lands being admittedly within the plaintiff's zemindary the defendants were bound to prove an old grant recognized by law; and secondly, that Exs. A, B and C were not admissible in evidence.

In the course of arguments the learned vakil also contended that the presumption of a lost grant which the learned Subordinate Judge held to have arisen from long enjoyment of the lands under a claim of rent-free title was not justifiable upon the findings arrived at by the learned Subordinate Judge.

The learned vakil contended that the defendants were not entitled to establish their claim to hold under a rent-free grant without the production of the original grant. In support of this contention the learned vakil relied upon the case of *Jagdeo Narain Singh* v. *Baldeo Singh* (1). There is no doubt as to the general principle that a person who claims to hold as a tenant land within the ambit of a zemindary must prove his right to hold it without payment of rent by a grant from the zemindar. In the case before their Lordships, they were not satisfied that the tenant had succeeded in proving such a grant. Their Lordships did not intend to lay down that the only way to prove a grant was by production of the grant itself.

This contention of the learned vakil, therefore, fails.

The learned Subordinate Judge has presumed the existence of a lost grant. It is only in cases of long possession under the claim of a definite right that the question of presumption of a lost grant arises. It is a well-known principle. In a recent decision of the Judicial Committee in the case of *Sri Nath Roy* v. *Dina Bandhu Sen* (2), their Lordships observed:

> In practice such original grants are but rarely forthcoming and resort must be had to secondary evidence of them or to the inference of legal origin from long user.

Later on their Lordships observed that the evidence of

> a Government grant of an exclusive fishery in navigable waters ought to be conclusive and clear, but they are of opinion that in so far as such evidence can not be expected to be forthcoming as to particular grants more than a century old, the evidence in the present case was sufficient to show that the competent authority—the Government of India in right of the Crown—did actually grant to the plaintiffs' predecessors-in-title or settle with them so as in effect to grant a jalkar right.

In this case a lost grant by the Crown of a several fishery in favour of the subject was presumed from long possession. In cases of claims of prescriptive right based on long user, presumption of lost grant has been made. The Judicial Committee in the case of *Maharani Raj Roop Koer* v. *Syed Abdul Hossein* (3) observed as follows:

> Their Lordships think that in this case there is abundant evidence upon the facts found by the Court for presuming the existence of a grant at some distant period of time.

Similar presumption of a lost grant has been drawn in cases where the permanency of a tenure has been claimed from long user and other circumstances.

---

(1) A. I. R. 1922 P. C. 272=2 Pat. 38.
(2) [1914] 42 Cal. 489=25 I. C. 467=41 I. A. 221 (P. C.).
(3) [1880] 6 Cal. 394=7 I. A. 240 = 7 C. L. R. 529=4 Sar. 199 (P. C.).

See the case of *Abdul Hakim* v. *Elahi Baksha* (4).

In Bengal Rajas and rich zemindars in ancient days made numerous rent-free brahmottar grants to learned pandits and Brahmins of saintly character for their maintenance. At this distance of time most of the original grants recorded in country papers have been lost.

Long possession by the grantees and their successors under a claim of rent-free brahmottar grant is all that can be expected after a long lapse of time in proof of a legal origin of such grants. At this distance of time it is unreasonable to expect that grants made to those Brahmins would exist or could be produced in Court. Whether a presumption of a lost grant should arise or not must depend upon the circumstances of each case. The existence of these original grants after the lapse of such a long time can only be expected if such documents escaped destruction either by the climatic influence of lower Bengal or by ravages of white ants or destruction by fire or cyclone of the thatched huts in which the grantees of this class ordinarily resided. It is only in rare cases that an ancient grant which has survived these risks is now available for production in Court. In cases of this nature when long possession, as here, for 62 years has been proved by direct evidence, the Court not only might, but, in my opinion, ought, to presume that the claim was based upon a grant which is now lost. Care must, however, always be taken to see in these cases that long possession is clearly established to have been enjoyed under a definite claim of right in such a manner that in the circumstances it was likely to have attracted the notice of the person or persons whose rights are adversely affected by such a claim. In England where deeds are ordinarily kept in safer custody and are less liable to destruction, this rule of law is also well established. I shall refer to one well known case in which this principle is stated by Lord Herschel in the following words :

> Now, I apprehend that where there has been long continued possession in assertion of a right, it is a well settled principle of English Law that the right should be presumed to have had a legal origin, if such a legal origin was possible, and the Court will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title ; *Philipps* v. *Halliday* (5).

Lord Reading, C. J., referred to this enunciation of the law in a comparatively recent case of *General Estates Company* v. *Beaver* (6).

In the present case the learned Subordinate Judge has found possession for 62 years under a claim of a rent-free grant by the original grantee and his successors and then, after the property was sold by the purchasers, defendants. During this long period of time the zemindar did not receive any rent for these lands.

I am, therefore, of opinion that the learned Subordinate Judge was right in holding that from the circumstances of the present case the presumption of a lost grant arose.

As to the second point raised by the learned vakil, as I have already stated, no objection as to the admissibility of those documents was raised in either of the Courts below. Nor was it raised in the written grounds of appeal before this Court. It is difficult to see on what ground their admissibility as evidence can be questioned. The first document is a piece of evidence which shows the dealing of the property by the descendants of the original grantee as rent-free brahmottar land ; and the other two documents are connected with the title of the defendants. One of them is in fact the title deed upon which the defendants' claim was based as purchasers at an execution sale. The other document shows that delivery of possession under that purchase was taken.

None of the grounds relied upon by the learned vakil for the appellants has any force. Strong reliance was placed by the learned vakil for the appellants on the presumption as to the correctness of the entry in the record-of-rights in favour of the plaintiffs. There cannot be any doubt that the entry must be presumed to be correct unless the contrary is proved but when the matter is investigated by the civil Court and the parties adduce their evidence on the point in controversy, the entry loses its weight when the evidence discloses no foundation for it.

(4) A. I. R. 1925 Cal. 309=52 Cal. 43.

(5) [1891] A. C. 228 = 61 L. J. Q. B. 210 = 64 L. T. 745=55 J. P. 741.

(6) [1914] 3 K. B. 918=84 L. J. K. B. 21=111 L. T. 957=79 J. P. 41=12 L. G. R. 1146= 30 T. L. R. 634.

The appeal, therefore, fails and is dismissed with costs.

**Panton, J.**—I agree.

*Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 213

MUKERJI AND G. N. ROY, JJ.

*Badu Mir* and *another*—Accused—Applicants.

v.

*Emperor*—Opposite Party.

Criminal Revision No. 577 of 1926, Decided on 17th August 1926, from the order of the S. J., Mymensing, D/- 21st April 1926.

*Criminal P. C., S.* 110—*Person registered as member of criminal tribe may be proceeded against under S.* 110—*Each case will depend on its own facts.*

**While the control that is obtained over a person by registering him as a member of a criminal tribe is sufficient to prevent him from committing many of the acts for which preventive action under Ch. 8 of the Criminal Procedure Code may be necessary, he has, notwithstanding such control, enough liberty left in him to pursue a career of crime bringing him within some of the Clauses (a) to (e) of S. 110 or to prove himself dangerous to society within the meaning of Cl. (f) of that section. Each case, therefore, has to be scrutinized on its merits, the information upon which proceedings are asked for being scanned and the question whether preventive action is called for or not being considered, due regard being also had to the consequences which in most cases will inevitably follow, namely that there would be failure to furnish sureties. If such proceedings appear to be necessary in view of the exigencies of any particular case, evidence of general repute which is bound to be affected in a large measure by the very fact of the person proceeded against being a member of a criminal tribe, should be, if at all, acted upon with great caution and scrutiny.** [P 213, C 2 ; P 214, C 1]

*Suresh Chandra Taluqdar* and *Mahendra Kumar Ghosh*—for Applicants.

*Profulla Chandra Chakrabarty*—for the Crown.

**Judgment.**—The two petitioners in whose favour this Rule has been issued have been bound down under S. 118, Criminal P. C., to be of good behaviour for three years, each in a bond of Rs. 500 with two sureties of the like amount. One of the grounds of the Rule is to the effect that the proceedings were inexpedient or illegal in view of the fact that the petitioners had already been registered as members of a criminal tribe. The other ground on which the Rule has been issued is to the effect that the security demanded is excessive.

In support of the first of the grounds reliance has been placed upon the decision of this Court in the case of *Sheikh Ghulam Rasul* v. *Emperor* (1). In that case the question of legality or propriety of instituting proceedings under S. 110, Criminal P. C., against persons who had already been registered as members of a criminal tribe came up before this Court for consideration. The learned Judges declined to quash the proceedings in that case as the facts had not yet been gone into in the trial Court. Richardson, J., expressed the view that while it could not be laid down as a fixed and immutable rule a person who has once been registered under the Criminal Tribes Act cannot be proceeded against under S. 110, Criminal P. C., the fact of such registration was an important factor which should be taken into consideration before an order is made binding down under S. 118, Criminal P. C., a person so registered. Hoda, J., was of opinion that the proceedings were inexpedient as the control which is obtained over a person as soon as he is brought under the Criminal Tribes Act should ordinarily be sufficient to attain the preventive object which S. 110, Criminal Procedure Code, aims at, and also because the inevitable consequences of demanding surety from such a person would be to send him to jail.

Having examined the provisions of the Criminal Tribes Act (3 of 1911) and perused the rules framed thereunder it seems to me that while the control that is obtained over a person by registering him as a member of a criminal tribe is sufficient to prevent him from committing many of the acts for which preventive action under Chapter 8 of the Code of Criminal Procedure may be necessary, he has, notwithstanding such control, enough liberty left in him to pursue a career of crime bringing him within some of the Clauses (a) to (e) of S. 110 or to prove himself dangerous to society within the meaning of Clause (f) of that section. Each case therefore has to be scrutinized on its merits, the information upon which proceedings are asked for being scanned and the question whether

(1) [1918] 20 Cr. L. J. 30=18 I. C. 510.

preventive action is called for or not being considered, due regard being also had to the consequences which in most cases will inevitably follow, namely, that there would be failure to furnish sureties. If such proceedings appear to be necessary in view of the exigencies of any particular case, evidence of general repute which is bound to be affected in a large measure by the very fact of the person proceeded against being a member of a criminal tribe, should be, if at all, acted upon with great caution and scrutiny.

The proceedings in the present case alleged that the petitioners are by habit dacoits, house-breakers and thieves, and associate themselves for the purpose of committing those offences, and are so desperate and dangerous as to render their being at large without security hazardous to the community. The two petitioners were registered under S. 4 of the Criminal Tribes Act in December 1924 and the proceedings under S. 110, Criminal Procedure Code, were started in October 1925. The evidence of general repute that has been adduced against the petitioners is not of much importance, firstly because they are members of a criminal tribe; and secondly because they may have had the same reputation when they were registered under S. 4 and the fact that their reputation continued as before does not show that further preventive action is necessary. The important thing is to see what these two persons may have done after such registration. On this point the evidence is singularly weak. As against the petitioner Badu Mir there is only the fact that in February 1925 his name was mentioned in the first information in connexion with a dacoity, in which it was alleged that he was recognized as one of the culprits. He was not, however, sent up for trial in that case. As regards Tear Bap alias Asraf Khan he appears to have been implicated by evidence of doubtful value in a dacoity which took place in March, 1925. This man at the time of his arrest appears to have had a das in his hand, and taking the worst view of the evidence, was about to commit an assault on the Sub-Inspector when he was on the point of arresting him. It is hard to say that these materials are sufficient to bind down the two petitioners when they are already registered members of a criminal tribe.

We accordingly make the Rule absolute. The order passed under S. 118, Criminal Procedure Code, against the two petitioners is discharged.

*Rule made absolute.*

---

## A. I. R. 1927 Calcutta 214

CUMING AND PAGE, JJ.

*Uma Charan Panda*—Defendant—Appellant.

v.

*Lakshmi Narayan Panda* and *others*—Plaintiffs—Respondents.

Appeal No. 2411 of 1923, Decided on 17th February 1926, from the appellate decree of the Offg. 1st Sub-J., Midnapur, D-/ 29th June 1923.

*Bengal Tenancy Act, Ss. 104J and 103B—Entry in Record of Rights as to area is not conclusive under S. 104J—It is only conclusive under S. 103B—Suit for ejectment—Tenant can give evidence as to area.*

An entry as to area in the Record of Rights is not conclusive under S. 104J. Such entry can only be presumed to be correct under S. 103B until the contrary is proved by evidence and, therefore, an under-raiyat can, in defence to a suit for ejectment, give evidence to prove that the holding from which he is being ejected forms part of a larger holding : *A. I. R.* 1924 *Cal.* 341, *Foll.* [P 215, C 1]

*Santosh Kumar Pal*—for Appellant.

*Apurba Charan Mukerjee*—for Respondents.

**Cuming, J.**—In the suit out of which this appeal has arisen the plaintiffs sought to eject the defendant on the allegation that he was an under-raiyat and notice has been duly served upon him. The defendant resisted the claim on the ground that he was not an under-raiyat but that his status was that of an occupancy raiyat and that notice had not been duly served and that he was not liable to be evicted. He further pleaded that the land in suit was not a complete holding but it formed part of a larger holding of which the jama was Rs. 9-4. He raised various other objections which it is not necessary to deal with.

The first Court decided this case in favour of the plaintiffs. He held that the defendant was an under-raiyat and further that he was precluded by S. 104 J of the Bengal Tenancy Act from giving

evidence that his holding forms part of a larger holding. In appeal to the District Court this finding was upheld and the appeal was dismissed.

The defendant has appealed to this Court and the only ground urged in support of this appeal is that the Courts below were wrong in holding that the terms of S. 104 J and Cl. (d) of S. 104H of the Bengal Tenancy Act precluded him from giving evidence as to the fact that this holding from which he was sought to be ejected forms part of a larger holding. It is quite clear that the view taken by the lower Courts holding that the defendant was precluded from giving evidence that the holding in suit forms part of a larger holding is not correct. The point was decided in the case of *Priya-Nath Basu* v. *Sarat Chand Moral* (1), a decision to which I myself was a party where it was held that an entry as to area in the Record of Rights was not conclusive under S. 104 J of the Bengal Tenancy Act. and that such entry could only be presumed to be correct under S. 103 B until the contrary is proved by evidence.

In this view of the case the case must go back to the lower appellate Court and the learned Judge will have to consider whether the presumption which arises under S. 103 B as to the correctness of the statement of the area of the holding has been rebutted by the evidence. If he finds that the presumption under S. 103 B of the Bengal Tenancy Act as to the correctness of the area has been rebutted by evidence he will dismiss the suit otherwise the appeal will be dismissed. The appellant is entitled to his costs in this Court. The costs of the lower Courts will abide the final result.

**Page, J.**—I agree.

*Case remanded.*

(1) A. I. R. 1924 Cal. 341.

---

## A. I. R. 1927 Calcutta 215

CHOTZNER AND DUVAL, JJ.

*Hemendra Prasad Ghose* and *another* —Accused—Petitioners.

v.

*King-Emperor*—Opposite Party.

Criminal Revision No. 682 of 1926, Decided on 2nd September 1926, from an order of the Chief. Presy. Mag., Calcutta.

(a) *Penal Code, S.* 153.1—*Publishing matter in public interest honestly—Publisher is not liable.*

The editor of a newspaper has certain public duties, one of which is to publish matters which, it is to the public interest, that it should be known and if he does so honestly he is evidently not liable to be dealt with by a criminal Court. [P 216, C 1]

(b) *Penal Code. S.* 153.1—*Essence is malicious intention—In the absence of that, honesty may be inferred.*

The essence of an offence under S. 153A is malicious intention, and if there is no malicious intention in the publication, honesty of purpose may safely be inferred: *A. I. R.* 1926 *Cal.* 1133, *Appl.* [P 216, C 1, 2]

*N. K. Bose, Sukumar De* and *Pashupati Ghose*—for Petitioners.

*A. K. Bose*—for the Crown.

**Judgment.** — The petitioners who have obtained the present Rule are the editor, the printer and the publisher of the Bengali nawspaper called Dainik Basumati. On the 23rd April 1926 an item headed "Telegram to the Nakhoda Mosque" was published in a conspicuous position at the top of a column. The petitioners were thereupon charged before the Chief Presidency Magistrate with having committed an offence under S. 153A of the I. P. C. The defence taken was that they published the telegram to draw the attention of the authorities to a piece of information received from a reliable source so that they might trace the persons responsible for the disturbances and find some means of securing peace between the two communities.

The learned Chief Presidency Magistrate took the view that the publication of this telegram did not fall within the explanation of S. 153 A. But having regard to the circumstances of the case he came to the conclusion that it would be sufficient to deal with the petitioners under S. 562 of the Criminal P. C., and dismissed them with a warning not to publish rumours of this nature in future particularly at a time of tension. The telegram in question is in these terms:

It is rumoured that a certain Moslem has sent a telegram to the Nakhoda Mosque from Port Louis Mauritius to the following effect: 'Let the quarrel between Hindus and Moslems be carried on; whatever money will be spent, I will pay up on going. I am soon going to Calcutta. Will the Iman Shaheb of the mosque disclose whether or not this telegram has come?

Now the defence taken by the petitioners was that this item of news was based upon a telegram which had been

actually received in Calcutta from Mauritius and the telegraph officer has produced the original in Court. It is addressed to Abdulla Sindhi, Nakhoda Masjid, Jakaria Street, Calcutta in these terms:

> Wait, starting Naringa, take money for food Mirzapuri.

and is signed by Kher Mahomed Sindhi. Mr. Bose who has appeared for the petitioners construes this message as meaning that the writer was shortly starting for Calcutta by the steamer "Naringa" and was bringing money with him to feed Mirzapuris by which he means goondas. If that is the correct interpretation of the message the question is whether the editor of a paper is justified in translating it into the words which find expression in the paper. Reading the wording in the newspaper as a whole we think that this is a possible interpretation of the telegram.

The next question is whether in publishing a message of this kind the petitioners brought themselves within the scope of S. 153A. The learned Magistrate has expressed his view in this way:

> If the accused honestly thought there was anything in it requiring investigation he could have given particulars of his information to the police. I cannot see any honesty in this pretence of informing the authorities by quoting rumours. It is the obvious duty of a paper not to give currency to rumours at such times.

The editor of a newspaper has certain public duties, one of which is to publish matters which it is to the public interest should be known and if he does so honestly he is evidently not liable to be dealt with by a criminal Court. S. 153A says that a person is liable under this section if he promotes or attempts to promote feelings of enmity or hatred between diffierent classes of His Majesty's subjects. The explanation says that it does not amount to an offence within the meaning of this section to point out without malicious intention and with an honest view to their removal matters which are producing or have a tendency to produce feelings of enmity or hatred between different classes of His Majesty's subjects. It is well settled as Mr. Bose, the learned counsel, who has appeared for the Crown has stated that the essence of an offence under this section and also under S. 108 of the Criminal P. C. is malicious intention.

In the recent case of *P. K. Chakravarti* v. *King-Emperor* (1), Rankin J., makes the following observations: "In substance my opinion of this case" (he is referring to the prosecution of the paper "Forward"):

> is that the newspaper here has given its readers in the ordinary way a perfectly legitimate and sensible piece of news without any intention to utilize that piece of news for the purpose of promoting or furthering class hatred and that even if the news is of such a character that it is possible to suppose that some people reading it may momentarily or foolishly be induced to entertain unreasonable feeling towards a class of other people, this is not enough to bring it within the mischief either of S. 153A of the I. P. C. or S. 108 of the Criminal P. C.

Applying that test to the present case we are of opinion that there is no indication of any such intention as to bring the case within the purview of S. 153 A. Learned counsel for the Crown has contended that that is not enough but that the petitioners must also show that the publication was with an honest view to remove certain matters which have a tendency to produce feelings of enmity between the various classes. If there is no malicious intention in the publication we think honesty of purpose may safely be inferred. Upon the facts found in the present case we are not satisfied that the action taken by the Magistrate in dealing with the petitioners was necessary. The order made under S. 562 should be vacated.

The rule is accordingly made absolute.

*Rule made absolute.*

(1) A. I. R. 1926 Cal. 1133.

---

## A. I. R. 1927 Calcutta 216

GREAVES AND M. N. MUKERJI, JJ.

*Mt. Asrufannessa Khatun* and *another* —Defendants—Appellants.

v.

*Hem Chandra Chaudhury*—Plaintiff —Respondent.

Appeal No. 1512 of 1923, Decided on 5th May 1926, from the appellate decree of the 2nd Sub-J., Pabna, D/- 15th February 1923.

*Civil P. C., S. 11—Plaintiff recorded as owner of certain share—Defendant suing for correction of the record under S. 106, B. T. Act—Plaintiff's suit for declaration of title and recovery of possession is not barred.*

The plaintiff's name was recorded in the finally published record of rights as the owner

of 8 gandas 3 karas and 5 dantis. The Defendant No. 1 thereupon instituted a suit under S. 106 of the Bengal Tenancy Act for a correction to be made in the entry of the names of the owners of the Taluk and alleged that she had 14 annas and odd share therein. She made one J, Defendant No. 2, a pro forma defendant, alleging that he owned a share of one anna and odd. Defendant No. 1 was successful in the said proceedings. The plaintiff thereupon instituted a suit for declaration of title and recovery of possession. [P. 217, C. 1]

*Held*: that the decision in the suit of Defendant No. 1 under S. 106 of the Bengal Tenancy Act did not operate as res judicata in respect of the plaintiff's claim: 12 *C. W. N.* 8; 18 *C. W. N.* 938 and 15 *C. W. N.* 974, *Relied on.* [P. 217, C. 2]

*Dwarka Nath Mitter* and *Moulvi Syed Nasim Ali*—for Appellants.

*Jogesh Chunder Roy, Ramani Mohan Chatterjee* and *Rebati Mohan Chatterjee*—for Respondent.

**M N. Mukerji, J.**—This appeal arises out of a suit for declaration of the plaintiffs' title to and recovery of possession in respect of certain shares in a taluk bearing Towzi No. 328 of the Mymensingh Collectorate. The plaintiffs' name was recorded in the finally published record of rights as the owner of 8 gandas 3 karas and 5 dantis. The Defendant No. 1 in the present suit thereupon instituted a suit under S. 106 of the Bengal Tenancy Act for a correction to be made in the entry of the names of the owners of the taluk and alleged that she had 14 annas and odd share therein, and in the said suit she made one Jowhar Ali, who is Defendant No. 2 in the present suit, pro forma defendant, alleging that the said Jowhar Ali had one anna odd gandas share in the said taluq. The Defendant No. 1 was successful in the said proceedings. The plaintiff thereupon has instituted the present suit. In the suit as originally framed there were, besides the prayers for declaration of title and recovery of possession, a prayer for setting aside the order of the revenue officer made in the proceeding under S. 106 of the Bengal Tenanty Act and also a prayer for an order for recording the plaintiffs' name as owner in respect of the said 8 gandas and odd share. These two latter prayers however were withdrawn and the suit was decreed by the Court of first instance in giving the plaintiff declaration of his title to the said share and a decree for khas possession in respect of the same. That decision has been affirmed on appeal by the learned Subordinate Judge. The defendants then have preferred this appeal.

Two grounds have been urged in support of the appeal. The first ground is to the effect that the decision in the suit under S. 106 of the Bengal Tenancy Act operates as res judicata in respect of the plaintiff's claim in the present suit. This contention however is against a series of decisions of this Court amongst which reference may be made to the cases of *Padmalav* v. *Lukmi Rani* (1); *Kali Sundari Debya* v. *Girija Sankar Sanyal* (2); *Ram Chandra* v. *Nandananda* (3) and *Pran Krishna Saha* v. *Trailokya Nath Choudhuri* (4). It has been urged on behalf of the appellants that, although there are these decisions of this Court upon the point in question, the earliest decision upon which the later ones proceed, namely the case of *Padmalav* v. *Lukmi Rani* (1), related to the provisions of Ch. 10 of the Bengal Tenancy Act prior to the amendment in 1907. The argument in substance is that now that the revenue officers have much wider powers under the provisions of that chapter and inasmuch as in framing the record under S. 102 of the Bengal Tenancy Act the revenue officer has to record under Cl. (d d) of that section the name of each proprietor in the local area or estate, it necessarily follows that the revenue officer has got to consider and determine the question of title as between rival proprietors. I am of opinion that, notwithstanding the introduction of Clause (d d) in S. 102 of the Bengal Tenancy Act, the rulings to whi h reference has been made must be regarded as laying down the law correctly. S. 104, Cl. (4) of the Act lays down that the survey shall be made and the record of rights prepared in accordance with rules made in this behalf of the Local Government, and it stands to reason that an entry made in accordance with the rules by the revenue officer cannot be altered or corrected in a suit under S. 106 of the Bengal Tenancy Act. R. 49, Cl. (4) says that the application under S. 101, sub-S. 2 (a), made by a proprietor, shall not be admitted unless

(1) [1907] 12 C. W. N. 8.
(2) [1911] 15 C. W. N. 974=11 I. C. 184.
(3) [1913] 19 C. L. J. 197=20 I. C. 298=18 C. W. N. 938.
(4) [1915] 19 C. W. N. 911=27 I. C. 883.

the name of the applicant and the extent of his interest are registered under the Land Registration Act of 1876. R. 58 says that the petition recording the ownership of land or the ownership of any interest in land shall be decided by the revenue officer on the basis of actual possession. What the revenue officer has to go upon primarily is the question of possession, and in making an entry in the record of the name of each proprietor in the local area or the estate under Cl. (d d) of S. 102 the revenue officer has to do the same. A party who is not in possession cannot seek to recover possession in a suit under S. 106 of the Act. The alteration in the law therefore has not, in my opinion, affected in any way the authority of the decision in the case of *Padmalav* v. *Lukmi Rani* (1), to which I have referred and the reasons upon which the said decision is founded still hold good. The first contention urged on behalf of the appellants therefore fails.

The next contention urged on behalf of the appellants in substance amounts to this. The plaintiff in his plaint stated that he had been dispossessed by reason of the entries that have been made in accordance with the order passed in the suit under S. 106 of the Bengal Tenancy Act. The defendants, in their written statements, alleged that they were in possession for a period long over 12 years and that the plaintiff's rights had been barred. There was a decree for partition amongst the co-sharers on the 24th March 1909. The suit was instituted against the Defendant No. 1 on the 17th January 1921, but the Defendant No. 2 was not made a party to the suit till the 1st December 1921. The learned Subordinate Judge in disposing of the question as to whether the suit was barred by limitation or not held that it was not barred, inasmuch as the partition decree was dated the 24th March 1909 and the suit was filed on the 13th January 1924. The learned Subordinate Judge appears to have overlooked the fact that the Defendant No. 2 was not made a party till the 1st December 1921. The institution of the suit on the 13th January 1921 cannot possibly be taken to have affected the Defendant No. 2 against whom the suit must not be treated as having been instituted till the date on which he was made a party. The question of limitation so far as the Defendant No. 2 is concerned, therefore does not seem to have been properly considered by the Subordinate Judge.

In this view of the matter I set aside the decree passed by the learned Subordinate Judge and send the case back to his Court in order that he may determine the question of limitation taking into consideration the fact that Defendant No. 2 was made a party to the suit on the 1st December 1921 and having regard to all the other facts and circumstances of the case. This is the only question which now remains for his determination.

The costs will abide the result.

**Greaves, J.**—I agree.

*Case remanded.*

---

## A. I. R. 1927 Calcutta 218

CUMING AND GREGORY, JJ.

*Barada Prosad Roy Chowdhury*— Accused—Applicant.

v.

*Corporation of Calcutta* — Opposite Party.

Criminal Revision No. 906 of 1926, Decided on 26th November 1926, from the order of the Presy. Mag., Calcutta, D/- 9th August 1926.

*Calcutta Municipal Act* (3 *B. C. of* 1923), *Ss.* 346 *and* 359—*Corporation cannot refuse notice under S.* 359—*Bustee owner prosecuted and fined under S.* 346 *is immaterial—Prosecution within six months of notice is not valid.*

It is obligatory on the Corporation to accept notice given to them under S. 359 and it is not open to them under the section to refuse to accept such a notice and the owner of the bustee giving the notice is entitled to six months' time, allowed by the section within which he is to effect the removal of all the huts standing on the land. It is immaterial whether the bustee owner had already been prosecuted and fined for neglect to carry out a requisition under S. 346; he is entitled to serve a notice under S. 359 on the Corporation and to get six months' time allowed under that section for the removal of all the huts on the land: but it is open to the Corporation if, on the expiry of the six months from the date of the notice, the huts had not been removed to revive once more the former proceedings under S. 346. The Corporation are clearly not entitled to prosecute the bustee owner within six months from the date of notice. [P. 220, C. 1]

*Sures Chandra Talukdar* and *Jatindra Nath Sanyal*—for Petitioner.

*Probodh Chandra Chatterjee* and *Gopendra Kumar Banerjee*—for Opposite Party.

**Cuming, J.**—The facts of this case appear to be these: The petitioner is the owner of a certain bustee at 32, Ballygunge Circular Road. On the 13th August 1925 a notice was issued on him under S. 346 of the Calcutta Municipal Act requiring him to carry out certain improvements in the bustee. The petitioner failed to comply with this notice and was fined Rs. 50 on the 10th December 1925 for failing to do so. On the 16th of December 1925 the petitioner served a written notice on the Corporation under S. 359 stating that he intended to remove all the huts standing on the land. The Corporation, as far as can be ascertained, refused to accept this notice. Meanwhile the petitioner had served notices on the tenants of this bustee to remove their huts. I may here note that it was by a letter dated the 13th January 1926 which was received by the petitioner on the 15th January by which the Bustee Surveyor informed the petitioner that the Standing Committee had refused to accept the notice under S. 359 of the Calcutta Municipal Act. About the middle of March the Bustee Surveyor suggested to the petitioner that he should take action under S. 527 of the Calcutta Municipal Act and obtain an order from the Small Cause Court to affect the improvements. The petitioner made an application under S. 527 before the Small Cause Court Judge of Sealdah and obtained an order regarding the tenants to give him facilities for complying with the requisition of the Corporation. The tenants, however, when he went to get compliance with the requisition, refused to allow him to carry out the works. One of these tenants was prosecuted but was discharged on the 8th July 1926.

Meanwhile on the 18th March 1926 proceedings were once more taken against the petitioner for not having carried out the improvements required by the notice of the 13th August 1925 for the non-compliance with which the petitioner had once been convicted and fined on the 10th December 1925. These proceedings terminated on the 9th of August 1926 when the Municipal Magistrate convicted the petitioner and fined him Rs. 150 being at the rate of Rs. 3 a day for 50 days. The petitioner then moved this Court and has obtained this Rule on two grounds: first that the petitioner having applied for time under S. 359 of the Calcutta Municipal Act, and having taken bona fide action for removing all the huts on the land the prosecution and conviction are bad in law; secondly that the tenants having refused facilities to effect the improvements and the petitioner having obtained an order under S. 527 the prosecution and conviction are illegal. I will now deal with the first point. S. 359 of the Calcutta Municipal Act provides that

> the owner of any land included in a Bustee and bearing a separate number in the assessment book may, at any time, whether a standard plan for the Bustee has been prepared under this chapter or not, send a written notice to the corporation that he intends to remove all the huts standing on such land;

and Clause 3 of this section runs as follows:

> Such owner shall, within six months after the date of such notice, or within such further time as the Corporation may from time to time allow, remove all huts standing on such land; and if he does not do so, this notice shall be deemed to be cancelled.

Mr. Talukdar contends on behalf of the petitioner that the Corporation is bound to accept this notice under S. 359 and that once a notice has been given to the Corporation under this section the Corporation must wait for the statutory period of six months before taking any further proceedings against the bustee owner. Mr. Talukdar contends that the Corporation has no option but to accept the notice. Mr. Chatterjee, on behalf of the Corporation would seem to argue that once there had been a prosecution and the Bustee owner had been fined for non-compliance with the requisition requiring certain improvements to be made in the Bustee it was not open to the bustee owner to make an application under S. 359. He further argued that although the proceedings against the petitioner were instituted on the 18th March 1926 no action was taken until the 15th July 1926 which date is more than six months from the 16th December the date on which the petitioner gave notice to the Corporation of his intention to remove all the huts standing on the land.

The case would seem to turn upon whether the Corporation are obliged to accept notice given to them under S. 359, and secondly whether, as Mr. Chatterjee contends, once a Bustee owner had been fined for neglect to carry out an order

under S. 346, he could or could not serve such a notice on the Corporation. As we read S. 359 it is obligatory on the Corporation to accept such notice and it is not open to them under the section to refuse to accept such a notice and the owner of the Bustee giving the notice is entitled to six months' time allowed by the section within which he is to effect the removal of all the huts standing on the land. As far as can be seen it is immaterial whether the Bustee owner had already been prosecuted and fined for neglect to carry out a requisition under S. 346: he is entitled to serve a notice under S. 359 on the Corporation and to get six months' time allowed under that section for the removal of all the huts on the land. No doubt it would be open to the Corporation if, on the expiry of the 6 months from the date of the notice, the huts had not been removed to revive once more the former proceedings under S. 346. The Corporation, therefore, were clearly not entitled to prosecute the petitioner within six months from the 16th December 1925. Mr. Chatterjee contends that nothing had really been done in the matter of this prosecution till the 15th July which was more than six months from the 16th December. We have not the order-sheet before us and it is impossible for us to say what orders were or were not passed by the Magistrate. It is sufficient for our purpose that the proceedings against the petitioner were started on the 18th March that is, a date within six months from the 16th December. Therefore it seems to us that the Corporation were not entitled to prosecute the petitioner in the circumstances of this case. The conviction and sentence of the petitioner must be set aside, the whole proceedings being illegal. The petitioner is acquitted. The fine, if paid, will be refunded.

**Gregory, J.**—I agree.

*Conviction set aside.*

---

## A. I. R. 1927 Calcutta 220

GREAVES AND M. N. MUKERJI, JJ.

*Mahanta Bhagaban Das*—Defendant—Appellant.

v.

*Bisweswar Nath Saha* and *others*—Plaintiffs—Respondents.

Appeal No. 222 of 1924, Decided on 6th May 1926, from the decree of the Dist. J., Birbhum, D/- 24th September 1923.

(a) *Lease—Kabuliat — Construction— Kabuliat creating tenancy in respect of certain lands, containing clauses consistent with creation of raiyati interest such as payment of Falkar, and compensation for land acquired for public purposes—There is presumption in favour of creation of tenure.*

One K executed in favour of B a kabuliat by which a Sarasari jama was sought to be created in respect of 275 bighas of land. Out of these 275 bighas 160 bighas were cultivated land for which a rental of Rs. 74 was fixed. The remaining 115 bighas were waste land for which no rent was assessed and it was provided in the document that the rent would be assessed therefor when the land would be brought under cultivation. It went on to state that if any market, hat &c., were established on the land the landlord would be entitled to make settlements about them separately, and if any portion of the land was acquired for public purposes the landlord would get the price therefor. It further provided that the tenant would enjoy the fruits of the trees on the land paying Falkar and would be liable to pay further compensation if he did damage to the trees &c. It further stated that if the entire rent for any particular years was not paid in time the landlord would be entitled to make a fresh settlement of the jama. It stated also that the tenancy that was created was to be heritable.

*Held*: that the interest created was that of a tenure-holder and not that of a raiyat and the tenure was transferable. [P 221 C 1, 2; P 222 C 2]

(b) *Transfer of Property Act, S. 6—Tenancy created after Transfer of Property Act but before operation of Bengal Tenancy Act is transferable.*

A non-permanent tenure created after the passing of the Transfer of Property Act and before the passing of the Bengal Tenancy Act came into operation is transferable under S. 6 of the former Act: 7 *C. L. J.* 553, *Dist.* [P 223 C 2]

(c) *Transfer of Property Act, S. 41—Principle applies where one stands by and acquiesces in the act of another and by such acquiescence injury is caused to a third person.*

The principle contained in S. 41 relates to a case where one stands by and acquiesces in something that is being done by another, and if in consequence of such acquiescence some injury is caused to some third party, it is not open to the person so acquiescing to say that what was done by that other person was not authorized by him: 20 *C. W. N.* 355, *Dist.* [P 223 C 2]

(d) *Civil P. C., S.* 100—*Question of fact.*

The question whether there has been a representation amounting to acquiescence or not is a question of fact : 17 *C. W. N.* 833, *Foll.*

[P 224 C 1]

*Gunada Charan Sen* and *Prasanta Bhusan Gupta*—for Appellant.

*Radhika Ranjan Guha*—for Respondents.

**Mukerji, J.**—The facts which led to this litigation are these : The Defendant No. 1 is the putnidar. On the 24th May 1884 one Kalu Majhi executed in favour of the Defendant No. 1 a kabuliat by which a Sarasari Jama was sought to be created in respect of 275 bighas of land. Out of these 275 bighas 160 bighas were cultivated land for which a rental of Rs. 74 was fixed. The remaining 115 bighas were waste land for which no rent was assessed and it was provided in the document that the rent would be assessed therefor when the land would be brought under cultivation. On the 1st December 1888 Kalu sold this tenancy in respect of the 160 bighas to one Bishu Majhi and one Kanai Dhangor. Bishu and Kanai were recognized by the Defendant No. 1 as transferees in rsspect of the said 160 bighas and they thereafter sold to the plaintiff's father Giridhari the said tenancy by a conveyance dated the 4th May 1894. On the 16th February 1895 Giridhari got a conveyance from Kalu in respect of the remaining 115 bighas. Giridhari however was not recognized by the Defendant No. 1 who went on instituting suits for rent against the heirs of Bishu and Kanai, and Giridhari appears to have satisfied the decrees so obtained by depositing the decretal amounts in Court. On the 20th September 1910 the Defendant No. 1 obtained a decree for arrears of rent against the heirs of Bishu and Kanai for certain period and in execution of that decree he purchased the tenancy interest on the 20th January 1911 and took possession of the tenancy on the 28th January 1911. The plaintiffs who are two out of the three sons of Giridhari applied for setting aside the sale also made an application resisting the delivery of possession to the decree-holder Defendant No. 1. Those proceedings ended in favour of the Defendant No. 1 on the 5th January 1914. In the meantime that is to say in July 1911, the name of the Defendant No. 1 was recorded in the settlement proceedjng as holder of this tenancy interest. The plaintiffs thereafter instituted the present suit out of which this appeal arises for declaration of their title to and for recovery of possession of $\frac{2}{3}$rds share of the suit land. The third son of Giridhari, was impleaded in the suit as Defendant No. 10. The Defendants 2 and 3 are the sons of Bishu, Defendant No. 4 the son of Kanai and Defendants 5 to 10 are the purchasers of the interest of the said Defendant No. 10. The suit has been decreed by the Courts below though upon different grounds. The learned Munsiff held that the tenancy created by the document of the 24th May 1884 was a permanent tenure which was transferable and that therefore the decree obtained by Defendant No. 1 against the sons of Bishu and Kanai and the sale held in pursuance of that decree were not binding on the plaintiffs. On appeal the learned District Judge held that the tenure was not a permanent one but it was transferable and accordingly the plaintiffs were not bound by the decree and the sale to which I have refetred. The Defendant No. 1 has thereupon preferred this appeal.

Three grounds have been urged on behalf of the Defendant No. 1 in this appeal. The first ground is to the effect that upon a proper construction of the kabuliat of the 24th May 1884 it should have been held that the interest created thereby was not a tenure but a raiyati holding. The kabuliat in question has been placed before us and the terms of the document have been brought to our notice and it has been urged that having regard to certain provisions in the document to which I shall presently refer it was the intention of the parties that an occupancy raiyati holding and not a tenure was to be created thereby. The document recited that it was a sarasari kabuliat, and Kalu the executant of the document is described therein as being a person whose occupation was cultivation. The document further provided that if any patit land in addition to the land which had already been brought under cultivation was cultivated, rent would have to be paid therefor separately. It went on to state that if any market, hat &c., were established on the land the landlord would be entitled to make settlements about them separately, and if any portion of the land was acquired for pub-

lic purposes the landlord would get the price therefor. It further provided that the tenant would enjoy the fruits of the trees on the land paying falkar and would be liable to pay further compensation if he did damage to the trees &c. It further stated that if the entire rent for any particular years was not paid by the end of the year and at the time of the Chaitra kist the landlord would be entitled to make a fresh settlement of the jama. It stated also that the tenancy that was created was to be heritable. No period was fixed for the lease and the amount of rent fixed was as I have stated Rs. 74 for 160 bighas and it was stipulated that when fresh land would be cultivated assessment of rent would be made in respect of the same. Some of the clauses contained in this document no doubt are clauses which would be more consistent with the creation of a raiyati interest than with the creation of of a tenure ; for instance the clause relating to the payment of falkar, the clause relating to the compensation for lands to be acquired for public purposes and so on. But it is not unusual to find such clauses even in documents which are expressly executed for the purpose of creating the interest of a tenure-holder. The document purported to create a tenancy in respect of 275 bighas of land. That itself raises a presumption that the interest created was that of a tenure-holder and that presumption continues until it is rebutted by evidence to the contrary.

The learned District Judge has referred to certain other facts and circumstances in his judgment and upon which he has relied for coming to the conclusion that the interest created was that of a tenure-holder and not of a raiyat. These facts are that Kalu himself held a few bighas out of 275 bighas of land and the rest was in the possession of other tenants. He has referred to a number of documents from which he has inferred that Kalu had tenants under him with regard to a portion of this land. He has referred to certain rent decrees obtained by Kalu against his under-tenants. He has referred also to the fact that Bishu and Kanai used to live at a distance of 14 or 16 miles from the place where the lands are situate and that therefore they could not have themselves cultivated the land. The document apart from the attending circumstances may perhaps be equally consistent with the theory that an occupancy holding was being created unless reliance was placed upon the presumption which arises by reason of the area being 275 bighas. But these circumstances to which the learned Judge has referred may legitimately be referred to for the purpose of arriving at a definite conclusion, and I am of opinion that the learned Judge upon a consideration of all these facts and circumstances was right in holding that the interest created was that of a tenure-holder and not that of a raiyat. The appellant contends in the first place that the fact that notwithstanding the transfer, suits for realization of rent were being instituted against the original tenants Bishu and Kanai who had been recognized by him, and the fact that in the record the name of the appellant was entered as the holder of these lands should be taken into consideration, and from these facts it should be held that the presumption which arises under S. 5 of the Bengal Tenancy Act has been rebutted. It should be remembered however that according to the plaintiff's case the entry was made without any notice to them and the fact that the transfer was not recognized by the defendant cannot be taken to be a fact in his favour in the present suit.

The second contention urged on behalf of the appellant is that if the tenure was not a permanent one then the onus is on the plaintiffs to prove that it was transferable. In support of this contention reference has been made in the first place to the provisions of S. 11 of the Bengal Tenancy Act, which states that every permanent tenure shall, subject to the provisions of this Act, be capable of being transferred and bequeathed in the same manner and to the same extent as other immovable property. The appellant's argument is that because there is no provision in the Bengal Tenancy Act to the effect that a non-permanent tenure would be transferable, whereas there is a clear provision that a permanent tenure is transferable it should be held that the person who alleges that a non-permanent tenure is transferable must prove it ; and in support of this contention reliance has also been placed upon a passage to be found in the judgment of this Court in the case of *Hira-*

*moti Dassya* v. *Annoda Prosad Ghosh* (1). The passage runs thus :

It is noticeable that S. 11 of the Bengal Tenancy Act enacts that every permanent tenure shall, subject to the provisions of the Act, be capable of being transferred. Nothing however is said about non-permanent tenures. If it had been also intended to make them transferable we might have expected the Legislature to have said so.

The case in 7 *C. L. J.* 553 was a case in which the question arose as to the transferability or otherwise of a non-permanent tenure which had been created before the passing of the Transfer of Property Act. The learned Judges first of all held that the tenancy having been created before the Transfer of Property Act came into operation the said Act was not applicable to the case, and thereafter they made the observations to which I have referred. Those observations are in the nature of an obiter dictum, and with great respect to the learned Judges who made them I am of opinion that even if they are correct they cannot be said to apply to a case like the present where admittedly upon the pleadings of the parties the tenancy was created after the passing of the Transfer of Property Act and before the Bengal Tenancy Act came into operation. In the present case it should be remembered that the tenancy was created by a kabuliyat of the 24th May 1884.

An attempt was made here on behalf of the appellant to show that the tenancy existed from before 1882. But that was not the position that was taken by him in any of the Courts below, and I am of opinion that he should not be allowed to take up that position at so late a stage of the case. If the tenancy was created after the Transfer of Property Act came into operation and before the Bengal Tenancy Act came into existence then under S. 6 of the Transfer of Property Act the tenancy would be transferable if in point of fact there is no provision either in that Act or in any other Act restricting the transfer thereof. S. 117 of the Transfer of Property Act provides only that the operation of the chapter in which that section occurs does not extend to leases for agricultural purposes. S. 6 of the Transfer of Property Act lays down that property of any kind may be transferred except as otherwise provided by that Act or by any other law for the time being in force, and Cl. (i) of that section says that

nothing in this section shall be deemed to authorize a tenant having untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue or the lessee of an estate under the management of a Court of Wards to assign his interest as such tenant, farmer or lessee.

It is clear from this that unless there is some special provision in the Bengal Tenancy Act or in some other Act which prohibits the transfer of a non-permanent tenure the general provisions contained in S. 6 as to the transferability of tenures will hold good. In the present case I am of opinion that it having been found that the interest created by the document of 1884 was a non-permanent tenure, the said tenancy is a transferable one.

The next argument of the appellant is to the effect that as the plaintiffs had allowed themselves to be represented in the Sherista of Defendant No. 1 through Bishu and Kanai it was not open to them to allege that they are not bound by the decree and the sale to which I have referred. Reliance has been placed in support of this argument upon the principle contained in S. 41 of the Transfer of Property Act. That principle however relates to a case where one stands by and acquiesces in something that is being done by another, and if in consequence of such acquiescence some injury is caused to some third party, it is provided by that section that it is not open to the person so acquiescing to say that what was done by that other person was not authorized by him. Reference has been made to certain decisions of this Court as supporting this contention of the appellant. The case which is most relied upon for the purposes of this contention is that of *Ali Mahamud* v. *Aftabuddin Bhuya* (2). It will be seen that in that case there was a finding by the Subordinate Judge to the effect that a certain tenant and his heir had "allowed" another person to represent them as tenants in the sherista of the landlord.

In the present case it cannot be said for a moment that the plaintiff or Giridhari, the transferee, ever allowed their vendors to represent them in the sherista of the landlord. Suits for rent were being instituted against the said vendors in spite of the fact of the said transfer and decretal amounts were being deposited by the transferee when the decrees were

(1) [1908] 7 C. L. J. 553.

(2) [1915] 20 C. W. N. 355=34 I. C. 251.

obtained. There is no question of acquiescence or of allowing somebody else to represent the transferee in the sherista of the landlord in the present case. As has been observed in a decision of this Court in the case of *Chamatkari Dasi* v. *Triguna Nath Sardar* (3) the question whether there has been such representation or not is a question of fact, and the mere fact that the transferee refrained from instituting a suit for a declaration to get his name recorded in the defendants' sherista, which seems to be the only course left to the transferee to adopt in the circumstances of this case, cannot be taken as an acquiessence on his part or allowing of the transferrers to represent him in the landlord's sherista. I am therefore of opinion that the principle to which reference has been made in connexion with this contention has no application to the facts of this case.

These are all the contentions that have been urged on behalf of the appellant. As they fail the appeal must be dismissed with costs.

**Greaves, J.**—I agree.

*Appeal dismissed.*

(3) [1913] 17 C. W. N. 833=19 I. C. 989.

---

## A. I. R. 1927 Calcutta 224

RANKIN AND CHOTZNER, JJ.

*Alfred Laird*—Accused—Petitioner.

v.

*King-Emperor*—Opposite-Party.

Criminal Revision No. 418 of 1926, Decided on 30th June 1926, from an order of the Ch. Presy. Mag., Calcutta.

(a) *Merchants Shipping Act* (1923), *S.* 103 (4)—*Essence.*

The essence of S. 103 (4) is assault.

[P. 225, C. 1]

(b) *Criminal P. C., S.* 403 (1)—*Conviction under Calcutta Police Act, S.* 68—*Trial under Merchants Shipping Act, S.* 103 (4) *on the same facts is barred—Merchants Shipping Act, S.* 103 (4).

Where the accused, an officer of a steamship, was convicted under S. 68 of the Calcutta Police Act on a charge of drinking and disorderly conduct creating a disturbance by assaulting the Captain of the vessel and sentenced to pay a fine, and the Captain subsequently filed a complaint on the same facts under S. 103 (4) of the Merchants Shipping Act charging the accused with having assaulted him and he was convicted under the said section and sentenced.

*Held*; that the substantial charge under the Police Act being "assault," Criminal P. C. S. 403 (1), 2nd part, is a bar to a second conviction upon the same facts under a different enactment, namely, the Merchants Shipping Act.

[P. 225, C. 2]

*Mrityunjay Chattopadhyay* and *Sachindra Nath Banerjee*—for Petitioner.

*Khundkar*—for the Crown.

**Chotzner, J.**—This is a Rule calling upon the Chief Presidency Magistrate to show cause why the order made by him sentencing the petitioner, Alfred Laird, to seven days' simple imprisonment under S. 103 (4) of the Indian Merchants Shipping Act 11 of 1923, should not be set aside on the first and second grounds specified in the petition. These grounds are; first, that the petitioner had already been convicted upon the same facts, and consequently his subsequent trial and conviction was bad in law; and secondly, that the conviction of the petitioner under two different enactments for the same act was illegal.

There is no dispute about the facts. The petitioner was the Third Officer of the steamship "City of Newcastle" and he was sent up on the 26th April 1926 upon a charge of having assaulted the Captain of the ship, Daniel Jenkins. According to the evidence the petitioner was drunk and used abusive language and assaulted the Captain with the result that the Captain was somewhat seriously injured and had to call in the police. A Sergeant of Police came on board the ship, the occurrence having taken place in the Captain's cabin and took the accused ashore. He was placed before an Honorary Magistrate charged with an offence under S. 68 of the Calcutta Police Act. In para. 6 of the form the offence complained of is stated to be

drunk and disorderly conduct by creating a disturbance by assaulting the Captain of the vessel "City of Newcastle" at No. 2 Berth, kidderpore Docks, on the 25th April 1926,

and the section given was S. 68 of the Calcutta Police Act. In the 7th paragraph the plea of the accused was recorded in these words: "Admits asault."

Thereupon the learned Honorary Magistrate, Dr. Sarbadhikari, made the final order fining the accused Rs. 20 or in default seven days' rigorous imprisonment. Thereafter, on the 28th April, the Captain filed a second complaint under

S,. 103 (4) of the Indian Merchants Shipping Act. This case was heard by Mr. Roxburgh, the Chief Presidency Magistrate, who, on the 10th of May sentenced the petitioner to seven days' simple imprisonment. The defence set up by the petitioner before Mr. Roxburgh was that he had already been convicted and fined Rs. 20. The learned Magistrate states that the fact that the petitioner had already been fined under the Calcutta Police Act was immaterial, and goes on to say :

What happened evidently was that the police arrested the accused on the letter of the Captain and then had to justify this by putting up a cognizable case. They sent the accused up then on a challan for 'drunken and disorderly conduct by creating a disturbance by assaulting the Captain of the vessel City of Newcastle' at No. 2 Berth, Kidderpore Docks, on 25th April 1926.' But the Captain's letter which was sent up with the challan shows that the assault was in his cabin. If the Magistrate had bothered to read this and to give the matter a moment's thought, he would have seen that whatever the accused might plead, he ought never to have been called on to answer a charge under S. 68 (Act IV of 1866) street appliee to anyone found drunk etc., in any which or thoroughfare or in any place of public amusement or . . . . . .It is thus clear that the conviction under S, 68 of the Police Act is illeged and the accused can get it set aside if he thinks fit. But in my opinion it does not in any way bar the present proceedings under S. 403, Criminal P. C., or S. 26 of the General Clauses Act.

He says in conclusion :

So that even if S. 68 could have any application here the offlences are governed by S. 235 (1) of the Criminal Procedure Code, and not by S. 236 or, 237, Criminal P. C.

The question here seems to me to be purely one of fact, that is to say, of what offence was the accused convicted before Dr. Sarbadhikari. Can it be said that the offence was split up, so to speak, into its component parts and that the accused was convicted by Dr. Sarbadhikari for using abusive language and not convicted of assault ? When the record is examined it will be found that the accused was convicted of assault and nothing more. Therefore when the complainant seeks to have the petitioner again placed on his trial for the same offence under a different enactment, namely, the Indian Merchants Shipping Act, it seems to me difficult to say that the provisions of S. 403, Criminal P. C., do not apply. Before Dr. Sarbadhikari the petitioner pleaded guilty of assault and upon that plea he was convicted. S. 103 (IV) of the Indian Merchants Shipping Act says that a seaman shall be liable to be punished

If he assaults the master or any mate or a certified engineer of the ship and shall be liable to imprisonment for a term which may extend to 12 weeks.

It is clear therefore that the essence of that section is assault. Now S. 403. Criminal P. C., says this :

A person who has once been tried by a Court of competent jurisdiction for an offence, and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence nor on the same facts for any other offences for which a different charge from the one made against him might have been made under S. 236. or for which he might have been convicted under S. 237.

It is perfectly true that the charge against the petitioner might very well have been laid under the Indian Merchants Shipping Act in the first instance, and probably it was wrong of Dr. Sarbadhikary to entertain a charge under the Calcutta Police Act, because on the face of it it was inappropriate. At the same time, when Mr. Khundkar who appears for the Crown asks us to interfere in our revisional capacity and set aside the conviction under the Police Act because the conviction under the Indian Merchants Shipping Act would be more appropriate, we do not feel disposed to accede to his request. There can be no question in my judgment that the substantial charge upon which the petitioner was convicted under the Police Act was assault and the Honorary Magistrate recognised that that was the offence of which he was guilty. I think, therefore, that S. 403 (1), second part, must operate as a bar to a second conviction upon the same facts.

The result therefore is that the Rule is made absolute. Let the petitioner be released and discharged and let his bail bond be cancelled.

**Rankin, J.**—I agree.

*Rule made absolute.*



---

## A. I. R. 1927 Calcutta 225

RANKIN, C. J., AND M. N. MUKERJI, J.

*Satish Chandra Joardar* and *others*—Plaintiffs—Applicants.

v.

*Kumar Birendra Nath Roy Bahadur*—Defendant—Respondent.

Application for leave to appeal to Privy Council, No. 14 of 1926, Decided on 23rd November 1926.

*Civil P. O., S.* 110 — *Low valuation put on plaint does not estop plaintiffs for the purpose of Privy Council appeal — High Court can go into question of real value if trial in a different Court is not necessary.*

The mere fact that a low valuation is put on a plaint for the purpose of Court-fee and consequently for the purpose of jurisdiction should not be allowed to operate as estoppel against the plaintiff on the question of value for the purpose of Privy Council appeals and the High Court is entitled to go into the real value for the purpose of considering whether a certificate should be granted when it is not a case in which the higher valuation would have meant that the trial would have to be in a different Court : 1 *I. A.* 84 (*P. C.*) and 1 *I. A.* 317 (*P. C.*), *Dist.* [P 225 C 2]

*Narendra Kumar Basu* and *Rajendra Bhusan Bakshi*—for Appellants.

*Sarat Chunder Bose* and *Jatindra Mohan Choudhury*—for Respondent.

**Rankin, C. J.**—In this case two questions arise for consideration with reference to the value of the subject-matter. The judgment complained of is a judgment of reversal and if the subject matter is of the value of Rs. 10,000 the appellants to England are entitled to a certificate.

It is said first that the appellants to England, namely, the plaintiffs are estopped from alleging that the value of the subject-matter amounts to Rs. 10,000. It appears that in this suit the valuation which was put upon the plaint for the purpose of Court-fee, was, apart from mesne profits a valuation of some Rs. 930 only and it is said that the plaintiffs having failed in the first Court brought an appeal to the Court of the District Judge on the footing that the value of the subject matter was under Rs, 5,000. The District Judge having found in their favour and the High Court in second appeal having been against them and they now being desirous of proceeding further on appeal it is said that they are estopped because they cannot approbate and reprobate and that their action in taking their appeal to the Court of the District Judge means that they took an advantage on the basis that the valuation of the suit was much lower than what it is now said to be.

In my judgment the cases cited to us do not cover the present case. There are two cases *Kristo Indro Saha* v. *Huromonee Dassee* (1) and *Babu Lekraj Roy* v. *Kanhya Singh* (2). The case at page 317 does not, in my judgment touch the point at all. The case at page 84 is an authority for this—and so far as I can see only for this—that where a defendant took an advantage by accepting a high valuation and proceeded to appeal to the High Court direct, he could not afterwards allege that the real value was lower when the plaintiff wanted to go to the Privy Council. For this purpose the view of the law appears to be that for an appellant to proceed to a higher Court immediately is to take an advantage but it is not so far as I know to be found anywhere laid down that to proceed to a lower Court and take a chance of what the lower Court would do is to take an advantage. It has in my short experience been generally accepted in this Court that the mere fact that a low valuation is put on a plaint for the purpose of Court-fee and consequently for the purpose of jurisdiction should not be allowed to operate as estoppel against the plaintiff on the question of value for the purpose of Privy Council appeals. There is perhaps a good deal to be said in favour of such a rule being introduced but there is a great deal to be said against such a rule being introduced by judicial decision. The cases *Hari Mohan Misser* v. *Surendra Narain Singh* (3) and *Kumar Basanta Kumar Roy* v. *Secretary of State for India* (4) seem to me to take the matter no further than I have said and I am of opinion that we are entitled to go into the real value for the purpose of considering whether a certificate should be granted. This is not a case in which the higher valuation would have meant that the trial would have had to be in a different Court. I reserve my opinion as to such a case.

It appears that the suit as framed asked for vacant possession by ejecting the defendants. It appears further that the appeal which succeeded in this Court was an appeal from a decree of the District Judge which in its final formg ranted that very prayer, namely, khas possession by ejecting the defendants.

The learned Subordinate Judge to whom this matter of valuation was referred has dealt with the matter on the basis that whatever happens in this suit the plaintiffs cannot really get vacant possession by ejecting the defendants. He has taken it to be a fact that tenants have been settled upon this land in a way

(1) [1873] 1 I.A. 84=3 Sar. 317 (P.C.)
(2) [1874] 1 I.A. 317=3 Sar. 373 (P..C.).
(3) [1903] 31 Cal. 301.
(4) [1910] 14 C.W.N. 872=6 I.C. 792.

that binds the plaintiffs and that therefore one has to allow merely the value that the plaintiffs will be likely to make out of this land by taking rent from persons who are already established on the land. In that way the learned Subordinate Judge prefers to deal with the matter on a rental basis. He has also dealt with the matter from the point of view of the value of the produce of the land. He finds in the end that as regards the claim for mesne profits the plaintiffs' case now is represented by a produce value of Rs. 6,552 on the basis that the gross value of the yield is Rs. 6 a bigha, that the net value which the plaintiffs could make would be at Rs. 3 and that the plaintiffs in that way can make out a claim for mesne profits at Rs. 6,552. It follows, therefore, that if it can be shown that the value of the land itself apart from mesne profits is as much as Rs. 3448 the plaintiffs have made out their right to a certificate. The learned Judge says that the value is only Rs 3286 and he does that by taking general evidence of witnesses some of whom gave one figure and some another. It is objected that they were speaking not really of the value of the land at all but were speaking merely of the rates that appear in documents which show sales of tenants' right and it must be very evident that it is impossible to arrive at any degree of exactness upon the evidence which was before the learned Subordinate Judge.

Looking at the whole matter I am satisfied that the learned Subordinate Judge, in this case has adopted an estimate which is distinctly conservative. I cannot help noticing that for 146 bighas at Rs. 3 a bigha, at 12 years' purchase only, a figure would be obtained of Rs. 5,256 and looking at the form of the plaintiffs' suit, the form of the decree which was obtained from the District Judge and to the materials in the very careful report of the Subordinate Judge I am satisfied that we are not over-estimating the value of the plaintiffs' claim if we say that it is Rs. 10,000.

For these reasons I think that this case must be treated as one where a certificate must issue that the case is a fit one for appeal to His Majesty in Council under S. 110 of the Code.

We make no order as to costs on either side whether in this application or in the proceedings before the Subordinate Judge.

**Mukerji, J.**—I agree.

*Certificate issued.*

---

## A. I. R. 1927 Calcutta 227

RANKIN, C. J., AND C. C. GHOSE, J.

*Bhican Chand Charorla* and *others* — Appellants.

v.

*G. and M. Fogt* and *others*—Respondents.

Appeal No. 65 of 1926, Decided on 19th November 1926, from the original order of Buckland, J., D/- 23rd March 1926.

*Arbitration—Bengal Chamber of Commerce. Rr. 13 and 14—Arbitrators must allow opportunity to adduce oral evidence in certain cases—Oral evidence as to market rate on a particular date need not necessarily be heard.*

There may arise occasions when having regard to the facts involved it is incumbent on the Bengal Chamber of Commerce to give parties suitable opportunities of adducing evidence. But each case must depend on its own facts.[P 228 C 2]

Where the question is one relating to the market rate on a particular date, prima facie it is not necessary for the arbitrators to hear oral evidence as market rates are as a rule, well within their own knowledge and within the special experience for which arbitrators are selected.

[P 229 C 1]

*N. N. Sircar* and *R. N. Sircar*—for Appellants.

*Langford James* and *Ameer Ali*—for Respondents.

**C. C. Ghose, J.**—This is an appeal from a judgment of Mr. Justice Buckland whereby he refused to set aside an award of the Bengal Chamber of Commerce.

The facts, shortly stated, are as follows: On the 30th of April 1925 a contract was entered into between the appellant firm and the respondent firm whereby the appellant firm agreed to sell and the respondent firm agreed to buy 15,003½ maunds bales of Kishengunj jute, delivery to be given by August or September 1925. No delivery having been effected by the end of September 1925, the appellant firm asked on the 3rd October 1925. for an extension of time for delivery up to the 31st October 1925. The respondent firm refused to agree to the extension asked for, but they stated that they were prepared to allow an extension of time up to the 10th of October 1925. The appellant firm did not see their way

to accept the extension of time up to the 10th of October 1925, but it appears that on the 5th of October 1925 the respondent firm expressed their willingness to grant an extension of time for delivery up to the 31st of October 1925. The appellant firm, however, stated on the 9th of October 1925 that in the events which had happened they were not then keen on getting an extension of time.

On the 15th of October the respondents made out their bill and forwarded the same to the appellant firm. That bill was for a sum of Rs. 35,437-8-0 and it was made on the footing of the difference in the price of the goods contracted for between the contract rate and the market rate on the 15th of October 1925. The appellant firm did not pay the amount of the bill with the result that the respondent firm applied to the Bengal Chamber of Commerce for arbitration in terms of the arbitration clause contained in the contract. The matter then came before the Bengal Chamber of Commerce and on the 2nd of February 1926 the Tribunal of Arbitration of the Bengal Chamber of Commerce made their award whereby they awarded the whole of the amount claimed by the respondent firm, i. e., Rs. 35,437-8-0 to the respondents with interest thereon and costs.

The appellants thereafter applied to Mr. Justice Buckland for an order for setting aside the award and the contention that was urged before the learned Judge was that, having regard to the nature of the case, the appellants should have been allowed an opportunity of adducing evidence before the said Tribunal of Arbitration of the Bengal Chamber of Commerce.

In order to appreciate the precise significance of this contention, it is necessary to see what the appellants put forward before the Bengal Chamber of Commerce in their statement of case. That statement was in reply to statement of case sent in by the respondents. The respondents in their statement made it perfectly clear that their bill had been made out on the footing of the difference in price of the goods between the contract rate and the market rate on the 15th of October 1925 and that in their view the 15th of October 1925 was the due date for ascertainment of damages in the events which had happened. The appellant firm in their statement of case to the Bengal Chamber of Commerce by way of reply stated as follows:

We contend that the buyers have not suffered any damages and we ask for an opportunity to place evidence on the basis of the 30th September 1925, after the buyers have submitted a revised statement of their alleged claim. The claim for Rs. 35,437-8-0, propounded on an imaginary and fictitious basis, is wholly untenable and absurd on the face of it and the arbitrators, we humbly submit, will find no difficulty in rejecting the claim. For, assuming for a moment that there was an extension up to 31st October, no claim can be put forward on the basis of the 15th October as the alleged due date on delivery which was never the due date according to the case of both parties.

In these circumstances the learned Judge had to consider whether, having regard to the rules of the Bengal Chamber of Commerce, it was incumbent upon the Tribunal for Arbitration of the Bengal Chamber of Commerce to give the appellants an opportunity of adducing oral evidence.

No doubt from time to time there have been cases where it has been held that there must arise occasions when, having regard to the facts involved, it is incumbent on the Bengal Chamber of Commerce to give parties suitable opportunities of adducing evidence: see for instance the case of *David Sasoon* v. *Karnidass* dated the 9th August 1921. But as indicated above, each case must depend on its own facts and in this case the appellants had, in my opinion, abundant opportunities of stating in their case to the Bengal Chamber of Commerce what the market rate was on the 15th of October or on any other date and also the evidence in support of such rate and also of showing that the rate claimed by the respondents was a rate which, having regard to the state of the market on the date mentioned above, could not be allowed. This opportunity the appellants failed to seize and, in these circumstances, bearing in mind the nature of the case and holding as I do that this was not one of those cases where it would be incumbent on the Bengal Chamber of Commorce to hold a formal trial, I think the learned Judge was entirely right in holding that there had been no misconduct whatsoever on the part of the arbitrators and that there were no circumstances which would justify the Court to set aside the award.

The appeal is dismissed with costs.

**Rankin, C. J.**—I agree.

It appears to me that the nature of the arbitration before the Begal Chamber of

Commerce is such that one is quite safe in saying that prima facie it is not necessary for the arbitrators to hear oral evidence about market rates which are as a rule well within their own knowledge and within the special experience for which arbitrators are selected. That proposition is sufficient, in my judgment, to decide this quession,

I agree that this appeal must be dismissed with costs.

*Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 229

CUMING AND GREGORY, JJ.

*Khetra Mohan Das* and *others*—Plaintiffs—Appellants.

v.

*Bhairab Chandra Das* and *others*—Defendants—Respondents.

Appeal No. 2224 of 1923, Decided on 21st August 1925, from the appellate decree of the 3rd Offg. Sub-J., Midnapur, D/- 25th May 1923.

*Evidence Act, S. 90—Court is not bound to presume the correctness of every statement in a document thirty years old.*

The person producing a document under S. 90 is relieved of the necessity of proving that it was executed by the person who purported to be the executant; provided that it satisfies the other conditions, namely, it is 30 years old and produced from propar custody. But that is not the same as saying that the Court shall presume the correctness or genuineness of every statement appearing in the document.

[P. 229, C. 2, P. 230, C. 1]

*S. C. Maiti* and *Apurba Charan Mukherjee*—for Appellants.

*Santosh Kumar Pal*—for Respondents.

**Cuming, J.**—In the suit out of which this appeal arises the plaintiffs sued for a declaration of their title as tenants under Defendants Nos. 4 to 8, and for correction of the settlement record and confirmation of their possession. Defendants Nos. 1, 2 and 3 are the persons whose names are recorded in the record-of-rights as tenants now in possession.

The plaintiffs' case was that in 1287, corresponding to 1880, their mother took a settlement from the ijaradar of Defendants Nos. 4 to 8 and paid rent all along to the ijaradar and that on her death the plaintiffs came into possession and continued to pay rent to the ijaradar. In the record of rights prepared in 1917 Defendants Nos. 1, 2 and 3 were recorded as tenants under the Defendants Nos. 4 to 8. This entry in the record of rights had thrown a cloud on the plaintiffs' title; they, therefore, brought the suit for the correction of the record of rights and confirmation of their possession after declaration of their title. The first Court decreed the plaintiffs' suit. On appeal to the District Court this decision was reversed and the plaintiffs' suit was entirely dismissed. The plaintiffs have appealed to this Court.

Their contentions are as follows: first of all the lower appellate Court has wrongly rejected a certain jamabandi furd. They contend that this jamabandi furd being an ancient document has proved itself under S. 90 of the Indian Evidence Act; and that if the lower appellate Court was of opinion that the document was not genuine the plaintiffs should have been given an opportunity of proving the genuineness of the document. Is it, therefore, necessary to see how the lower appellate Court has dealt with this document. The learned Subordinate Judge remarks as follows:

> Therefore, only the jamabandi furd (Ex. 1) is the solitary document to prove title. It was filed after the defendants filed under their hukumnama Ex. A. I have reasons to suspect the genuineness of this document. It is purported to have been granted by an ijaradar of the Rajas named Darpa Narayan, whose name appears to have been signed by the pen of one Becha Ram. There is no evidence to show that Darpa Narayan was the ijaradar and no evidence to show that Becha Ram had the power to sign his name. Following the ruling laid down in the case of *Imrit Chamar* v. *Sridhar Pandey* (1), I hold that the genuineness of this jamabandi furd (Ex. 1) cannot be presumed only from the proof of custody under S. 90, Evidence Act.

Now S. 90 provides that

> where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwrting of any particular person, is in that person's handwrting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

In other words the person producing such a document is relieved of the necessity of proving that it was executed by the person who purported to be the executant; provided that it satisfies the

(1) [1912] 17 C. W. N. 108=13 I. C. 120=15 C. L. J. 7.

other conditions, namely, it is 30 years old and produced from proper custody. But that is not the same as saying that the Court shall presume the correctness or genuineness of every statement appearing in the document.

The learned counsel who has appeared for the appellants contends that his clients have been misled, because the learned Munsif admitted this document without proof, and for that reason they did not adduce any evidence to prove that Darpa Narayan was the ijaradar of the zemindars. But merely because the trial Court admitted the document without proof the plaintiffs were not relieved of the necessity of proving that Darpa Narayan was an ijaradar of the zemindars, because that fact cannot be presumed to have been proved by the document itself. The lower appellate Court in dealing with this document found that there was no documentary evidence —by that I presume it means no reliable evidence—to show that Darpa Narayan was the ijaradar of the zemindar. In that case, therefore, it would be quite immaterial whether Darpa Narayan had executed this document through the pen of Becha Ram, because even if he had done so that would not in itself prove that he was the ijaradar. That fact not having been proved the lower appellate Court was quite right in not relying upon this document as proving any part of the plaintiffs' case.

The next point raised by the learned counsel for the appellants is that the lower appellate Court should have held that the admitted dakhilas which were granted by the landlords proved the plaintiffs' case. But in dealing with these dakhilas the lower appellate Court points out that the dakhilas only exist from 1298 to 1304 and none after 1304; accordingly it did not consider that the plaintiffs' case was supported by the dakhilas. I am not prepared to say that the lower appellate Court is wrong, and to hold the plaintiffs have title to or possession of the lands in suit.

No other point has been urged in support of this appeal. The result is that the appeal must fail and is dismissed with costs.

**Gregory, J.**—I agree. It has been brought to our notice that one of the appellants in this appeal is a minor and he has not been properly represented in this appeal. The facts appear to be these: when the appeal was filed there were two appellants Khetra Mohan Das and Bonomali Das. Bonamali Das was a minor and represented by his guardian and uncle Khetra Mohan Das, Appellant No. 1. Khetra Mohan died and in his place his legal representative Bhuth Nath Das was duly substituted. But apparently for some reason or other no application was made for the appointment of a fresh guardian for the minor Bonomali who had been represented in the appeal by Khetra Mohan. The result is that so far as Bonomali, the minor is concerned he was not properly represented in this appeal; and the order which we have passed in this appeal so far as he is concerned must be vacated. Order 32, R. 10 Civil P. C., provides that

> on the retirement, removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place.

Therefore, in this case the order is that so far as Bonamali is concerned all further proceedings in this appeal will be stayed pending the appointment of a next friend.

Let the minor be given notice of the death of his next friend and of the above order.

*Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 230

B. B. GHOSE AND PANTON, JJ.

*Sheik Ketabuddin* and *others* —Defendants—Appellants.

v.

*Nafar Chandra Pattok* and *others*—Plaintiffs—Respondents.

Appeal No 2684 of 1923, Decided on 10th February 1926, from the appellate decree of the Addl. Sub-J., Howrah, D/- 8th October 1923.

*(a) Evidence Act, S. 157—Executant of document producing it in support of his evidence—Document is admissible.*

Where the executant of a document containing recitals of bouudaries of land in dispute is called as a witness and he gives his evidence and in support of that he produces a document executed by him. The document would be admis-

sible under S. 157 as corroborative of the evidence given by the witness in the witness-box.
[P 231 C 1]

(b) *Evidence Act, Ss.* 11 *and* 13—*Executant of document containing recitals of boundaries of land in dispute alive but not giving evidence—Document is not admissible.*

Where the executants of documents containing recitals of boundaries of land in dispute are alive and do not give their evidence, such documents are not admissible either under S. 11 or S. 13.
[P 231 C 2]

(c) *Evidence Act, S.* 32—*Executant of a document containing recital of boundaries of land in dispute dead—Document is admissible..*

Where the executant of a document containing recitals of boundaries of other lands is dead, such document is admissible under S. 32 : 23 *Bom.* 63 ; 16 *C. W. N.* 252 ; 11 *A. L. J.* 139 and 45 *Cal.* 159, *Foll.*
[P 231 C 2]

*Jadu Nath Kanjilal, Harendra Nath Sarbadhikari, Sisir Kumar Ghosal, Manmatha Nath Roy (Jr.)* and *Sadhan Chandra Roy Choudhury*—for Appellants.

*Sarat Chandra Bose* and *Narendra Krishna Bose*—for Respondents.

**B. B. Ghose, J.**—The only question argued on behalf of the appellants in this case is that the finding of fact arrived at by the lower appellate Court was based partly on evidence which is not admissible under the law. This objection refers to three documents Exs. 3, 5 and 6 which dealt with lands lying on the different boundaries of the land in dispute. They have been used for the purpose of showing that in describing the boundaries of those lands the land in dispute in the present suit has been described as being in the possession of the plaintiff which the learned advocate for the appellants contends is not permissible under the law. His contention is that those documents cannot be taken into consideration and as the judgment of the lower appellate Court on the facts depends partly on a consideration of those documents this judgment should be set aside and the case sent back for decision on the evidence excluding these three documents. The question of the admissibility of such documents may be considered in three aspects. The first is where the executant of a document is called as a witness and he gives his evidence and in support of that he produces a document executed by him. In such a case it is conceded that the document would be admissible under S. 157 of the Evidence Act as corroborative of the evidence given by the witness in the witness box. In the present case this has happened with regard to Ex. 6 and there is no question that this was rightly admitted in evidence. The second aspect of the question arises where the executants are alive and do not give their evidence in the case. In such cases there is a strong body of opinion that such documents are not admissible either under S. 11 or 13 of the Evidence Act. This has not been done in the present case. The third case is, where the executants are dead, whether any such documents are admissible under S. 32 of the Evidence Act or not. That such documents are admissible under S. 32 of the Evidence Act has been held in a long line of cases in different Courts in India. There is a question that under the English Law a statement in such documents would be admissible. It is unnecessary to cite any English case other than the leading case of *Higham* v. *Ridgway* (1). Whether such evidence is admissible under the Evidence Act was considered in favour of its admissibility in several cases the earliest of which is *Leelanund Singh* v. *Mt. Lakhputee* (2). This case was elaborately discussed and followed in the case of *Ningawa* v. *Bharmappa* (3), which was again followed in the Bombay High Court. in case of *Haji Bibi* v. *H. H. Sir Sultan Mahomed Shah* (4), and in our Court in the case of *Abdullah* v. *Kunj Behary Lal* (5). These cases were followed in Allahabad in the case of *Natwar* v, *Alkhu* (6), and all these cases were subsequently followed in this Court in *Imri Chamar* v. *Sirdhari Pandey* (7), and in the case of *Ambar Ali* v. *Lutfe Ali* (8). It is contended, however, by the learned advocate for the appellants that S. 32 of the Evidence Act does not really apply to statements in such documents and his contention is supported by the case in *Pramatha Nath Choudhuri* v. *Krishna Chandra Bhattacharjee* (9). The other cases cited by him do not

(1) [1808] 2 Sm. L. C. 307=10 East. 109=10 R. R. 235.
(2) [1874] 22 W. R. 231.
(3) [1899] 23 Bom. 63.
(4) [1909] 11 Bom. L. R. 409=2 I. C. 874.
(5) [1911] 16 C. W. N. 252=12 I. C. 149=14 C. L. J. 467.
(6) [1913] 11 A. L. J. 139=18 I. C. 752.
(7) [1911] 15 C. L. J. 7=13 I. C. 120=17 C. W. N. 108.
(8) [1918] 45 Cal. 159=21 C.W.N. 996=41 I.C. 116=25 C. L. J. 619.
(9) A. I. R. 1924 Cal. 1067.

really touch the question. In the case of *Soroj Kumar Acharji Chowdhuri* v. *Umed Ali Howladar* (10), which is purported to have been followed in the case of *Radha Krishna Marwari* v. *Sarbeswar Nag* (11), and in the case of *Chooni Lal Khemani* v. *Nilmadhab Barik* (12), the question of the admissibility of such a document under S. 32 of the Evidence Act has not at all been considered. These latter cases, therefore, do not appear to be of any assistance in the decision of the present question. The matter stands thus. There is a strong body of authorities in support of the proposition that under S. 32 of the Evidence Act these documents are admissible and there is a single case in *Pramatha Nath Choudhuri* v. *Krishna Chandra Bhattacharjee* (9), which takes a contrary view as to the applicability of S. 32 of the Evidence Act to such a case as this. It is, however, unnecessary for us to state in this case whether we should follow the line of cases which held that statements in documents under such circumstances are admissible under the law or take the contrary view following the case in *Pramatha Nath Choudhuri* v. *Krishna Chandra Bhattacharjee* (9). We were asked to make a reference to a Full Bench with regard to this question but we do not think that it is at all necessary to do so having regard to the circumstances of this case. We think that these documents are admissible in the present case under the following circumstances. The persons who are the owners of the lands on the boundaries of a land in dispute have been examined as witnesses in the case and they proved that they had purchased the lands which they held by transfers under Exs. Nos. 3 and 5. Those documents are certainly admissible to show that they have purchased these lands. These are corroborative documents of the oral testimony of the witnesses as regards their ownership and once being admissible in evidence the Court was entitled to look into the contents of the documents and make such use of the contents as it thought fit because there is no provision in the Evidence Act which says that this cannot be done. Under such circumstances we think that it cannot be said that the lower appellate Court acted erroneously in making use of those documents.

. On this ground this appeal fails and is dismissed with costs.

**Panton, J.**—I agree.

*Appeal dismissed.*

(10) A. I. R. 1922 Cal. 251.
(11) A. I. R. 1925 Cal. 684.
(12) A. I. R. 1925 Cal. 1034.

---

## A. I. R. 1927 Calcutta 232

GREAVES AND DUVAL, JJ.

*Rajani Kanta Ghose*—Defendant 1—Appellant.

v.

*Nagendra Narain Roy* and *others*—Plaintiffs and Defendants—Respondents.

Appeal No 2015 of 1923, Decided on 6th August 1925, from the appellate decree of the Dist. J., Murshidabad, D/- 21st April 1923.

*(a) Landlord and tenant—Transferability of holding by tenant—Proof—Few instances where landlord recognized transferees as tenants are not sufficient.*

Evidence to show that the landlords thought fit on payment of a certain nazar to recognize certain transferees whom they chose to recognize as tenants is not sufficient to establish a custom of transferability. [P 234 C 1, 2]

*(b) Practice — Second appeal — Record—Evidence.*

To put a translated copy of the evidence is not a satisfactory method of placing evidence before the High Court. [P 234 C 1]

*Pyari Mohan Chatterji*—for Appellant.

*Dwarka Nath Mitter* and *Nirodebandhu Roy*—for Respondents.

**Greaves, J.**—This is an appeal by the Defendant No. 1 against a decision of the District Judge of Murshidabad confirming a decision of the Second Court at Jungipur. The only question that arises in the appeal is whether there has been a complete abandonment by the tenants of the holding so as to entitle the plaintiffs to the relief which they seek in the suit, namely, recovery of po session. On the 8th of May 1910, the tenants executed in favour of the appellant a usufructuary mortgage. The area stated in the mortgage is 26 bighas 7 kotahs of land "as per boundaries given below." The boundaries and the plots comprised in the mortgage are set out in detail in the schedule to the deed. On the 20th of May 1911, the tenant sold 16 bighas 12 kotahs of the land to the appellant by a kobala of the date which I have men-

tioned. The area is stated in the document as 16 bighas 12 kotahs land out of the 26 bighas 7 kotahs mortgaged to the appellant. Subsequently, on the 31st of May 1918, the tenants sold to Defendants Nos. 2 and 3, 10 bighas 8 kotahs of land by a kobala of the date. This document describes the land sold as being the land that remained after various calculations had been made. I find this statement:

> There remains 10 bighas 8 kotahs. All the lands mentioned in the kobala executed by me Loharam Mandal and in the kobala executed by the mother and guardian of the minor and in this kobala have been sold.

This document refers to what are described as various inaccuracies of measurement appearing in the mortgage and in the kobala of the 20th of May 1911.

It appears that the total area of the holding in dispute is 27 bighas 5 kotahs and the appellant contends that there has been no abandonment as there are still 5 kotahs remaining undisposed of. Subsequently a baina patra was entered into for sale to the appellant of 8 bighas 15 kotahs land and another suit was instituted to enforce specific performance of this contract as the purchaser failed to get possession of the land.

Four points have been urged before us in this appeal; first, that on the facts which I have stated with regard to the area of the land there has been no complete abandonment of the holding so as to entitle the plaintiffs to the relief which they seek; secondly, it is said that the statements contained in the kobala of the 31st of May 1918, with regard to the area comprised in the deed and in the first kobala are not admissible in evidence against the first defendant, and it is said that the learned Judge in the Court below has really decided the case on these statements contained in the kobala which, as I have already said, are said not to be evidence against the appellant, thirdly, it is urged that the landlords accepted rent for a long period of years—seven, I think, in all, from the appellant and it is, therefore, said that the landlords have recognized the purchase by the appellant under the kobala of the 20th of May 1911, and that consequently they are not entitled to the relief claimed as against him; and, fourthly, it is said that upon the evidence there is a custom of transferability at a fixed nazar of 4 annas in the rupee and that on the evidence as given in the case the learned Judge should have inferred that a custom of transferability had been established.

So far as the first point is concerned, it seems to me that there has, on the facts of this case, been an abandonment of the entire holding. The second kobala is only evidence, I think, to a limited extent against the appellant and I think it is evidence to this extent, namely, to show that thereby the remainder of the holding was purported to be sold. It has been urged before us that we should send the matter back to the lower Court in order that the different documents should be investigated to ascertain whether the appellant's contention is correct that there are still 5 kotahs of land unsold, but I think that the learned Judge in the Court below was justified, on the materials before him, in coming to the conclusion that there had been, in fact, a total abandonment of the whole holding. The learned Judge states that admittedly all the lands were mortgaged by Ex. 6, and he refers to a statement made by the Defendant No. 1 in a connected case to this effect. It is now said that that statement of the defendant in the connected case was made under a misapprehension of the facts and in the absence of knowledge on his part that these 5 kotahs were excluded from the mortgage and from any sale of the lands: but I do not think it is open to the defendant to blow hot and cold in this way and make one statement in one suit and another statement in another, and I think we are bound to accept that for the purpose of this suit it was admitted by all the parties that all the lands of the holding were mortgaged by Ex. 6 and that it is not now open to the appellant to contend to the contrary.

So far as the second point is concerned, I agree that the statements as to the mistake in the areas in the mortgage-deed and in the first kobala are not binding on the appellant and are not evidence against him as he was not a party to the documents. Consequently I think that the second kobala was only admissible in evidence for tha limited purpose which I have stated in dealing with the first contention raised in this appeal.

So far as the third point is concerned, the learned Judge has held that Exs. B-4 and B-5, upon which the appellant relied to show recognition by the landlords could not be deemed to be recognition on their part of the appellants' purchase. He says that this would only show recognition of the defendant as usufructuary mortgagee. Now, by the terms of the mortgage the appellant had undertaken to pay the rent of the holding. The mortgage was still undischarged certainly as to a part thereof at the time when Exs. B-4 and B-5 were executed and consequently I think the learned Judge was justified in drawing the inference which he has done that the exhibits only showed recognition of the appellant as usufructuary mortgagee and not as purchaser.

Lastly comes the question of transferability by custom and we have been referred to the evidence that was given in the suit on this point. We have also been referred to various authorities and we have been told that there is no course open to us but to hold upon the facts as given in the evidence and upon the authorities that transferability has been established by custom. Here I differ entirely from the contention of the learned vakil for the appellant. We have only before us a translated copy of the evidence which is not a satisfactory method of placing evidence before this Court. The first witness for the plaintiffs states: "There is no special custom in our sherista for recognising tenants." He further states that many occupancy holdings had been sold in his time, that some of these purchasers had been recognized and none has been ejected, and that nazar was taken for recognition. Witness No. 2 states recognition takes place on payment of nazars at 4 annas "per rupee." Then there is the evidence of Witness No. 3 for the plaintiffs in which he says that he has seen no case of ejectment and that recognition takes place on payment of nazars; and Witness No. 1 for the defendant states that in the mehal occupancy holdings are all transferred on taking nazars at 4 annas in the rupee and that the landlords cannot eject the transferees. I think there is no doubt that there is a considerable body of evidence to show that the landlords thought fit on payment of nazar at the rate of 4 annas in the rupee to recognize certain transferees whom they chose to recognize as tenants; but to my mind this evidence falls far short of what is necessary in law to establish a custom.

There are the four points that have been raised in the appeal and in the result the appeal fails and is dismissed with costs.

**Duval, J.**—I agree.

*Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 234

B. B. GHOSE AND CAMMIADE, JJ.

*Pramatha Nath Roy Chowdhury* and *others*—Defendants—Appellants.

v.

*Rajah Bejoy Singh Dhudhuria* and *another*—Plaintiffs—Rospondents.

Appeals Nos. 402, 405 and 442 of 1924, Decided on 15th June 1926, from the appellate decrees of the 2nd Sub-J., Pabna, D/- 8th October 1923.

(a) *Will—Bequest.*

A bequest cannot be placed in the same category as a transfer inter vivos. [P. 235, C. 2]

(b) *Landlord and tenant—Nature of tenancy—Origin unknown—Uniform rate for more than 50 years—Lease for dwelling house—Suit not for rent—Inference that tenancy is permanent and heritable might be drawn.*

Where the origin of the tenancy was unknown, the rent had been paid at a uniform rate for more than 50 years, and the lease was for dwelling purpose.

*Held*: that the inference that the tenancy was permanent and heritable might be drawn. [P. 235, C. 2; P.236, C. 1]

(c) *Evidence Act, S. 32—Documents not inter partes—Statements as to boundary description—Executant dead—Documents are admissible.*

Where a person holding some land on the immediate east of the disputed land executed certain documents in favour of some other persons and in describing the boundaries of his own land he gave the name of the plaintiffs' predecessor as the owner of the land on one of his boundaries.

*Held*: that such documents, after the death of the executant, are admissible under S. 32. 16 *C. W. N.* 252; 23 *Bom.* 63; 11 *Bom. L. R.* 409; 11 *A. L. J.* 139; 17 *C. W. N.* 108; 45 *Cal.* 159 and 22 *W. R.* 231, *Foll.*; *A. I. R.* 1924 *Cal.* 1067 *Diss. from.* [P. 236, C. 1, 2]

*Dwarka Nath Mitter* and *Bhupendra Chandra Guha*—for Appellants.

*Sarat Chandra Bose, Hemendra Nath Sen* and *Gopendra Nath Dass*—for Respondents.

**B. B. Ghose, J.**—These three appeals arise out of three suits for rent brought by the plaintiff for the years 1325 to 1327 for lands which are non-agricultural and which are said to have been let out to the predecessors of the plaintiffs a considerable number of years ago extending over 50 years.

The original defendants in Suit No. 1742 out of which the second appeal No. 402 arises were three. Defendant No. 1 subsequently died and Defendants Nos. 2 and 3 were her heirs. Defendant No. 3 had transferred his interest to Defendants Nos. 4 to 8. The appellants before us are the defendants. The plea of the defendants was that the plaintiffs had no right to maintain the suit for rent. The appeal was limited to the claim for rent after Assin 1327, when Budh Singh, the testator, whose executors, are two of the plaintiffs, died. It is now admitted by the appellants that they are bound to pay rent to the plaintiffs for the period till the death of Budh Singh. But after the death of Budh Singh they are not bound to pay rent to the present plaintiffs. Their argument is based on the following facts: Budh Singh was a member of a joint Mitakshara family which consisted of the Plaintiff No. 1 and the direct descendants of Budh Singh who are shown in the genealogical table given in the judgment of the learned Subordinate Judge (at page 14 of the paper-book). Budh Singh being a member of such family and the properties in suit being his ancestral properties he was not competent to execute a Will with regard to these properties; and on that ground it is contended that the executors named in the Will had no right to bring these suits. They do not stand in the shoes of the coparceners of Budh Singh to whom the properties would go by survivorship. It is also urged that the lower appellate Court ought not to have taken into consideration the statement made in the Will of Budh Singh that the properties were self-acquired properties. But the difficulty in the way of the appellants is that this question was not raised in the trial Court. With reference to this contention the learned Subordinate Judge observed as follows:

> But those objections were not raised in the trial Court. Had they been raised there, the plaintiffs could have adduced evidence to show that they were the separate and self-acquired properties of Budh Singh.

From that observation of the learned Subordinate Judge it is not possible for us to differ. The learned Subordinate Judge does not find as a fact whether these properties were self-acquired properties of Budh Singh on the basis of the statement in the Will. What he states is that it is stated in the Will that these properties were self-acquired properties. It was not shown that they were ancestral properties. Had the defendants taken the plea that they were ancestral properties of the joint Mitakshara family evidence might have been adduced by the plaintiffs to substantiate the statement made in the will. That being so it is not open to the defendants who are the appellants before us to raise that contention in second appeal. This argument of the appellants must fail.

It is next contended that these tenancies are not transferable and therefore they could not be bequeathed. The difficulty with regard to this question again is that the properties have not been transferred at all. A bequest cannot be placed on the same category as a transfer inter vivos. It is also argued that the tenancies having been created before the Transfer of Property Act the incident of heritability and transferability does not attach to it. But as a matter of fact these properties have been inherited according to the defendant's own allegation, and the plaintiffs' right of inheritance was acknowledged by the landlord. Under such circumstances even if it be conceded that the interest under the lease was not originally heritable Budh Singh might claim to have acquired a new title when his interest was acknowledged by the landlord. This might very well have been after the passing of the Transfer of Property Act. This question does not appear to have been directly put in issue in either of the Courts below. It seems to me therefore that this question is without any substance. The Subordinate Judge has very rightly refrained from coming to any conclusion as regards the question whether the plaintiffs' right is a permanent right or not. But he comes to a finding as to the facts relating to the tenancy, that its origin is unknown; that the rent had been paid at a uniform rate for more than 50 years;

and that the lease was for dwelling purpose. From these findings of fact he might have drawn the inference that the tenancy was permanent and heritable. But as this question does not directly arise in a suit for rent brought by the plaintiffs against the defendants as tenants he has not drawn the obvious inference from the facts found in the case. This appeal must therefore fail and is dismissed with costs.

With regard to Appeal No. 405 arising out of Suit No. 1739 the questions raised above are common to it. But there was another question with reference to the identity of the land. It was objected by the defendants that this land did not belong to the plaintiffs. The learned Subordinate Judge has come to the conclusion upon the evidence in the case that this land did actually belong to the plaintiffs. In dealing with the evidence he has taken into consideration two documents Exhibits 109 and 108 as being in favour of the plaintiffs' contention. These two documents appear to have been executed by one Imam Bux who was a person holding some land on the immediate east of the disputed land. He executed these documents in favour of some other person and in describing the boundaries of his own land he gave the name of the plaintiff's predecessor as the owner of the land on one of his boundaries. It is objected on behalf of the appellants that this evidence is inadmissible; and although the learned Subordinate Judge has come to his conclusion upon this evidence as well as upon other evidence it is contended that if this evidence is held to be inadmissible we have no other alternative but to send the case back to the lower appellate Court in order that that Court may come to a finding of fact on the question after excluding these two documents from the evidence in the case. I have therefore to examine the proposition that these two documents are not admissible in evidence.

There has been some conflict of decisions on this question. But before I deal with that question I must state that no objection was taken to the admissibility of these documents in the trial Court. It is not known whether any person gave evidence to the effect that Imam Bux was the person holding any land on the boundary of the disputed land. The documents themselves were proved by a person who was not a party to the document. Imam Bux was dead. The Subordinate Judge held on the authority of the case of *Abdullah* v. *Kunj Behary* (1) that under S. 32 (3) of the Evidence Act the documents were admissible in evidence. It is contended before us that it is not so, and reliance has been placed on two cases: *Soroj Kumar Acharji Chowdhuri* v. *Umedali Howladar* (2) and *Pramatha Nath Chowdhuri* v. *Krishna Chandra Bhattacharjee* (3). As the Subordinate Judge points out the case of *Soroj Kumar Acharji* v. *Umedali Howladar* (2) does not deal with the question whether documents such as these are admissible under S. 32 of the Evidence Act or not. The learned Judges there dealt with the question whether such documents were admissible in evidence under S. 11 or S. 13 of the Evidence Act. The question that we have to consider is whether these documents are admissible under S. 32 of the Evidence Act. This question was dealt with by a Division Bench of this Court consisting of Panton, J., and myself in *Ketabuddin* v. *Nafar Chandra* (10), where I enumerated all the cases I could find in which the question was considered. It has been held in a number of cases that such documents are admissible under S. 32 of the Evidence Act: See *Ningawa* v. *Bharmappa* (4), *Haji Bibi* v. *H. H. Sir Sultan Mahomed Shah* (5); *Abdulla* v. *Kunj Behary Lal* (1); *Natwar* v. *Alkhu* (6); *Imrit Chamar* v. *Sirdhari Pandey* (7); *Ambar Ali* v. *Lutfi Ali* (8). There is only one case of *Pramatha Nath Chowdhuri* v. *Krishna Chandra Bhattacharjee* (3) which lays down the contrary proposition. I may also refer to the case of *Raja Leelanund Singh* v. *Mt. Lakhputee Thakoorani* (9) which was discussed and followed in the case of *Ningawa* v. *Bharmappa* (4) as laying down the proposition that such documents were admis-

(1) [1911] 14 C. L. J. 467=12 I. C. 149=16 C. W. N. 252.
(2) A. I. R. 1922 Cal. 251.
(3) A. I. R. 1924 Cal. 1067.
(4) [1899] 23 Bom. 63.
(5) [1909] 11 Bom. L. R. 409=2 I. C. 874.
(6) [1913] 11 A. L. J. 139=18 I. C. 752.
(7) [1911] 15 C. L. J. 7=13 I. C. 120=17 C. W. N. 108.
(8) [1918] 45 Cal. 159=21 C. W. N. 996=41 I. C. 116=25 C. L. J. 619.
(9) [1874] 22 W. R. 231.
(10) A. I. R. 1927 Cal. 230.

sible. As there is such a long line of authority in the different High Courts in support of the proposition that these documents are admissible under S. 32 of the Evidence Act, it is not necessary to discuss the question as I should have felt it to be if this point were res integra. I need only say that I prefer to follow the long line of cases rather than accept the view expressed in the single case mentioned above. The result is that this point also fails and this appeal must also be dismissed with costs.

With regard to Appeal No. 442, arising out of Suit No. 1740, in addition to the question as to the right of the plaintiffs under the bequest of Budh Singh another question was raised that this property did not belong to Budh Singh at all. The learned Subordinate Judge has, however, found as a fact that the defendant and his father before him had been paying rent with regard to this land to Budh Singh and they had attorned to him. The defendants' case was that the land belonged to Panna Bibi, a lady of that family. Having regard to this finding of the Subordinate Judge this question cannot be raised in the second appeal. The special point with regard to this appeal also fails and this appeal also must be dismissed with costs.

**Cammiade, J.**:—I agree.

*Appeals dismissed.*

---

## A. I. R. 1927 Calcutta 237

NEWBOULD AND GRAHAM, JJ.

*Jogesh Chandra Banerjee* and *another* —Plaintiffs—Appellants.

v.

*Hayder Ali* and *others*—Defendants—Respondents.

Appeals Nos. 631 to 637 of 1923, Decided on 21st July 1225, from the appellate decrees of the Dist. J.. Noakhali, D/- 18th September 1922.

*Civil P. C., O. 2, R. 2—Suit for declaration of title by purchaser of the rights of auction-purchaser at revenue sale.*

**A purchaser of the rights of the auction-purchaser of a residuary share of an estate at a revenue sale brought a suit for declaration of his title and for joint possession against co-sharers who were in exclusive possession of different portions of the land of the estate. The defendants did not traverse the plaintiff's allegation as to his cause of action arising from their individually refusing to allow him to take possession of the separate parcels of land which were the subjects of separate suits.**

*Held* : that the cause of action was based on the fact that when the plaintiffs tried to take possession of the particular piece of land which was the subject of a separate suit they were resisted by the defendants in that suit. It was not based on any concerted action of the other proprietors which took place before the auction-purchaser and the suit as framed was maintainable. [P 238 C 1, 2]

*Sarat Chandra Basak* and *Jitendra Kumar Sen Gupta*—for Appellants.

*Bijan Kumar Mukerjee* and *Raj Kumar Chakravarty*—for Respondents.

**Judgment.**—In 1914 the residuary share of an estate was sold at a revenue sale and the plaintiffs purchased the rights of the auction-purchaser. They were unable to get possession of any portion of the estate as purchaser of this share. They then brought eight suits for declaration of their title and for joint possession against co-sharers who were in exclusive possession of different portions of the land of the estate. At the trial the main issue between the parties was whether the separate shares entered in the Collectorate register were recorded as separate accounts under S. 10 or under S. 11 of Act 11 of 1859. The plaintiffs' contention was that separate accounts were opened under S. 10 which relates to separation of shares held in common. The contention of the defendants in each suit was that the separate accounts were opened under S. 11 which relates to the separation of shares consisting of land. On this issue the plaintiffs succeeded and obtained decrees in the first Court. On appeal the lower appellate Court though upholding the decision of the Munsiff on the main issue decreed the appeals and dismissed the suit on the ground that they were not maintainable. I should mention that they only appealed in seven of the suits, as one had been compromised in the first Court.

In our opinion the lower appellate Court has misunderstood the nature of the cause of action on which the plaintiffs based these suits. This is to some extent due to the unsatisfactory way in which the plaints have been prepared. The plaintiffs' real cause of action is set out in paragraph 5 of the plaint. But in pargraph 9 where they give the date of the cause of action they gave the dates of three different events which are in-

dependent of the cause of action set out in paragraph 5. The plaintiffs' real cause of action was that when they attempted to take possession by virtue of their purchase of each particular piece of land which was subject of a separate suit they were in each resisted by the defendants to the suits. These defendants in each suit are the persons who have been recorded as possessing the land in the Record of Rights prepared at the last Survey Settlement. In discussing the cause of action the first error in which the lower appellate Court has fallen is to confuse the defaulting proprietor with the plaintiffs' predecessor. It is obvious that when he refers to the plaintiffs' predecessors he means the defaulting proprietors who owned the residuary share of the estate before the revenue sale. But they were not the plaintiffs' predecessors. The predecessor of the plaintiffs was the actual auction-purchaser and he admittedly never had any possession delivered by the Collector after his purchase at the revenue sale. The lower appellate Court seems to think that the plaintiffs' cause of action arose at some time unknown when the co-sharers of the estate by mutual arrangement divided the land among themselves so that each held certain specific land as representing his respective share. But this could not be the plaintiffs' cause of action as they, having the rights of the purchaser at the revenue sale, were unaffected by any arrangement which the other co-sharers had made before the revenue sale. The effect of this mutual arrangement between the co-sharers was that they were individually possessing separate plots of land and individually asserting independent title to the land. At the trial they did not traverse the plaintiffs' allegation as to their cause of action arising from their individually refusing to allow them to take possession of the separate parcels of land which is the subject of a separate suit. It was in fact traversed in one written statement only, that in suit 745 but even there the contention was not pressed at the trial and no issue was framed on this point. On the facts as alleged in the plaint and not disputed the plainiffs have good cause of action against each separate set of defendants in each suit. Their cause of action was based on the fact that when they tried to take possession of the land which was the subject of one suit they were resisted by the defendants in that suit. Their cause of action was not as the lower appellate Court seems to hold on any concerted action of the other proprietors which took place before the auction purchase. In fact there was no evidence given at the trial on either side to show that there had been any combination by the plaintiffs' co-sharers to prevent their taking possession. On the pleadings there was separate cause of action and there has been no splitting up of joint cause of action. We think it would have been better if in each of these suits the other co-sharers had been joined as pro forma defendants and the matter decided in their presence. But that was a defect of nonjoinder to which no objection was taken at the trial and it is not fatal to the plaintiffs' suits. It is merely in the present case a formal objection since it has not been shown that any of the co-sharers have been in any way prejudiced by their nonjoinder in any of these suits. We hold therefore that the ground on which the suits have been dismissed was not established and that the suits as framed were maintainable. We think that the defects in the plaints were to some extent responsible for the mistake which has been made by the learned District Judge and we take that into consideration in respect of the order which we make as regards costs.

We decree these appeals and we set aside the judgment and decrees of the lower appellate Court dismissing these suits. The judgment and decrees of the Munsiff are restored in toto in respect of each of these suits. The parties will bear their own costs in this and in the lower appellate Court.

*Appeals allowed.*

---

## A. I. R. 1927 Calcutta 238

SUHRAWARDY AND DUVAL, JJ.

*Siddik Ahmed Kerani* — Plaintiff — Appellant.

v.

*Azizar Rahaman Khan* and *others*— Defendants—Respondents.

Appeal No. 1031 of 1923, Decided on 16th Novemb 1926, from the appellate decree of the Dist. J., Chittagong, D/- 28th November 1922.

(a) *Calcutta High Court Rules—Registrar can admit appeal out of time even though full Court-fees are not paid within time.*

Under the rules and the customs of the Court the Registrar has the power to admit an appeal out of time, even though full Court-fees are not put in within the period of limitation.

[P 239 C 1]

(b) *Civil P. C., O. 1, R. 9—Suit for khas possession—Division of land not possible—Some respondents dead—Heirs not brought on record—Appeal should not be entertained despite R. 9.*

Where it is not possible to differentiate and divide the lands among the various respondents and some of them are dead and their legal representatives are not brought on record, the Court will not be justified, despite the provisions of O. 1, R. 9, in entertaining the appeal in which no effective decree can be made owing to the absence of interested parties : 25 *C. W. N.* 249, *Rel. on.*

[P 239 C 2]

*Jogesh Chunder Roy* and *Chandra Sekhar Sen*—for Appellant.

*Biraj Mohan Majumdar*, *Narendra Kumar Das* and *Nurul Huq*—for Respondents.

**Judgment.**—In this case the plaintiff brought a suit to have his Sadar Putni Taluka right declared and Khas possession given in certain properties alleging that one Jogendra Lal Chowdhury had purchased the estate under Act 11 of 1859 and had given him a Putni lease with powers to avoid the encumbrances on the land and obtained Khas possession. The first Court declared his title to most of the lands, excluding some mosques and burial grounds, and found that he was entitled to obtain Khas possession. In appeal the learned District Judge upheld the declaration of the plaintiff's title in respect of the land decreed by the lower Court, but set aside the order for Khas possession. The appeal before us is directed against that order.

A preliminary objection is taken, first of all, with reference to the question whether the Registrar of this Court was competent to admit the appeal out of time as it appears that the full Court-fees were not put in within the period of limitation. On this point the rules of this Court have been placed before us and it appears that under the rules and the customs of the Court the Registrar had the power to admit the appeal out of time.

A more serious difficulty arises owing to the fact, however, that of the defendants who are interested as being in Khas possession of the lands, and who, according to the Plaintiff No. 44, it appears that Defendant No. 11 is dead, a Rule was issued for substitution of his heirs but was subsequently discharged. It also appears that the Defendant-Respondent No. 42 is also dead, and no steps have been taken at all to substitute his heirs.

Now the order which we are asked to give is one of Khas possession of all the disputed lands. But there is nothing on the record to show that the various defendants owned lands in separate allotments or even in separate shares. There is no definition of shares, or of specific lands, belonging more to one defendant than to another. The effect therefore would be, if we were to give a decree for Khas possession, that it would be an infructuous decree for the unknown shares of the deceased Respondents Nos. 11 and 42 could not pass under it. The question therefore is whether the appeal does not abate. It is urged on behalf of the appellant that he will not proceed against the deceased respondents, but is entitled to appeal for a decree in respect of the rest. That might be so, if it was at all possible to differentiate and divide the lands of the deceased respondents from the rest of the lands. But that is impossible. The case therefore appears to us to be one in which the Court should not be justified, despite the provisions of O. 1, R. 9, in entertaining this appeal in which no effective decree can be made owing to the absence of interested parties. In this connexion see the case of *Haran Sheikh* v. *Romesh Chandra Bhattacharjee* (1). In this view the appeal is dismissed with costs to the respondents who have appeared in this Court.

*Appeal dismissed.*

(1) [1920] 25 C. W. N. 249=62 I. C. 425.

---

## A. I. R. 1927 Calcutta 239

GREAVER AND PANTON. JJ.

*Appul Gafur* — Judgment-debtor—Appellant.

v.

*Mannalal Agarwala* and *others*—Decree-holders and Judgment-debtor—Respondents.

Appeal No. 152 of 1924, Decided on 8th December 1925, from the order of the Offg. Sub-J., Jalpaiguri, D/- 12th February 1924.

*Civil P. C., S.* 145—*Surety undertaking to be liable in case a decree was passed against the debtor and the debtor failed to pay—Compromise decree passed granting certain period to debtor for payment—Surety is not liable.*

A was arrested before judgment and B became a surety for him. The surety bond provided that if a decree was passed against A and the decretal amount was not realized from him B would be liable for the amount. Eventually a compromise decree was passed by which A was given certain period for payment of the amount.

*Held*: that as the decree that was passed was not capable of immediate execution the surety was no longer liable for the decretal amount.

[P 240, C 2]

*Atul Chandra Gupta* and *Radhicaranjan Guha*—for Appellant.

*Santosh Kumar Bose*—for Respondents.

**Greaves, J.**—This is an appeal against an order passed by the Officiating Subordinate Judge of Jalpaiguri affirming an order of the Munsif of the First Court of the same place. The matter is a short one. A certain debtor was arrested before judgment in a money-suit. The appellant became surety for him and the surety bond provided that the surety was to be liable in case the suit was decreed against the defendant and the decretal amount was not realized from him in execution. Eventually, a compromise decree was obtained in the suit whereby Rs. 80 claim was remitted and a period of one month was given within which the money was to be paid. The judgment-debtor, as a result of the execution proceedings paid two sums of Rs. 150 and Rs. 50 and decamped. Thereupon the decree-holders attempted in these proceedings to enforce the liability of the surety for the balance of the decretal amount.

The surety has taken a point that he is not liable because one month was given by the compromise decree for payment of the decretal amount and he says that as this time was given to the judgment-debtor without the surety's consent he has been released from his suretyship. We think that this contention is correct. The lower appellate Court seems to consider that in default of evidence that the turety did not agree to the compromise she decree-holders are entitled to succeed. But we do not think that this is really the point at issue. We think that one has got to consider whether by the terms of the suretyship bond it was in the contemplation of the parties that a decree would be obtained which was not immediately capable of execution and I cannot think myself that in a surety bond of this form it can be taken to be in the contemplation of the parties that there should be any delay in the execution of the decree. Surely, the surety could not have contemplated the liability continuing for an indefinite number of years which would be the case if the respondents' contention is correct. This being so we think that the decree is no longer enforceable against the surety under the terms of the surety bond having regard to the fact that the compromise decree which was obtained was not immediately capable of execution against the judgment-debtor. For these reasons the order of the lower appellate Court is set aside and the appeal is allowed.

The appellant will be entitled to his costs in this and in the two Courts below. We assess the hearing-fee in this Court at two gold mohurs.

**Panton, J.**—I agree.

*Appeal allowed.*

---

## A. I. R. 1927 Calcutta 240

MUKERJI AND GRAHAM, JJ.

*Firm Chaitanya Krishna Mandal* and *others*—Petitioners.

v.

*Jagat Chandra Banikya* and *others*—Opposite Party.

Civil Revision No. 789 of 1926, Decided on 29th November 1926, from the order of the Sub-J., Tipperah, D/- 26th April 1926 and the order of the 3rd Munsiff, Chandpur, D/- 14th November 1925.

*Civil P. C., O.* 38, *R.* 11—*Attachment before judgment—Another person attaching and selling same property in execution of his decree—Sale not confirmed — Attachment before judgment revives and re-attachment is not necessary.*

Where a person obtains attachment before judgment and a decree is passed subsequently and another person in execution of his decree attaches the same property and sells it, but the sale is not confirmed, the attachment before judgment again revives and it is not necessary to re-attach the property over again in execution of the decree passed.

[P 242, C 2]

*Asita Ranjan Ghose*—for Petitioners.

*Nagendra Chandra Chowdhury*—for Opposite Party.

**Mukerji, J.**—This Rule is directed against an order passed by the Subordinate Judge of Tippera dated the 26th of April 1926 and also against an order

passed by the Munsif, 3rd Court of Chandpur, dated the 14th of November 1925. The facts which led up to the application upon which this Rule has been issued are the following :

The petitioners in this Rule obtained a decree for money against the opposite party. The said decree was passed in a suit which had been instituted by the petitioners for recovery of money and during the pendency of the said suit on or before the 11th of June 1923, the petitioners attached before judgment three properties belonging to the opposite party. The decree was passed on the 26th of September 1923 and in execution of the said decree the three properties were advertised for sale. In the meantime another person, namely, one Nagarbashi obtained another money decree against the opposite party and attached one of the properties namely Lot No. 1 out of the aforesaid three properties and the said lot was put up to sale and purchased by the said decree-holder Nagarbashi. The petitioners thereafter put in a petition stating that Lot No. 1 had already been sold as above stated and consequently that it could not be sold again and praying that only Lots Nos. 2 and 3 might be sold. Lots Nos. 2 and 3 were then sold in execution of the petitioners' decree and were purchased by the petitioners. The sale was confirmed and the execution case relating to the petitioner's decree was struck off on part satisfaction.

Within 30 days of the sale of Lot No. 1 the opposite party paid in the decretal amount due on Nagarbashi's decree and in consequence of the said payment the sale of Lot No. 1 was not confirmed but was set aside. Thereafter the petitioners proceeded against the said Lot No 1 in execution for recovery of the balance of the decretal amount due to them and the said lot was again put up to sale and was purchased by the petitioners on the 24th of October 1925. Thereafter certain claims were put in on behalf of parties who are not before us but those claims were not allowed. The sale in favour of the petitioners in respect of Lot No. 1, however, was set aside by the learned Munsif by an order passed on the 24th of November 1925. The Munsif held that the sale of Lot No. 1 had taken place without attachment and was therefore void. He, therefore, in the exercise of his powers under S. 151 of the Code of Civil Procedure set aside the sale and refused to confirm it. Against this order the petitioners preferred an appeal which was dismissed by the Subordinate Judge of Tippera on the 26th of April 1926, the learned Subordinate Judge being of opinion that the appeal was incompetent. The petitioners have thereafter moved this Court and obtained the present Rule.

In the Rule two questions have been urged on behalf of the petitioners. The first is to the effect that the order which had been passed by the learned Munsif may very well be regarded as one passed under the provisions of O. 21, R. 92 of the Code of Civil Procedure and that, therefore, the learned Subordinate Judge was wrong in holding that no appeal lay from the said order.

The second question that has been raised is as regards the propriety of setting aside the sale and refusing to confirm it in the view that a fresh attachment was necessary after the sale in favour of Nagarbashi had been set aside.

It is not necessary to deal with the first of the aforesaid contentions; for the Rule is directed not merely against the order which the learned Subordinate Judge has passed but also against the order which was passed by the learned Munsif and we are of opinion that the latter order should be set aside by us in the exercise of our powers under S. 115 of the Code of Civil Procedure. Lot No. 1 it is admitted was attached before judgment at the instance of the present petitioners. Under O. 38, R. 11, it was not necessary for the petitioners to re-attach the said lot upon an application for execution of the decree which the petitioners had obtained on the 26th of September 1923 and the attachment before judgment which had been made at the instance of the petitioners became by virtue of the petitioners' application for execution an attachment in execution. When this attachment was existing Nagarbashi attached the property over again and put it up to sale which, as I have already stated, was eventually set aside and not confirmed. If the sale had been confirmed the effect of that would have been to put an end to all attachments that might have existed prior to the date of that sale. This is a proposition which is well settled and was laid

down in the case of *Kashi Nath Roy Chowdhry* v. *Surbanand Shaha* (1).

It was observed in that case that on the happening of a judicial sale, all previous attachments effected upon the property sold fall to the ground. If the sale in execution of Nagarbashi's decree had been duly confirmed by the Court the title of Nagarbashi would have dated back to the date of the sale and all previous attachments would have fallen through. But the effect of refusing to confirm that sale was to remit the property to the estate in which it was before the sale. It follows, therefore, that when this sale was set aside the attachment which had existed in respect of this property in execution of the decree which the petitioners had obtained by reason of the fact that the petitioners had got an attachment of it before judgment was revived and if thereafter the property was sold and purchased by the petitioners, as it has been, it cannot be contended that the sale took place without an attachment.

Some argument has been advanced before us based on the provisions of O. 21, R. 57 of the Code of Civil Procedure and it has been urged that in view of the provisions of this rule the attachment cannot be said to have been subsisting at the date at which the sale took place. Now, it is not necessary on the present occasion to go into the question whether an attachment before judgment is an attachment which comes within the purview of O. 21, R. 57 of the Code of Civil Procedure, a question with regard to which there appears to be a conflict of judicial opinion : see for instance, the case of *Ganesh Chandra Adak* v. *Banwari Lal Ray* (2) and *Meyyappa Chettiar* v. *Chidambaran Chettiar* (3), because it is conceded that in the present case no question of dismissal of an execution petition for the decree-holder's default such as is contemplated by that rule has arisen. It is clear therefore, that having regard to the provisions of O. 38, R. 11 of the Code of Civil Procedure, and the considerations to which I have already referred, there can be but one conclusion at which we can arrive, namely, that the attachment which the petitioners had obtained prior to judgment in this suit remained operative until the sale took place in execution of Nagarbashi's decree and when that sale was not confirmed the said attachment was again revived and it was not necessary to re-attach the property over again. The contrary view taken by the learned Munsif, in my opinion, seems to be wrong.

The Rule in this case therefore should be made absolute and the orders against which it is directed must be set aside and we would further order that the learned Munsif will now proceed to confirm the sale in view of the provisions of O. 21, R. 92 of the Code of Civil Procedure. The petitioners are entitled to the costs of this Rule as well as of the costs in the Court of first instance. Hearing-fee in this Rule is assessed at two gold mohurs.

**Graham, J.**—I agree.

*Rule made absolute.*

(1) [1885] 12 Cal. 317.
(2) [1916] 16 C. W. N. 1097=14 I. C. 345=16 C. L. J. 86.
(3) A. I. R. 1924 Mad. 494=47 Mad. 483 (F. B.).

---

## * A. I. R. 1927 Calcutta 242

CHOTZNER AND DUVAL, JJ.

*Bhola Nath Hazra* and *others*—Accused—Petitioners.

v.

*Emperor*—Opposite Party.

Criminal Revision No. 759 of 1926, Decided on 29th October 1926, from the order of the S. J., Burdwan, D/-26th June 1926.

* *Criminal P. C., S. 276—Jurors summoned—Only the number forming quorum present—All of them cannot be empanelled—Some other persons present should be added and jurors selected by lot—Omission to do so vitiates trial.*

Where out of the jurors summoned to attend the Court, only such number of jurors is present as is necessary to form a quorum, proper course is for the Judge to make good the deficit by choosing some other persons who are present, add their names to the jurors that are present and from the whole body to choose the necessary jurors by lot to act as the jury. Omission to follow this course and empanell only the jurors that are present is an irregularity, of a very grave and material nature inasmuch as it affects the proper constitution of the Court : 7 *C. W. N.* 188 ; 33 *All.* 385 and *A. I. R.* 1925 *Cal.* 798, *Rel. on.* [P 243 C 1]

*N.K. Bose, Probodh Chunder Chatterjee* and *Panchanan Chowdhury*—for Petitioners.

*Khundkar*—for the Crown.

**Chotzner, J.**—This rule must be made absolute on the first ground upon which it was granted, namely that the trial was bad as not being in conformity with the provisions of S. 276 Criminal Procedure Code. It appears that of the 12 jurors summoned to attend the Sessions Court only 5 appeared, and those were empanelled as jurors and heard and decided the case.

Now S. 276 requires the jurors to be chosen by lot and the second proviso to the section lays down that in case of a deficiency of the persons summoned, the number of jurors required may with the leave of the Court be chosen from such other persons as may be present. In the present case there being only 5 jurors present and 5 being the necessary quorum for a jury plainly there were not enough jurors present to permit of their being chosen by lot. The proper course in my opinion therefore for the Judge to have followed was to make good the deficit by choosing some other persons who were present and adding their names to the five jurors and from the whole body choosing the necessary five by lot to act as the jury in the case.

The learned Sessions Judge thinks that the procedure followed is a mere irregularity and as no objection was raised by the accused and no prejudice was caused to them the verdict cannot be upset. He refers to the case of *Empress* v. *Jhubboo Mahton* (1). That decision was however not followed in the later case of *Brojendra Lal Sirkar* v. *King-Emperor* (2), wherein it was held that

> the irregularity was of a very grave and material nature inasmuch as it affected the proper constitution of the Court.

The same view was taken by the Allahabad High Court in the case of *Emperor* v. *Bradshaw* (3).

The latest case of *The Government of Bengal* v. *Muchu Khan* (4) does not lay down any different proposition of law. We are therefore of opinion that the trial is bad. The conviction and sentence are according to law upon the original charges. The petitioners are permitted to remain on their present bail pending the orders of the Sessions Judge.

**Duval, J.**—I agree.

*Rule made absolute.*

(1) [1882] 8 Cal. 739=12 W. R. 233.
(2) [1902] 7 C. W. N. 188.
(3) [1911] 33 All. 385=9 I.C. 278=8 A.L.J. 182.
(4) A. I. R. 1925 Cal. 798.

## A. I. R. 1927 Calcutta 243

CUMING AND PAGE, JJ.

*Kailash Chandra Ghosh*—Plaintiff—Appellant.

v.

*Hamid Ali* and *others*—Defendants—Respondents.

Appeal No. 2413 of 1923, Decided on 17th January 1926, from the appellate decree of the Dist. J., Chittagong, D/- 26th June 1923.

*Lease—Kabuliyat—Construction—Whether rent fixed is in kind or cash depends upon the terms of a particular Kabuliat.*

In each case the question, whether rent stipulated for is in kind or cash, depends upon the particular terms of the particular kabuliyat and no hard-and-fast rule can be laid down.

Where a kabuliyat provided: "I do execute this patta that in lieu of the price of Rs. 39 per year as described above with respect to the land you would be liable to deliver within the month of Magh every year at my house 78 aris of paddy. If you do not deliver then I shall be entitled to realize the same with interest and damages at the rate of 4 annas per rupee."

*Held*: that the rent provided for was in cash at Rs. 39 per year and not in kind. [P 244, C 1]

*Paresh Chandra Sen*—for Appellant.

*Harendra Nath Mookerjee* for *Probodh Kumar Das*—for Respondents.

**Cuming, J.**—In the suit out of which this appeal has arisen the plaintiff sued for rent for two years, 1281 and 1882 M. E. at the rate of 78 aris of paddy. He valued the paddy at 1¼ aris per rupee and laid his claim at Rs. 160-14. The contention of the defendant was that the jama was a money one of Rs. 39 only and that that was taken as the fixed price of 78 aris of paddy.

The first Court decreed the plaintiff's suit in full holding that the plaintiff was entitled to get the price of 71 aris of paddy a year at the rate of 1½ aris per rupee. The defendant appealed to the District Court and the learned District Judge held on a construction of the kabuliyat that the plaintiff was not entitled to recover rent at more than Rs. 39 per annum with cess and damages at 25 per cent.

The plaintiff has appealed to this Court and the contention he puts forward is that he is entitled on a proper construction of the kabuliyat to recover rent at the rate of 78 aris of paddy a year at the present market rate. It will be seen that this case depends entirely

on the proper construction of the kabuliyat. There are a number of decisions of this Court in which similar cases have been dealt with. It may be taken that the consensus opinions of the learned Judges who decided those cases is that each case depends upon the particular terms of the particular kabuliyat and that no hard-and-fast rule can be laid down in these cases. Therefore, it would serve no useful purpose to refer to any of the numerous decisions on the point. The kabuliyat states as follows :

> As you have executed istamrari kabuliyat for bhag paddy and have prayed for getting patta, I do execute this patta, that in lieu of the price of Rs. 39 per year as decribed above with respect to the land you would be liable to deliver within the month of Magh every year at my house 78 aris of paddy.

The learned Judge considering this kabuliyat has come to the conclusion that the rent fixed was really a money-rent, namely, Rs. 39 per annum, and that as a concession the tenant was allowed to pay this rent in kind. After a careful consideration of the kabuliyat I am not prepared to say that the view taken by the learned District Judge is wrong. The concluding words of the patta are :

> If you do not deliver then I shall be entitled to realize the same with interest and damages at the rate of 4 annas per rupee.

It does not state that "I shall be entitled to realize paddy," but uses the expression "the same" which could possibly refer to the money-rent, and the fact that it is stated "with interest and damages at the rate of 4 annas per rupee" would lend some force to the contention that it was money-rent ; otherwise, it seems to me it would have been stated that "with interest and damages calculated at so many seers per aris".

I am not prepared to say that the construction put upon the kabuliyat by the learned District Judge is wrong.

The appeal, therefore, fails and is dismissed with costs.

**Page, J.**—I agree. To my mind this appeal presents no difficulty. The question is whether the amount of rent payable was the market price of 78 aris of paddy at the time when the aris of paddy should have been delivered, or Rs. 39, the rent which the defendant says was fixed by the patta. Each case must be determind having regard to the terms under which the tenant holds the land. In this case the tenant holds under a patta in which it is provided that

> I do execute this patta that in lieu of the price of Rs. 39 per year as described above with respect to the land you would be liable to deliver within the month of Magh every year at my house 78 aris of paddy of good quality, ripe, dry and unmixed with refuse and measured by any ari of 16 seers.....If you do not deliver then I shall be entitled to realize the same with interest and damages at the rate of 4 annas per rupee.

At the beginning of the document it is stated : "Bhag paddy fixed 78 aris price Rs. 39." As a matter of construction the learned vakil for the appellant contends that the proper inference to be drawn from the use of those latter words in the patta is that the rent should be in kind, namely, 78 aris of paddy, and that reference to Rs. 39 is made merely for the purpose of complying with the rules relating to the stamping and registration of documents

I agree with the view expressed by Mr. Justice Woodroffe in the case of *Bipro Charan Majhi* v. *Suchand Roy Chowdhury* (1) where, in considering the terms of a document almost identical with those before us, the learned Judge stated that if the price (in this case Rs. 39) was inserted merely for registration purposes it is strange that it should be found as representing the amount fixed for the rent in the body of the patta. In my opinion it is clear from the language used that this was a holding at a money rent of Rs. 39 payable in paddy. As there has been a failure to deliver the paddy in accordance with the contract the plaintiff landlord is entitled to recover the arrears of rent at the rate fixed, namely, Rs. 39 a year.

I agree that the appeal should be dismissed with costs.

*Appeal dismissed.*

(1) [1910] 12 C. L. J. 595=8 I. C. 945.

---

## * A. I. R. 1927 Calcutta 244

CHOTZNER, J.

*Sri Sri Kalimata Debi* and *another*—Plaintiffs.

v.

*Nagendra Nath Chuckerbutty* and *others*—Defendants.

Original Suit No. 382 of 1926, Decided on 12th November 1926.

* *(a) Hindu Law—Religious endowment—Suit in respect of properties belonging to idol can be maintained only by Shebait and as long as he does not refuse to do so, none else can sue on behalf of the idol.*

The proper person to institute a suit in respect of the property belonging to an idol is the Shebait and nobody else. In the absence of refusal by the Shebait to institute such a suit neither a worshipper nor the idol is competent to sue : 32 *Cal.* 129 (*P. C.*) ; *A. I. R.* 1925 *P. C.* 139 (*P. C.*) ; *Rel. on.* [P. 246, C. 2]

*(b) Hindu Law—Religious Endowment—Dedication to idol to save property from creditors—Dedication can be impeached—To test reality of dedication settlor's dealing with the property should be looked to.*

If the settlor is in debt at the time when he makes a dedication of his properties to an idol and the dedication is made to protect the property covered by it from creditors. the dedication becomes invalid and can be impeached. In dealing with the question whether an endowment is real or nominal, the manner in which the dedication of the property is held and enjoyed is a most important point for consideration : 27 *Cal.* 242, *Foll.* [P. 247, C. 1]

*S. M. Bose, B. C. Ghose* and *P. C. Ghose* —for Plaintiffs.

*P. N. Chatterjee* and *N. C. Chatterjee*—for Defendant No. 8.

**Judgment.**—This is a suit instituted by Sri Sri Kalimata Devi established at No. 28, Sovabazar Street, by her next friend Srimati Basanta Kumari Debi and by the said Srimati Basanta Kumari Debi as one of the worshippers of the said deity, for a declaration that the deed of revocation and mortgage executed by one Suresh Chunder Chuckerbutty are not binding upon the idol. The facts of the case are as follows :

Nemai Chunder Chuckerbutty, who died in 1894, left four sons : Sashi, Suresh, Nagendra and Debendra. Sashi and Debendra died before the 1st May 1922, on which date Suresh executed a deed of trust in favour of himself and his brother Nagendra in regard to two properties, being No. 12 Beniatolla Street, and 18 Sovabazar Street. The deed of trust provided that Suresh and Nagendra should be the Shebaits to carry on the worship of the idol and that Chandi, Nagendra's son, and Gourmohan, Debendra's son, should also be added to the category of Shebaits upon attainment of their majority.

On 6th June 1923 Suresh and Nagendra, acting for himself and as guardian for Chandi, and Bejoy, son of Suresh, as well as Charubala, Debendra's wife, as guardian for Gourmohan, executed a deed of revocation the effect of which was to set aside the deed of trust executed on the 1st May 1922. Thereafter, on 20th June 1923, Suresh executed a mortgage in favour of the 8th defendant, the firm of Kodarmull Luchmiuarain, which has since filed a suit on the mortgage and recovered a decree.

The defence to the suit is that the deed of trust in May 1922 is merely a colourable transaction executed in fraud of creditors and has therefore no legal or binding effect, and was never acted upon. It is further said that Suresh never actually divested himself of the property or of his beneficial interest therein and after the deed of settlement appropriated the rents and profits thereof to his own use and not to the worship of the idol. The defendants further plead that there was no dedication of the properties and no trust was effectually created thereby and that neither of the properties became debutter property or the absolute property of the idol. It was in any event a fraudulent or colourable debutter created with the ulterior object mentioned and thus constituted no valid endowment or dedication. The defendants further plead that the liability of the mortgagor was just and bona fide and that there was valid consideration for the said mortgage. They further plead that Sreemati Basanta Kumari Debi was not the Shebait of the idol and has no locus standi to maintain this suit, and further, that the idol never had any title in the properties so that no cloud could be cast over it in any way. The infant defendants submit their interest to the protection and judgment of the Court.

The defendants, Nagendra, Srimati Charubala Debi and Nandabala Debi, have filed written statements; and in paragraph 2 they say that some time before the deed of trust Suresh became involved in debts and closed his business, whereupon his creditors began to press him ; and in order to appease them Suresh proposed to these defendants that they should execute along with him a deed purporting to revoke the deed of dedication and it was on account of the importunate requests of Suresh that these defendants were prevailed upon to execute the deed of revocation and they say they had no independent advice at the time but acted entirely on the representation made by

Suresh without caring to read, understand or appreciate the nature and effect thereof.

The following issues were framed :

(1) Was there any valid dedication of the properties in suit to Plaintiff No. 1.

(2) Where the properties treated as absolute debutter properties of the idols ?

(3) Is the suit maintainable by either of the plaintiffs ?

(4) Is the deed of revocation void ?

(5) Is the mortgage in favour of Defendant No. 8 void.

(6) What reliefs, if any, are the plaintiffs or either of them entitled to ?

I will deal with the third issue first as it relates to the maintainability of the suit. As I have said, the plaintiffs are the idol and Srimati Basanta Kumari Debi, who is the widow of Nemai Chunder Chuckerbutty. The argument of the learned ceunsel for the plaintiff is that the idol is a juristic person and is therefore competent to sue and though in the ordinary way the Shebait is the proper person to represent the idol in any litigation, in the present case Nagendra, who is the only surviving Shebait, is not in a position to maintain the suit. Therefore Srimati Basanta Kumari Debi, who is a worshipper of the idol is the proper person.

On behalf of the defence it has been contended that the only person who can represent the idol in any litigation is the Shebait. Basanta was not appointed a Shebait under the deed of Trust, and so far from Nagendra not being in a position to maintain the suit, he admits in his examination that he has been acting as Shebait and has done what the Shebait is required to do according to the tenets of Hindu Law. Unless therefore it is shown that Nagendra is unwilling to maintain the suit, no one else can do so.

The rights of an idol to maintain a suit through its Shebait is indisputable. In the case of *Maharaja Jagadindra Nath Roy Bahadur* v. *Rani Hemanta Kumari Debi* (1) the head note says :

Although an idol may be regarded as a juridical person capable as such of holding property, especially where the dedication is of the completest character, yet the possession and management of the dedicated property with the right to sue in respect of it are vested in the Shebait.

At page 210 the following passage occurs :

But assuming the religious dedication to have been of the strictest character, it still remains that the possession and management of the dedicated property belong to the Shebait. And this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the Shebait, not in the idol.

In the case of *Pramatha Nath* v. *Pradhyumna Kumar* (2), the following passage occurs at page 251 :

It must be remembered in regard to this branch of the law that the duties of piety from the time of the consecration of the idol are duties to something existing. which, though symbolishing the Divinity, has in the eye of the law a status as a separate persona. The position and rights of the deity, must, in order to work this out both in regard to its preservation, its maintenance and the services to be performed, be in charge of a human being. Accordingly he is the Shebait custodian of the idol and the Manager of its estate.

It would appear therefore that the proper person to have instituted the suit was the Shebait and nobody else. Had the position been that Nagendra in his capacity of Shebait had definitely declined to institute the suit, it might perhaps have been open to Basanta as the next friend of the idol to have taken his place but in the absence of any such refusal it seems to me that neither Basanta nor the idol are competent. The suit is therefore bad.

I now proceed to consider the other issues. The deed of trust as it stands is undoubtedly a valid deed. Under it Suresh divested himself of his title in favour of the trustees and the trustees are himself and his brother Nagendra. Prima facie therefore the deed would constitute a valid endowment and no one could impeach it unless it were shown that it was executed in fraud of creditors. Now in the present case there is clear evidence that in May 1922 Suresh was heavily indebted. Two brothers have given evidence in Court today and from the evidence of the broker Balkissen who deals in hundies appears that hundies drawn by Suresh to the extent of Rs. 33,800 were in existence in May 1922, some of which would mature in that month and others a little later on. Learned counsel for the plaintiff has contended that some of these have been paid off. Very likely that is true, but the fact remains that on the particular date when the deed of trust was executed Suresh had a very large sum of money outstanding and had subsequently to renew the hundies. The result that inevitably followed was that

(1) [1904] 32 Cal. 129=31 I. A. 203=8 C. W. N. 809=8 Sar. 698 (P. C.).

(2) 52 I. A. 245=A. I. R. 1925 P. C. 139=52 Cal. 809.

a year or so later Suresh had to be declared an insolvent. Mr. J. N. Bose of the firm of Messrs. B. N. Bose and Co., Solicitors, says that a composition was come to between Suresh and his partner Satya Charan Sur and the creditors, and under it Suresh agreed to pay a certain proportion of the debts which the creditors agreed to accept. Mr. Bose says that he paid them a sum of Rs. 76,000 on Suresh's account, the total amount of debts being about $1\frac{3}{4}$ lakhs. There is, therefore, in my judgment no room for doubt that at the time when the deed of trust was executed Suresh was in serious financial embarrassment and that he resorted to this device in the hope of saving the properties from his creditors.

Now it is well established that if the settlor is in debt at the time when he makes a dedication of the character described, the dedication becomes invalid and can be impeached. In *Ram Chandra* v. *Ranjit Singh* (3) it was said at page 249 :

> We are of opinion that the first defendant is entitled to succeed on the ground that the dedication was nominal and colourable only made with a view to protect the property covered by it against the claims of the creditors.

At page 251 the following passge appears:

> In dealing with the question whether an endowment is real or nominal, the manner in which the dedication of the property is held and enjoyed is a most important point for consideration. In the present case there is not sufficient and reliable evidence to show how, during the four months in which the property was dedicated, the income of the properties was spent; nor is there any sufficient evidence in respect of any period subsequent to the death of the donor.

In the present case there is no satisfactory evidence to show how the income of the properties was spent. All that the evidence shows is that the idol which is an old family idol remained where it was ; that the pujari continued to receive the monthly stipend of Rs. 2, which he had always received, and that offerings varying from 4 annas to 8 annas continued to be made by outsiders to the deity and were presumably appropriated as in former years by the pujari. It is that a rate bill has been produced to show that there was a mutation of names, but that is a mere clerical piece of work and it does not seem to be sufficient to show that the income of the property was devoted to the worship and maintenance of the idol so as to divest the transaction from the suspicion that it was merely a colourable one.

The next point to be considered is what the effect of the deed of revocation is. On the face of it all the parties interested in the deed of Trust joined in revoking it. The motive for the revocation is obvious. If the dedicated property was inaccessible to his many creditors, Suresh would have found himself in an even more hopeless position and there can in my judgment be no doubt that he prevalied upon his brother Nagendra and sister-in-law Charubala to become signatories to the document simply to help him out of the difficulty. Nagendra, in his evidence in the box, pretended that he did not know what he was signing and that his brother was so insistent that he was quite content to put his signature to the document without reading it. Nagendra, according to his own account, is a man of affairs, and it is merely childish for him to make a statement of that kind. In point of fact the statement is false, and has been conclusively proved to be false by the evidence of the witness Dr. Sailendra Nath Ghose who is Mr. J. N. Bose's assistant and a pleader of the Alipore Court who swears that he read and explained the whole document to Nagendra as well as to the lady before they affixed their signatures.

I would therefore answer the issues by saying that the dedication to the idol was valid in its inception, but there was nothing to prevent the trustees from revoking it. The deed of revocation is a valid document. The mortgage in favour of the 8th defendant was executed for consideration and it is valid and binding. I answer the issues accordingly. The result therefore is that the suit fails and must be dismissed with costs on scale No 2.

*Suit dismissed.*

(3) [1899] 27 Cal. 242 =4 C. W. N. 405.

---

## A. I. R. 1927 Calcutta 247

B. B. GHOSE AND CAMMIADE, JJ.

*Har Kumar De*—Plaintiff—Appellant.

v.

*Jagat Bandhu De*—Defendant—Respondent.

Appeal No. 706 of 1924, Decided on 18th June 1926, from the appellate decree of the Sub-J., Chittagong, D/- 1st December 1923.

*Damages—Suit for — Temporary injunction wrongfully obtained—Suit is maintainable— Civil P. C., S. 95 — Provincial Small Cause Courts Act, Sch. 2, Art. 35 (k).*

Where a temporary injunction is wrongfully obtained on insufficient grounds a suit for damages is maintainable : 9 *W. R.* 133 and 16 *C. W. N.* 540, *Rel. on.* [P. 249, C, 2]

*Narendra Kumar Das*—for Appellant.

*Chandrasekhar Sen*—for Respondent.

**B. B. Ghose, J.**—This appeal raises a short question, but with regard to which there seems to be a good deal of controversy.

The plaintiff brought the suit for damages against the defendant for obtaining an order of temporary injunction wrongfully on insufficient grounds, by reason of which the plaintiff had suffered damages, inasmuch as he had to pay compensation to a third person on account of breach of a contract for erecting a hut. The defendant had brought a suit for possession of a certain property and, in the course of the suit he had obtained a temporary injunction restraining the present plaintiff from going on with the building operation on the disputed land. The suit was decided in favour of the present plaintiff and thereupon the injunction was dissolved.

It is unnecessary for me to state in detail all the facts alleged, having regard to the order that we propose to make in this case.

The trial Court passed a decree in favour of the plaintiff. On appeal by the defendant, the suit has been dismissed by the Subordinate Judge on the ground that such a suit as this is not maintainable. He relied on the authority of the case of *Mohini Mohan Misser* v. *Surendra Narayan Singh* (1) for holding that the present action for damages is not maintainable.

The plaintiff appeals against that decision and the point that has been argued before us is that, according to the authorities of this Court, such a suit is maintainable. We have now to consider the question with reference to the cases that have been decided in this Court. There cannot be any doubt whatever that as a general rule an action does not lie for damages against a person for bringing a civil action, however malicious and unfounded it may be. The reason is this that the defendant is amply compensated in the costs awarded by the Court and the Court has the authority to mould its decree for costs according to the circumstances of the case.

The question is whether under the present circumstances a separate suit for damages lies or not. At the outset I must refer to the case of *Norendra Nath Koer* v. *Bhusan Chandra Pal* (2) which came for consideration before a Full Bench of this Court. But it was held that the question referred to the Full Bench did not arise for decision in that case. In delivering the judgment of the Court, Mookerjee, Acting Chief Justice, made the following observation :

There are two sets of decisions in the reports. In one set it is laid down that a person who unlawfully interferes with the exercise of the property rights of another commits an act in the nature of trespass to property and is liable for damages in an action for trespass. In the other series of cases it is laid down that no suit lies for damages against a defendant for maliciously and without reasonable and probable cause instituting a civil action. As an illustration of the former class reference may be made to the case of *Bhut Nath Pal Mistry* v. *Chandra Binode Pal Chowdhury* (3). As an illustration of the latter class reference may be made to the case of *Bishun Singh* v. *A. W. N. Wyatt* (4) and *Mohini Mohan Misser* v. *Surendra Narayan Singh* (1).

The learned vakil for the appellant relies upon the case of *Bhut Nath Pal Mistry* v. *Chandra Binode Pal Chowdhury* (3) cited above, as directly in his favour. I do not find anything distinguishing the present case from that case. In that case it was held that because the defendant had obtained a temporary injunction in a previous suit for possession of property restraining the plaintiff from carrying on a building operation, the plaintiff was entitled to damages, as the act was in the nature of trespass to property. The case of *Bishun Singh* v. *A. W. N. Wyatt* (4), referred to above also supports the contention of the appellant. In that case Mookerjee, J., in delivering the judgment of the Court, is reported to have observed ( at page 520 ) :

The broad proposition formulated by the learned vakil for the appellant that the suit as framed is not maintainable cannot consequently be supported, and the statement that the institution of an ordinary civil action, however unfounded, vexatious and malicious it may be is not a good cause of action must be qualified when there has been arrest of person or seizure of property.

(1) [1914] 42 Cal. 550=18 C. W. N. 1189=26 I. C. 296=21 C. L. J. 68.

(2) [1920] 31 C. L. J. 495=57 I. C. 375 (F. B.).

(3) [1912] 16 C. L. J. 34=16 I. C. 443.

(4) [1911] 16 C. W. N. 540=11 I. C. 729=14 C. L. J. 515.

The learned Judge then referred to the provisions of the Civil P. C. of 1882 which are now embodied in S. 95 of the present Code, and lower down he referred to a number of cases in this Court which I have examined and found as supporting the proposition that a suit like the present one is maintainable. It is unnecessary for me to enumerate the cases over again. But I may observe that there is the high authority of Sir Barnes Peacock, C. J., in the case of *Joykalee Dassee* v. *Chandmalla* (5) in favour of this proposition. The learned Chief Justice observed at page 135 that :

> If a plaintiff brings a suit or makes an application, maliciously or without probable or reasonable cause, to a Court of competent jurisdiction to seize property of another person as the property of his judgment-debtor, he may be liable to damages for any injury which may be occasioned by reason of the order of the Court. Upon the same principle, a person may be liable to damages for applying for an injunction upon grounds which he knows to be insufficient.

In the case of *Raj Chunder Roy* v. *Shama Soondari Debi* (6), where a suit was brought to recover damages for injuries caused by an arrest in accordance with a decree of a competent Court, White, J., in giving the judgment of the Court, states the special circumstances under which such a suit is maintainable. One of the grounds is that the injury sustained is something other than an injury which has been or might have been compensated by an award of costs of the suit, e. g., that he has suffered from collateral wrong. It is unnecessary for me to cite other cases on the question. I may only refer to the last case of *Bhusan Chandra Pal* v. *Norendra Nath Koer* (7) the same case which was referred to the Full Bench (*Norendra Nath* v. *Bhusan Chandra Pal* (2)). This case came up for decision before a Division Bench consisting of Mookerjee, Acting Chief Justice, and Fletcher, J., and the learned Judges held that a suit for damages was maintainable for wrongful attachment of property, which was pointed out by the defendant as the property of his judgment-debtor. That such a suit is contemplated by the Legislature as capable of being brought would appear by a reference to sub-S. 2 of S. 95, Civil P. C. In that section arrest, attachment and temporary injunction are placed under the same categary. It would also appear to be absolutely wrong to deprive the plaintiff of a right of suit and to say that his only remedy is by an application under S. 95, Civil P. C., if he suffers damages to the extent of more than Rs. 1,000. I may also refer to Article 35, Clause (k) of the Second Schedule of the Provincial Small Cause Courts Act which contemplates that such a suit is maintainable and under which the cognizance of a suit like this is taken out of the jurisdiction of a Small Cause Court. It can, therefore, hardly be said that a suit like the present one is not maintainable.

It is quite true that certain observations made in the judgment of Mr. Justice Fletcher in the case of *Mohini Mohan Misser* v. *Surendra Narayan Singh* (1), may be considered as supporting the decision of the learned Subordinate Judge. But the general observations made with regard to the maintainability of a suit for damages for wrongfully obtaining a temporary injunction may be considered as obiter, because it was held in that case that even assuming that the suit was maintainable it was barred by limitation. Mr. Justice Richardson expressed his doubt whether such a suit was maintainable or not. But having regard to the long line of cases which have been enumerated in the judgment in the case of *Bishun Singh* v. *A. W. N. Wyatt* (4) to some of which I have referred, it can hardly be doubted that such a suit has always been regarded in this Court to be maintainable.

It is unnecessary for me to state at this stage what the plaintiff must prove in order to succeed in such a suit. The only thing that we have to decide now, and about which we need express an opinion, is that, having regard to the observations made above, it cannot be held that the suit should be thrown out on the ground that it is not maintainable.

The judgment and decree of the Subordinate Judge must therefore be reversed and the case sent back to the lower appellate Court for decision on the other questions involved in the case.

Costs of this appeal will abide the final result.

**Cammiade, J.**—I agree.

*Case remanded.*

---

(5) [1868] 9 W. R. 133.
(6) [1879] 4 Cal. 583.
(7) [1920] 32 C. L. J. 236=60 I. C. 280.

## A. I R. 1927 Calcutta 250

RANKIN AND DUVAL, JJ.

*Bechu Lal Kayastha*—Accused—Petitioner.

v.

*Injured Lady*—Complainant—Respondent.

Criminal Revision No. 672 of 1926, Decided on 24th August 1926, from the order of the Addl. Ch. Presy. Mag., Calcutta, D/- 2nd June 1926.

*Criminal P. C., S. 342—Summons cases.*

Section 342 applies to summons cases: *A. I. R.* 1923 *Cal.* 164; *A. I. R.* 1925 *Cal.* 480; and *A. I. R.* 1922 *Bom.* 290, *Appr.*; *A. I. R.* 1924 *Mad.* 15 (*F. B.*) and *A. I. R.* 1924 *Mad.* 30, *Disappr.*

[P. 253, C. 1]

*Herambo Chandra Guha* and *Jnan Chandra Roy*—for Petitioner.

*Khundkar*—for the Crown.

**Rankin, J.**—The petitioner is a driver in the employ of the Calcutta Tramways Coy. Ltd. He has been convicted by the Additional Chief Presidency Magistrate under S. 279 of the Indian Penal Code for rash and negligent driving and has been sentenced to pay a fine of Rs. 100. Half of the fine has been ordered to be paid to a person injured by the negligence of the petitioner.

The present Rule was issued on the sole ground that S. 342 of the Criminal Procedure Code was not complied with. The Magistrate in his explanation states that S. 342 was not complied with because the case was a summons case and cites the decisions of a Full Bench of the Madras High Court (*Ponnusamy Odayar* v. *Ramasamy Thathan* (1) and *Dharma Singh* v. *King-Emperor* (2) for the view that S. 342 does not apply to a summons case whether it be tried summarily or in the ordinary way.

In this Court convictions have in summons cases been set aside for failure to comply with S. 342: *Gulzari Lal* v. *Emperor* (3); *Surendra* v. *Isamaddi* (4) but we have not been referred to any case in which the applicability of the section to summons cases has been argued or the Madras decisions canvassed.

The Bombay High Court has in two cases held that the section applies to summons cases: *Emperor* v. *G. S. Fernandez* (5); *Emperor* v. *Gulabjan* (6), and this appears to be the prevailing view in provinces other than Madras.

Section 342 occurs in Chapter 24 which is headed "General Provisions as to Inquiries and Trials." Some of the sections in this chapter are not in accordance with a strict interpretation of the heading in respect that they do not deal with matters which either must or may arise in the course of any enquiry or trial (cf. Ss. 349, 350, 350A). Others deal with questions which are in nature general (e. g. tender of pardon to accomplice, compounding of offences) but permit of the specified procedure in particular cases only (cf. Ss. 337-339A, 345). Others however appear to be quite general and to be so expressed (exemptions or exceptions being made as necessary). The right to be defended by a pleader (S. 340), the rights of an accused who cannot be made to understand the proceedings (S. 341), the right to be free of undue influence by threat or promise (S. 343), the power of remand (S. 344), detention of offenders attending Court (S. 351), Courts to be held in public (S. 352)—these are all "General provisions as to enquiries and trials" in the fullest sense of the phrase. The language in several of these sections is of studied generality (e. g. any person accused of an offence before a criminal Court) (S. 340, cf. Ss. 351, 352) and it is appropriate to the subject-matter. They are intended as general provisions—not merely as miscellaneous provisions.

Taking Chapter 24 for the moment by itself it must I think be conceded that S. 342 has all the notes of generality. The language is "the Court may, at any stage of any inquiry or trial." The subject-matter of the opening phrase—"Power to examine the accused"—is undoubtedly general: it asserts a principle which is in marked contrast with a fundamental principle of the common law of England under which no Court could examine an accused. It is here and here only that we find it stated that no oath shall be administered to the accused, that he cannot be punished for not answering, that a charge of perjury cannot be brought upon his answers.

(1) A. I. R. 1924 Mad. 15=46 Mad. 758 (F. B.).
(2) A. I. R. 1924 Mad. 30=46 Mad. 766.
(3) A. I. R. 1923 Cal. 164=49 Cal. 1075.
(4) A. I. R. 1925 Cal. 480=51 Cal. 933.
(5) [1920] 45 Bom. 672=59 I. C. 129=22 Bom. L. R. 1040.
(6) A. I. R. 1922 Bom. 290=46 Bom. 441.

The history of the section—if this be relevant—detracts in no way from the force of these considerations. It was given by Jwala Prasad, J., in the case of *Raghu Bhumij* v. *The King Emperor* (7).

In the earlier Acts, the examination of the accused person was discretionary with the Court: vide S. 373 of Act 25 of 1861 and Act 8 of 1869. In Act 10 of 1872 while the discretionary nature of the examination was retained so far as enquiries and trials of cases other than Sessions cases were concerned, it was made compulsory for Sessions trials. S. 250 of that Act occurred in the chapter relating to Sessions trials and ran as follows:

"The Court may from time to time at any stage of the trial examine the accused person and shall question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence."

In 1882 the provisions relating to the examination of an accused person which were scattered in different chapters in the previous Acts, were removed from those chapters and brought under one chapter headed "General Provisions Relating to Enquiries and Trials." S. 250 of Act 10 of 1872 was therefore removed from the chapter relating to Sessions trials but its provisions were embodied in their entirety in S. 342 of the Code of 1882 as well as in 1898.

What then is the contention to be? Is it that no part of S. 342 applies to summons cases or merely that the last clause of sub-S. (1) does not apply. I am not quite sure which doctrine is affirmed by the Madras decisions but I think it is the former; though the reason given for it is the inapplicability of the closing words of the sub-section.

In either case it appears to me that there is really one argument upon which everything turns, and the other arguments collapse without it. Of a contested summons case, S. 244 says that

the Magistrate shall proceed to hear the complainant (if any), and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence.

In a warrant case after charge framed and after the last prosecution witness has been cross-examined and re-examined, S. 256 says: "The accused shall then be called upon to enter upon his defence and produce his evidence." Of Sessions cases S. 289 says:

When the examination of the witnesses for the prosecution and the examination (if any) of the accused are concluded the accused shall be asked whether he means to adduce evidence.

In sub-S. 4 the Code says that "the Court shall call on the accused to enter on his defence" and the context shows what this means. It means that if he calls no witnesses the accused (or his pleader) is to make his final address to the Jury: if he is calling witnesses he may open his case and proceed to call them.

It is to these sections that section 342 has to be applied. Its words are:

and shall question him—generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

I do not collect that any shadow of difficulty is imposed to surround the phrase "after the witnesses for the prosecution have been examined." These exact words do not occur in S. 244, S. 256 or S. 289 but they refer without any ambiguity whatever to a definite stage in any kind of trial, and their equivalent in the sections mentioned leaps to the eye. In these circumstances there seems little room for any further difficulty but it is said—if I follow the argument—that there is a significant precision of language in the words "before he is called on for his defence." This it is said has a definite meaning both in S. 289 and S. 256 but in Chapter 20 the expression is not used. "The prisoner in these cases does not enter on his defence" but the Magistrate is bound to "hear the accused" (per Schwabe, C. J.): in *Ponnusamy* v. *Ramasamy* (1).

The argument appears to me to be unsubstantial. There is no such exact identity of phrase as could make S. 342 short circuit with Ss. 289 and 256 to the exclusion of S. 244. The phrase is "called on for his defence." The words of S. 256 are "called upon to enter upon his defence"; in S. 289 "call on the accused to enter on, his defence." The similarity of phrase is apparent and there is no such similarity in S. 244 but that is all and there can be no question of significant precision. The Legislature has not hit upon a general expression equidistant from all three sections in point of variation of language. But as Mullick, J., observed in *Raghu Bhumij* v. *The King-Emperor* (7), a case already cited:

if it is argued that in a summons case the accused is never 'called on for his defence' the reply seems to be that there is no virtue in these particular words and the accused in a summons case is called on for his defence after the prosecution is closed just as much as an accused in any other case.

To call upon an accused person to enter upon his defence is a necessary incident of every trial:

(7) [1920] 5 Pat. L. J. 430=58 I. C. 49=1 Pat. L. T. 241.

Per Crump, J., in *Emperor* v. *S. S. Fernandez* (5). Macleod, C. J., has taken the same view: *Emperor* v. *Gulabjan* (6). There is every reason to suppose that the words are used as ordinary English and there is independent reason to presume that the provision is a general provision. The function of the concluding words of sub-S. 1 of S. 342 is to point to a definite stage of every trial. For this purpose it is natural enough to use rather more informal language than seems to be called for when describing the procedure in summons cases. Thus, although in summons cases there is no formal charge and Chapter 20 says nothing about "plea" or "pleading guilty," the legislature when in S. 263 (cf. S. 262) it has occasion to refer to this stage when dealing with summary trial both of summons cases and of warrant cases, uses the words "the plea of the accused." In the same way S. 342 uses the phrase "called on for his defence"—not only without any special or limited intention but in a chapter which is expressly devoted to general provisions and in a section which refers to "any stage of any inquiry or trial."

I do not here discuss whether if S. 342 applies to any case a failure to comply with it can be condoned under S 537. Nor do I discuss whether if in Warrant cases, or in Sessions cases it is purely discretionary for the Court to examine or not to examine. These questions are concluded by authority binding upon me.

Confining myself to summons cases, I would observe that the argument from the repealed S. 451 has been answered by Oldfield, J., in *Ponnusamy* v. *Ramasamy* (1) that S. 242 applies to a stage and a purpose different from S. 342; and that the words "if he thinks fit" in S. 245 do not necessarily mean more than that an accused can be acquitted without beirg examined. S. 245 is very similar in language to S. 209 and S. 253 but it has not quite the same purpose. The governing idea is that in summons cases the matter should be finally decided (save in cases under S. 249). It should proceed to a conviction or acquittal—not merely end in a discharge. Apparently S. 245 has been held to mean that a man cannot be acquitted until after he has been heard and after he has produced all his evidence [*Kesri* v. *Muhammad Bukhsh* (8)] which seems a little marvellous. If this be right, (which I take leave to doubt) then when the case against the accused breaks hopelessly down—I presume the really correct procedure must be to tell the accused that if he holds his tongue he will be acquitted but that if he will insist on defending the case further he may be convicted on any charge triable as a Summons case that may turn up before the case is over.

If "the evidence referred to in S. 244" is not a phrase used by mistake for

> the complainant (if any) and all such evidence as may be produced in support of the prosecution,

and if it really means that the accused must be asked to call his evidence even though there is no case to answer, then the words "if he thinks fit" do raise a difficulty. But on the common sense of the matter and even on the strict construction of the section it seems reasonably clear that the words "if he thinks fit" have reference in this section to cases in which the Magistrate is prepared to acquit without examining the accused. That he can convict without examining the accused is an inference from the dubious proposition that he cannot acquit without hearing all such evidence as the accused requires him to hear. Ss. 209 and 253 may I think be looked at to explain what is meant by the words "if he thinks fit" in S. 245. They all refer to cases where it is unnecessary to give an opportunity to an accused to explain any circumstances appearing in the evidence against him because the case against him is going to be stopped then and there. (The effect of the words "if any" in S. 289 is a different question).

My main criticism of the decision in *Ponnusamy Odayar* v. *Ramasamy* (1) is that it fails to appreciate that on the face of the Criminal Procedure Code every reference to any examination or possibility of an examination of an accused person by the Court is a reference to S. 342. Before 1882 the Code was different. But now S. 342 is the enabling section—it is the section which explains the purpose for which and the terms on which any accused can be examined by the Court at all. It confers a power which may be exercised at any stage. It is pre-supposed in Chapter 20 as in Chapter 18, Chapter 21, Chapter 22 and Chapter 23, and these are the only chapters to which its direct reference can

(8) [1896] 18 All. 221=(1896) A. W. N. 35.

be primarily intended. With all respect I think it impossible to maintain that S. 342 has no reference whatever to Summons cases. If the question be as to the applicability of the concluding words of sub-S. (1), then I think the Madras High Court applied a test which is inadequate when it said:

It must be applied to all cases unless the special sections dealing with particular cases indicate that it is not intended to apply to them or unless the words of the section itself give such indication.

*Ponnusamy* v. *Ramasamy* (1). The concluding words of the sub-section must have effect like the other words in the absence of an express exception or of an exception to be implied from a specific provision clearly inconsistent therewith unless indeed the words as applied to Summons cases are insensible or at least markedly inapt.

In the present case the Rule must be made absolute and the case must be re-tried by a Magistrate to be nominated by the Chief Presidency Magistrate.

The fine, if paid, will be refunded.

**Duval, J.**—I agree.

*Rule made absolute.*

---

## * A. I. R. 1927 Calcutta 253

GREAVES AND MUKERJI, JJ.

*Raja Shyam Lal Singh*—Defendant—Appellant.

v.

*Raj Kumar Thakur Madhusudan Singh*—Plaintiff—Respondent.

Appeal No. 306 of 1925, Decided on 16th March 1926, from the order of the Sub-J., Burdwan, D/- 15th June 1925.

* *Civil P. C., O. 40, R. 1—Order appointing Receiver subject to his furnishing security is not appealable before security is furnished.*

Where a Receiver has been appointed conditional on his furnishing security, the appointment is not complete till the security is furnished and therefore the order is not appealable before the security is furnished: 14 *C. L. J.* 489 and *O. O. No. 327 of* 1921, *Followed* although their Lordships held contrary opinion in this case.

[P 253 C 2]

*H. D. Bose, D. N. Mitra, Bigram, Bibhuti Bhusan Lahiri* and *Narendra Nath Mitra*—for Appellant.

*Trailokhya Nath Ghose, Asita Ranjan Ghose, Prosanta Bhusan Gupta* and *Monmatha Nath Roy (Jr.)*—for Respondent.

**Mukerji, J.**—This appeal is directed against an order passed by the Subordinate Judge of Asansole on the 15th June 1925. The order purports to grant the plaintiff's application for the appointment of a Receiver and states that the plaintiff is appointed Receiver of the disputed property during the pendency of the suit or until further orders but states as a condition that he would have to give security to the extent of Rs. 10,000 to the satisfaction of the Court within three weeks from the date of the order. It goes on to state that when appointed the Receiver will have to manage the properties under the direction of the Court and on certain terms. The Defendant No. 1 has appealed to this Court.

A preliminary objection has been urged on behalf of the plaintiff-respondent as regards the competency of the appeal. It has been urged that the appointment of the plaintiff as Receiver was conditional on his furnishing security and that inasmuch as the security called for has not yet been furnished there was no complete order appointing the Receiver within the meaning of O. 40, R. 1, sub-R. (1), Cl. (a) of the Code of Civil Procedure and that, therefore, the order to which I have referred is not an appealable one. In support of this preliminary objection reliance has been placed upon a number of decisions to which I shall presently refer, specially as there are certain decisions of this Court which I feel constrained to follow and as to the correctness of which I entertain considerable doubt.

It is necessary to state just a few further facts. The order to which I have referred was passed, as I have stated, on the 15th June 1925. On the 7th July 1925 the learned Subordinate Judge recorded an order to the effect that on the day before the plaintiff had applied for taking landed properties as security or in the alternative for granting him 15 days time to furnish cash security and that on the day on which the said order was passed the plaintiff had offered certain landed properties as security. By this order the learned Subordinate Judge adjourned the matter to the 17th July 1925 for hearing. Thereafter on the 9th July 1925, Defendant No. 1, who is the appellant before us, appears to have filed a petition for the stay of the appointment of the plaintiff as Receiver and afterwards, on the application of both parties,

the case was adjourned sine die and no further order appears to have been passed in connexion with the appointment of the Receiver.

The respondent relies upon certain decisions, the first one of which is the decision of this Court in the case of *Upendra Nath Nag Chaudhuri* v. *Bhupendra Nath Nag Chaudhuri* (1). That was a case in which the order had been passed by the Court below in these terms :

> I think the whole of the property in suit will be better managed and the interest of all the parties will be better served if the property in suit be placed in the hands of a competent Receiver.

It was against this order that an appeal was preferred to this Court and a preliminary objection as to the competency of this appeal was upheld, the learned Judges observing in their judgment that no final order had been passed appointing a Receiver in the case. The learned Judges went on to observe in their judgment that subsequent to the passing of the order from which an appeal had been preferred the office of the Receiver was offered to one Rash Behari Mandal who declined to accept the office, and thereafter the appointment of Rash Behari was cancelled and after that one Nakuleswar Bose was appointed Receiver. The learned Judges held that the order that was appealable was the order by which Nakuleswar was appointed Receiver but that no appeal had been preferred from that order.

The case is clearly distinguishable from the present one inasmuch as the order that had been appealed against in that case was simply one in which the learned Judge of the Court below had merely made certain observations as to the propriety of a competent Receiver being appointed and did not in fact appoint any Receiver thereby. The next case relied on is that of the Bombay High Court in *Narbadasankar* v. *Kevaldas Raghunath Das* (2). The order against which an appeal was preferred in that case ran in these words :

> I hold that a proper person should be appointed Receiver. The parties will be further heard on the point as to who should be appointed Receiver.

It is quite clear that by this order no appointment of a Receiver had actually been made and the learned Judges of the Bombay High Court were of opinion that no appeal lay from that order. A decision of the Allahabad High Court has also been placed before us. That is the decision in the case of *Ramji* v. *Koman Das* (3). That was a case where an appeal was preferred from an order which stated that the Court allowed an application for the appointment of a Receiver provisionally and by which the Court called upon all the parties to put in application showing their claims regarding the person or the power of the Receiver and as to other matters. That again was not an order which can be treated as an order appointing a Receiver which comes within the purview of Cl. (a), sub-R. (1), R. 1 of O. 40 and it was held that no appeal lay from that order.

These cases are authorities for the view that until a particular person has been appointed as Receiver, there is no effective order appointing a Receiver, and the mere expression of an opinion as to the propriety of an appointment of some person at a future date is not an order appointing a Receiver within the meaning of O. 40, R. 1, sub-R. (1), Cl. (a) ; or to put in another way, that

> the law gives a right of appeal only against an order appointing a Receiver and not against an expression of the Court below of its intention to appoint.

This, howevsr, is not the question for our consideration in the present case, for a particular person, namely, the plaintiff, has been appointed by the learned Judge in the present case. It may be observed that this view has been consistently maintained in the more recent decisions of this Court and the Allahabad High Court : vide *Muhammad Askari* v. *Niskar Husain* (4). There is, as far as I am aware, no decision of the Bombay High Court to the contrary. The Madras High Court has adopted the contrary view in a Full Bench decision by a majority in *Palaniappa Chetty* v. *Palaniappa Chetty* (5), and the Patna High Court has adopted that view in the case of *Govinda Ram* v. *Ganesh Ram* (6) and this contrary view seems to have been adopted by the Lahore High Court as well.

(1) [1910] 13 C. L. J. 157=9 I. C. 582.
(2) [1915] 17 Bom. L. R. 510=29 I. C. 504.
(3) [1914] 13 A. L. J. 79=27 I. C. 646.
(4) [1919] 42 All. 227=54 I. C. 520=18 A. L. J. 212.
(5) [1916] 40 Mad. 18=5 L. W. 776=32 M. L. J. 304=40 I. C. 185=(1917) M. W. N. 393.
(6) A. I. R. 1922 Patna 577=1 Pat. 625.

The next decision to which our attention has been drawn is the case of *Srinivas Prosad Singh* v. *Kesho Prosad Singh* (7). In this case a gentleman Mr. S. P. Sen Gupta was appointed Receiver to take possession of certain jewelleries, etc., and the order was that he was to furnish security for a certain amount. The Court after passing the said order passed another order directing the case to be put up for further orders on a subsequent date. This Court in dealing with the question as to whether an appeal lay from the order appointing a Receiver with a direction to furnish security held that if the appointment is conditional on the furnishing of security, the giving of security is a condition precedent and that there is no effective appointment till the security has been given. The learned Judges were of opinion that so long as the security demanded was not furnished there was no appointment of the Receiver within the meaning of R. 1 of O. 40 and that it was only when the appointment became an operative one by reason of the security demanded from the Receiver being furnished that an appeal would lie from the order which finally approved of his appointment. This decision appears to have been followed in later decisions of this Court, namely, in Appeal from Original Order No. 327 of 1921, decided on the 2nd April 1924.

Apart from authorities it seems to me plain upon the reading of the provisions of O. 40, R. 1 (1) (a) and R. 3 (a) of the Code that there are three stages in the matter of the appointment of a Receiver. The first is the stage at which the Court pronounces its opinion as to the propriety of making the appointment of a Receiver; the second is the stage at which the appointment is made; and the third is the final stage when the security, if any, ordered by the Court being furnished the person or persons appointed are put in possession of the property as Receiver or Receivers. Speaking for myself I am not prepared to hold that after an order has been made appointing a particular person as Receiver subject to his giving security, and during the time that the security is not furnished the order made by the Court, though it remains in abeyance in the sense that the Receiver is not clothed with his powers and duties as such, is any the less a judicial order open to appeal. With the greatest respect to the learned Judges who decided the case of *Srinivas Prosad Singh* v. *Kesho Prosad Singh* (7). I am not prepared to assent to the view that in the case of an appeal from an order of this nature "no appeal would lie till an appointment has been made, which but for the appeal is bound to be operative." I do not see that the Code, in providing for a right of appeal, contemplates any distinction of this character. The view I take receives support from a consideration of form 6 of App. E to the Code which, to my mind, shows that the judicial part of the order is over when such an order is passed and a right accrues to the person with the passing of the order which is embodied in the writ issued to him in that form. The authority of the decision in the case of *Srinivas Prosad Singh* v. *Kesho Prosad Singh* (7) in so far as this particular matter is concerned does not appear to have been followed in any of the other High Courts, and the learned Judge, who was in the minority in the case of *Palaniappa Chetty* v. *Palaniappa Chetty* (5) and who approved of this decision in other respects against the view of the majority, was also of opinion that the case had gone too far on this question as to the tentative character of an order of this nature.

The two cases of this Court, namely, the one of *Srinivas Prosad Singh* v. *Kesho Prosad Singh* (7) and the unreported decision of this Court to which I have referred, however, are not in any way distinguishable from the present case; and although personally I am not in agreement with the views taken in those cases I am not at present of opinion that it is necessary that there should be a reference to a Full Bench. I must therefore follow the decisions aforesaid and hold that in the present case no appeal lies from the order passed by the Subordinate Judge on the 15th June 1925.

The appeal must be held to be premature and must accordingly be dismissed with costs. The hearing-fee is assessed at two gold mohurs.

**Greaves**, J.—I agree.

*Appeal dismissed.*

(7) [1911] 14 C. L. J. 489=12 I. C. 745.

## * A. I. R. 1927 Calcutta 256

### Full Bench

SANDERSON, C. J., AND CHATTERJEA, RANKIN, SUHRAWARDY AND PANTON, JJ.

*Haridas Majumdar*—Defendant—Appellant.

v.

*Golam Mahiuddin Faruqi*—Plaintiff—Respondent.

Full Bench Reference No. 3 of 1925, Decided on 18th May 1926, made in Appeals Nos 1174 and 1180 of 1923, from the appellate decrees of the Spl., J., Tippera, D/- 17th August 1922.

* *Practice—High Court—Reference to Full Bench in second appeal—Full Bench holding that point referred does not arise—Case should be sent to referring Bench for decision.*

When the reference is in a second appeal and the question, which has been referred to a Full Bench, is decided by the Full Bench, then the Full Bench, disposes of the second appeal. But when the Full Bench considers that the point which has been referred does not arise, the matter is referred to the Division Bench for disposal. [P 256 C 2]

*Atul Chandra Gupta* and *Bhagirath Chand Das*—for Appellant.

*Surendra Nath Guha*—for Respondent.

**Sanderson, C. J.**—This is a Reference by two of my learned brothers in certain second appeals.

The appeals were divided by the learned Judges into three groups, and it was the third group of appeals, to which the questions, which were referred, related.

The questions were as follows; (i) whether a co-sharer collecting his own shares of the rent separately from the other co-sharer or co sharers is a joint landlord within the meaning of S. 188 of the Bengal Tenancy Act, and (ii) whether such a co-sharer is entitled to make an application under S. 105 of the Act.

The proceedings were initiated by the landlord under S. 105 of Bengal Tenancy Act and it appears from the judgment of the Assistant Settlement Officer that it was an admitted fact that the shares of the entire taluk passed into the hands of the plaintiff's predecessor gradually by sale.

The judgment of the learned Special Judge of Tippera with regard to this point was as follows :

> The plaintiff is sixteen annas proprietor of a patni taluk in which the tenancies are situated and claimed enhancement of rent under S. 30 (b) and additional rent under S. 52.

In another part of his judgment the learned Judge said as follows :

> I have observed that the plaintiff is now sixteen annas proprietor but he has been so only since 1312 B. S.

The learned vakil, who appeared for the respondent: drew our attention to these passages in the two judgments and argued that the point involved in the two questions, which had been referred to the Full Bench, did not arise.

In my judgment, as far as the present proceedings are concerned, this Court is bound by the abovementioned findings as to the position of the respondent and it must therefore be taken that the respondent was not a co-sharer but that he was the owner of the patni taluk to the extent of 16 annas.

It appears that there must have been some misunderstanding, when the matter was before my learned brothers, constituting the Division Bench, for I am of opinion that the questions which have been referred do not arise.

When the reference is in a second appeal and the question, which has been referred to the Full Bench, is decided by the Full Bench then the Full Bench disposes of the second appeal. But it appears to be the practice that when the Full Bench considers that the point which has been referred does not arise, the matter is referred to the Division Bench for disposal.

For these reasons, in my judgment, these appeals must be remanded to the Division Bench for disposal.

**Chatterjea, J.**—I agree.

**Rankin, J.**—I agree.

**Suhrawardy, J.**—I agree.

**Panton, J.**—I agree.

*Appeals remanded.*

# A. I. R. 1927 Calcutta 257

SUHRAWARDY AND DUVAL, JJ.

*Aseruddin*—Accused—Appellant.

v.

*Emperor*—Opposite Party.

Criminal Appeal No. 6 of 1926, Decided on 17th May 1926, from the order of the S. J., Dinajpur, D/- 18th November 1925; and Criminal Reference No. 5 and Appeal No. 510 of 1925, Decided on 8th October 1925.

(a) *Criminal P. C., S. 162—"I did not make any statement to the police" is not a statement contemplated by S. 162.*

For the application of S. 162 there must be a statement which is capable of being recorded, and reduced to writing and, therefore, if a witness says: "I did not make any statement to the police," it cannot be a statement under S. 162. [P. 258, C. 1]

(b) *Criminal P. C., S. 297—Right of private defence set up—Omission to state to jury the law as to private defence amounts to serious misdirection.*

Where the law as to the right of private defence of a person as bearing on the facts set up had not been clearly placed before the jury, and their attention was not directed to find as to whether the accused was, and, if so, how far, justified, in preventing injury to himself, in attacking the deceased:

*Held*: that the charge, as delivered by the Judge, contained serious misdirection necessitating a retrial. [P. 259, C. 1]

(c) *Criminal P. C., S. 161—Witness stating to police that he knew nothing — Application of S. 161 is doubtful.*

It is doubtful whether a statement to the police by the witness under S. 161 that he knew nothing about the occurrence is not a statement within the meaning of S. 161. [P. 258, C. 1]

*Debendra Narain Bhattacharjee* — for Appellant.

*Khundkar*—for the Crown.

**Judgment.**—In this case the accused Aseruddin, alias Botu, has been convicted under S. 326 of the Indian Penal Code on two charges: first, for causing grievous hurt with a dangerous weapon to one Rahimuddin, and secondly, for causing the same offence upon one Aseruddin, and sentenced to seven years' rigorous imprisonment on the first count, and to three years' rigorous imprisonment on the second, the sentences to run concurrently. The case for the prosecution is that there was some dispute with regard to possession of a piece of land. The complainant was in possession of the land, and as he was late in transplanting the crop, he called in a number of friends and dependents to help him in the matter on the 16th September 1925. On that date he went with a large number of men and started transplanting paddy. About three bighas of land lay to the west of a path, and when the men came to that part the accused Botu, with his brother Anaruddin and one Moji, came on to the land and protest edsaying that it was his. Botu cut the strings of the foremost plough when Rahimuddin came and mended it, and started ploughing again. Botu caught his penta and threatened to strike Rahim. Rahim seized Botu by the neck; Botu seized Rahim by the neck with his left hand, and then taking the knife into his right hand stabbed Rahim until the latter fell down. Aseruddin seized the knife, at which Botu struck him with the knife under the right armpit. On these facts the accused was charged under Ss. 304 and 326 of the Indian Penal Code. The majority of the jury found him not guilty under S. 304 of the Indian Penal Code and convicted him under S. 326 on the first count; and on the second charge, by a majority of four, found him guilty under S. 326 for causing grievous hurt to Aseruddin.

Two points have been taken on behalf of the appellant: (i) that some statements made by the defence witnesses to the police were admitted in violation of the provisions of S. 162 of the Criminal Procedure Code. With reference to this point, the facts are that two witnesses were examined on behalf of the accused. The first witness was Bibijan, who was set up by the accused as the owner of the land from whom he had taken settlement of it. In her evidence she stated: "The Sub-Inspector questioned me. I told him I knew nothing." The second witness was Sharitulla Sarkar who said:

I deposed to the Sub-Inspector. I started to tell him about the possession, but he said he did not want that, so I did not tell him any more.

With regard to the statement made by the first witness it is not the accused's case that she saw the occurrence, or that she knew anything about it. She merely told the police that she knew nothing about the occurrence. Even if this evidence is inadmissible, it does not in any way prejudice the accused. With regard to the statement made by the second witness, his statement is similarly innocuous. He said that he was not allowed by the Sub-Inspector to say what he

tended to say, and he denied that he said that he knew nothing.

The question which has been raised before us is whether the statement made before the police, that the witness did not say anything to the police about the occurrence, is a statement within the meaning of S. 162 of the Criminal Procedure Code.

If we accept the contention of the petitioner the result will be that the absence of a statement will be equivalent to a statement. S. 162 says that no statement made by any person to a police officer in the course of an investigation shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof be used for any purpose save as therein provided. For the application of this section there must be a statement which is capable of being recorded and reduced to writing and, therefore, if a witness says: "I did not make any statement to the police," it cannot be a statement under S. 162 of the Criminal Procedure Code. The same view has recently been taken in the unreported case of *Emperor* v. *Nagendra Nath* alias *Dadhiram Nath* (Reference No. 5, and Appeal No. 510 of 1925), decided on the 8th October 1925, in which it is said:

A question was put to one of the defence witnesses as to whether he had made a certain statement to the police when he was examined under S. 161 of the Criminal Procedure Code. It is contended that, having regard to the provisions of S. 162 of the Criminal Procedure Code, the statement made to the police officer under S. 161 could not be used for any purpose. But all that was put to the witness was whether he had made such a statement to the police, and his answer was that he did not remember. It is not proved that the statement was actually made to the police, and the mere fact that a question was put to the witness asking him whether he had made a particular statement to the police did not vitiate the trial as it is not proved that such a statement was actually made to the police under S. 161 of the Criminal Procedure Code.

It is, however, doubtful if a witness makes a statement to the police under S. 161 that he knew nothing about that occurrence is not a statement within the meaning of S. 161 of the Criminal Procedure Code. We need not pursue this matter further in the view that we have taken with regard to the second objection made on behalf of the accused.

It is said that the learned Judge's charge to the jury is defective inasmuch as he had not laid before the jury the law with regard to the right of private defence that arises in this case on the admitted and proved facts. We have said that the prosecution case was that the deceased Rahimuddin was the first to catch hold of the accused by the neck. There is no evidence before us as to how and with what force the attack was made by the deceased, and whether it was such as to raise an apprehension in the mind of the accused of grievous hurt. These are matters which should be considered by the jury. It is said that thereupon the accused brought out his knife and gave a few strokes with it to the deceased. The question that arises on these facts is whether the accused had any right of private defence, and if so, how far it extended. The learned Judge, in explaining the law, referred to relevant sections, as it appears from his written charge, relating to the right of private defence. He made the following observation: "If these facts are correct" (that the accused was defending his own property),

then the prosecution party were committing criminal trespass and the accused had a right to defend his property and, if attacked, his person, but he had no right to cause death unless you think that there was a reasonable apprehension that he would otherwise suffer death or grievous hurt.

It may be stated here that the learned Judge was of opinion that the property was probably in the possession of the accused. He did not, however, specifically put the case of defence of person based on the facts alleged by the prosecution before the jury. But this statement of law, as appears from the charge which contains only the heads of what it really was orally delivered might have been sufficient. But the learned Judge, in the concluding portion of his charge, made the following observation:

There is nothing to show that he was ever called on to defend his person before he killed Rahimuddin and wounded Aseruddin.

This, in our opinion, is a clear misstatement of facts. We have stated that the case for the prosecution was that it was the deceased who first caught hold of the accused by the neck; and the question whether the accused was justified in defending his person to the extent of causing grievous hurt to the deceased was a question of fact which should have been left to the jury. The statement

that there is nothing to show that he was ever called on to defend his person

is also incorrect from another point of view. There is some evidence on the point adduced by the accused. Whether it was sufficient for the purpose of proving his case is a matter for the consideration of the jury. It is, therefore, not correct to say that there is nothing to show that the accused had any occasion to exercise the right of private defence of person. According to the prosecution story the deceased caught the accused first by the neck, and according to the defence it was the deceased who actually gave the first blow. In this view we cannot say how far the last sentence in the Judge's charge to the jury influenced the jury in the verdict they returned, though the Judge wound up the charge by observing :

' The only question in this case would be whether the accused exceeded the right of self-defence.

The law, as bearing on the facts set up had not been clearly placed before the jury, and their attention was not directed to find as to whether the accused was, and, if so, how far, justified in preventing injury to himself in attacking the deceased. In this view we think that the charge, as delivered by the Judge, contains serious misdirection and the conviction of, and the sentence passed on, the accused should be set aside, and we direct that he be re-tried according to law. The accused will remain in custody until further orders of the Sessions Judge.

G.B.J. *Re-trial ordered.*

---

## * A. I. R. 1927 Calcutta 269

B. B GHOSE AND CAMMIADE, JJ.

*Bhagaban Chandra Kundu*—Plaintiff—Appellant.

v.

*Tarak Chandra Basak* and *others*—Defendants—Respondents.

Appeal No. 884 of 1924, Decided on 5th July 1926, from the appellate decree of the Sub-J., Bogra, D/- 17th January 1924.

*** *Mortgage, suit on—Purchaser of part of mortgaged property subsequent to mortgage not made party and ousted in execution of mortgage decree—His remedy is not suit for ejectment—He can only redeem the execution purchaser.***

**A purchaser of a portion of the mortgaged** property from the mortgagor subsequent to the mortgage, who was not made a party to the mortgage suit but who has been ousted from the possession of the mortgaged property by the purchaser in execution of the mortgage decree is not entitled to recover possession on the basis that the execution purchaser is a trespasser. His only remedy is to redeem such purchaser : 4 *C. W. N.* 452 and 6 *C.L.J.* 609, *not Foll.* ; 18 *Cal.* 164 (*P. C.*), *Rel. on.* [P 260, C 1]

*Manindra Nath Roy*—for Appellant.

*Jatindra Nath Sanyal*—for Respondents.

**Judgment.**—This is an appeal by the plaintiff which arises out of a suit by the plaintiff for recovery of possession of certain lands. His case shortly stated may be summed up in this way. In 1308 B. S. Defendants Nos. 4 to 8 gave the land in dispute with other lands in usufructuary mortgage to the plaintiff for 15 years, which was to remain in force till the end of 1322 B. S. In the year 1317 B. S. those defendants gave a second mortgage of those lands to Defendant No. 3 who was their landlord. The mortgagors after the execution of the usufructury mortgage in favour of the plaintiff remained in possession of the property as lessees under the plaintiff. The mortgagors defaulted in payment of the rent due to the plaintiff who obtained some rent decrees as against them. In the year 1321 B. S. the plaintiff purchased $4\frac{3}{4}$ bighas out of the mortgaged lands in satisfaction of his rent decrees and for some outstanding rent due to him for the previous period. In 1326 B. S. Defendant No. 3 brought a suit on his mortgage, but in that suit he did not implead the plaintiff as party defendant. Defendant No. 3 obtained a mortgage decree and purchased the entire 9 bighas of land himself in execution of that decree. In the year 1328 Defendants 1 and 2 dispossessed the plaintiff from the suit land, as lessees of Defendant No. 3. The plaintiff now seeks to recover possession of the land on the ground that he was not bound by the mortgage decree or the sale thereunder and those defendants had no right to dispossess him.

In the Court of first instance the plaintiff was asked whether he was willing to redeem the Defendant No. 3. He declined to do so and it seems that in the lower appellate Court he also persisted in retaining that position. In this Court also the learned vakil for the appellant, who has argued his case very carefully,

has informed us that his client is not willing to redeem the Defendant No. 3. The trial Court made a decree which is somewhat difficult to understand. He made a decree in favour of the plaintiff directing the Defendant No. 3 to redeem the plaintiff for what is said to be the unexpired term of the usufructuary mortgage. From that decree the plaintiff appealed and the defendants preferred cross-objections. The learned Subordinate Judge dismissed the appeal of the plaintiff and also the cross-objections and affirmed the decision of the Munsiff. The plaintiff appeals to this Court and the position taken on his behalf is that he was entitled to the present possession of the property and having been wrongfully dispossessed by the principal defendants, he was entitled to be put into possession. The defendants have also advanced cross-objections against the decree of the Subordinate Judge and their position is that the plaintiff had no subsisting right to recover possession and his suit should be dismissed.

We have now to consider whether the plaintiff, who repudiates his liability to redeem the defendants, is entitled to recover possession on the strength of his purchase of the equity of redemption in a portion of the property in the year 1321 B. S. The plaintiff denied the validity or the bona fides of the mortgage under which Defendant No. 3 claimed. But it has been found by both the Courts below that the transaction is valid and binding on the parties to it. The question then is whether a purchaser of a portion of the mortgaged property from the mortgagor subsequent to the mortgage, who was not made a party to the mortgage suit but who has been ousted from the possession of the mortgaged property by the purchaser in execution of the mortgage decree, is entitled to recover possession on the basis that the execution purchaser is a trespasser. There has been some divergence of opinion in this Court on the question. The contention of the learned vakil for the appellant finds support in two cases : *Grish* v. *Iswar* (1) and *Habibullah* v. *Jugdeo Singh* (2). Those cases, however, are not in accordance with the previous decisions of this Court and have been doubted subsequently. The cases taking the contrary view are numerous and many of them are referred to in the case of *Kalu* v. *Abhoy Charan* (3), in which the two cases mentioned above were not followed. Certain other cases have been cited before us on behalf of the appellant, but those do not directly touch the question as in those cases the purchaser in execution of a mortgage decree obtained in the absence of a necessary party sued in ejectment the absent party who was in possession. It was argued that the same reasoning on which those cases were decided may be applied to the present case. But the position of a person in possession whose right to redeem is subsisting and unaffected by a decree when sued in ejectment as a trespasser by a mortgagee or a purchaser in execution of an imperfect decree, is not the same as that of the plaintiff in this case who sues in ejectment.

The general principle in such cases is that the absent party has a right to redeem, and to recover possession on redemption of the mortgage, but cannot sue in ejectment. The true principle is thus stated in Jones on Mortgages, S. 1395 :

> When a party in interest other than the owner of the equity of redemption is not made a party to the bill, the foreclosure is not generally for this reason wholly void. It is effectual as against those persons interested in the equity who are made parties. The sale vests the estate in the purchaser subject to redemption by the person interested in it who was not made a party to the proceedings. His only remedy, however, is to redeem. He cannot maintain ejectment against the purchaser. He cannot have a sale set aside by intervening by petition in the foreclosure suit. His only right is the right of redemption.

This principle has been followed in various cases, and is also supported by the decision of the Privy Council in *Umes* v. *Zahur* (4) where an absent party, who was the plaintiff in the suit, was given the right to redeem the purchaser in execution of a mortgage decree in which the plaintiff was not made a party although he had an interest in the equity of redemption. In our opinion, therefore, the plaintiff is not entitled to get a decree in ejectment as against the defendants on the basis that he is not bound to redeem the mortgage of Defendant No. 3. As the plaintiff has not asked for redemption and in fact he has taken the

(1) [1898] 4 C. W. N. 452.
(2) [1901] 6 C. L. J. 609.
(3) A. I. R. 1921 Cal. 157.
(4) [1889] 18 Cal. 164=17 I. A. 201=5 Sar. 507 (P. C.).

attitude that he is not bound to redeem the defendant, his suit for ejectment must fail.

With regard to the cross-objection it is difficult to understand on what ground Defendant No. 3 was asked to redeem the plaintiff. The plaintiff's prior mortgage expired by efflux of time in the year 1322 B. S. The plaintiff was only entitled to remain in possession of the 4¾ bighas of the property by virtue of his purchase in 1321 B. S. of the interest of the mortgagor for the rents due to him and after 1322 B. S. he had no other right in the land. The principal defendants took possession in 1328 B. S. when there was no mortgage in favour of the plaintiff which was subsisting and which they were bound to redeem. The cross-objection must, therefore, succeed.

The result is that the plaintiff's suit must be dismissed with costs in all the Courts.

G.B.J. *Appeal dismissed*: *Cross-objection allowed.*

---

## * A. I. R. 1927 Calcutta 261

CHOTZNER AND DUVAL, JJ.

*Collector of Howrah* and *another*—Complainants.

v.

*Santak Das* and *others*—Accused.

Criminal Reference No. 198 of 1926' Decided on 30th September 1926, made by the Addl. S. J., Hooghly, on 27th July 1026.

*** (a) *Criminal P. C., S. 145—Party, taking possession by ousting without physical force another in possession without title, himself dispossessed by force within 2 months—He is entitled to be restored to possession.***

The mere ouster of people with no title to the land without using any physical violence and removing of things which had no right to be on the land cannot be said to be an unlawful entry on the land, and if person so taking possession is dispossessed by force from the land within 2 months of the order under sub-S. (2), he is entitled to be restored to possession.

[P 262 C 1]

*** (b) *Criminal P. C., S. 438—Reference asking to quash a part of the order under S. 145 is not proper.***

A reference asking to confirm a part of the order under S. 145 and quash the rest is not in proper form.

[P 262 C 1]

*Narendra Kumar Bose* and *Haradhone Chatterjee*—for 1st Party.

*Satindra Nath Mukherjee* and *Mritunjoy Chatterjee*—for 2nd Party.

**Duval, J.**—In this matter the Additional Sessions Judge of Hooghly has made a reference in respect of a proceeding under S. 145, Criminal P. C. It appears that certain sanyasis some years ago planted a banian tree on some land which is now leased by the Government to the Howrah Amta Railway Company. In course of time a pucca plinth was built round the tree and later on (it is said somewhat recently) further encroachments were made on this land by the Sanyasis by putting up a hogla shed. On the 23rd September last the Chief Engineer of the Howrah Railway Company accompanied by police in the absence of the Sanyasis removed the hogla sheds and their structures recently built and took possession of the land again. It does not appear that they disturbed the plinth, the banian tree or the idols standing on the plinth. On the 25th the Sanyasis returned and with a crowd they proceeded to take possession again of the land on which the sheds stood before and other lands as well and put up a wall. This they were able to do by force and have since been in possession. On the 20th November proceedings were instituted in respect of this larger area of land under S. 145 Criminal P. C. The Magistrate who tried the case found that the Railway Company had been in possession within two months of the order; that is to say, they had all along been in possession of some of the lands and had been in possession of the rest of the land taken over on the 23rd from them till the 25th September—the date on which the Sanyasis came and put up their new wall. He, therefore found that as they had been dispossessed within 2 months the Railway Company were entitled to have their possession declared under S. 145 Criminal P. C. This reference is made by the learned Judge on the ground that the possession taken on the 23rd September was forcible possession. He, therefore, recommends that the order made in respect of S. 145 should be vacated in respect of so much of the land as was not freshly taken by the Sanyasis when they recovered possession on the 25th September. Now, as to what took place on the 23rd Septem-

ber, it appears that in the absence of the Sanyasis, Mr. Das the Railway Engineer, with the help of the police released the land and incorporated it in the other lands of the Company. It is clear that the Sanyasis had no title to this land at all and, therefore, it cannot be said that mere ouster of people with no title to the land without using any physical violence and removing of things which had no right to be on the land can be said to be an unlawful entry on the land. It appears to us, therefore, that on the 25th September, the Company were in lawful possession of the land. It is not denied that after that the Sanyasis came in force and with the help of a large crowd put up a wall including within it land they had never claimed before. This they had absolutely no right to do. It was done within two months of the order and, therefore, the Magistrate was within his power in availing himself of the proviso (2) to S. 145. For this reason we cannot accept the reference.

There is another point. The reference is not in form. For it asks us not to quash an order under S. 145, Criminal P. C., but to confirm a part of the order and quash the rest. We know of no authority for a reference in this form. The reference, therefore, will be discharged.

**Chotzner, J.**—I agree.

G.B.J. *Reference not accepted.*

---

## * A. I. R. 1927 Calcutta 262

RANKIN, C. J., AND C. C. GHOSE, J.

*Brojendra Nath Seal* and *another*—Defendants Nos. 1 and 2—Appellants.

v.

*Lalit Mohan Seal* and *others*—Plaintiffs—Respondents.

Appeal No. 23 of 1926, decided on 8th December 1926, from the original decree of Page J., D/- 13th August 1925.

(a) *Hindu Law—Religious endowment—Suit involving question of Deb Sheba—Idol is not necessary party in all cases.*

The broad proposition that in every case where questions of deb sheba arise the idol is a necessary party to be brought on the record is not correct: *A. I. R.* 1925 *P. C.* 139, *Dist.*

[P. 264, C. 1]

*(b) *Hindu Law — Religious endowment — Family idol — Additional endowment — Donor can appoint Shebait in respect of additional endowment, but such Shebait has no power to interfere with management of original endowment.*

It is open to a person interested in the maintenance and worship of family idols to create additional endowments for the benefit of such idols. It is also open to such donors to lay down rules for the management of the subsequently endowed properties and to nominate the persons who should be the managers thereof. But such managers, although they may be described by the donor as Shebaits, do not become Shebaits of the family idols in the sense in which the Shebaits nominated by the original founder are; nor do they become entitled to interfere in the management of the originally endowed properties. [P. 265, C. 1]

*B. K. Ghosh* and *S. C. Mitter*—for Appellants.

*H. D. Bose, S. K. Chakravarty, S. Maity* and *P. N. Mullick*—for Respondents.

**C. C. Ghose, J.**—This is an appeal against a judgment of my learned brother, Mr. Justice Page delivered on the 13th August 1925.

The facts giving rise to this litigation may be shortly stated as folfows:

One Gopal Chandra Seal who was a Hindu inhabitant of Calcutta, died some time in September 1911, leaving him surviving his widow, Srimati Badam Moni Dassi, and three sons, namely, the plaintiff, Lalit Mohan Seal and the defendant Dulal Chandra Seal and one Akhoy Kumar Seal, and after having executed his last Will and testament on the 20th day of August 1910. Akhoy Kumar Seal died some time thereafter, leaving him surviving his two sons, the defendants Brojendra Nath Seal and Banamali Seal. Probate of the said Will was granted, on the 16th June 1916, to the defendants Brojendra Nath Seal and Banamali Seal, and subsequently on the 10th June 1922 grant of probate was also made to the defendant Kartick Chandra Seal, who is a son of the defendant Dulal Chandra Seal. Gopal Chandra Seal possessed various immovable properties, and in respect of some of his properties he had executed, among others, on the 22nd February 1897, a deed of declaration of trust, and on the 9th August 1906, an indenture of gift. The deed of declaration of trust bearing date the 22nd February 1897, related to Premises No. 6, Damzen's Lane, and the settler declared that the said premises should be held by him upon trust to collect the rents, issues, profits thereof and to apply the same in paying the rates, taxes and charges payable in

respect thereof, and in maintaining the same in proper repairs and thereafter in applying and expending 1/3rd of such rents, issues and profits in and towards the performance of the daily worship of the settler's family idols during the months of Pous to Chaitra in every Bengali year, and 1/3rd of the residue for the periodical worship of the said idols during the said period, and to set apart the remaining 1/3rd as a reserve fund for the daily or periodical worship of the said idols or for the improvement of the endowed property as the shebait for the time being should consider fit and proper. The settler went on to add as follows :

I do further declare that I shall during my lifetime be the Shebait and managing trustee for the performance of the Sheva and the daily and periodical worship of the said idols and on my death my appointee or appointees, and in case of non-appointment, my wife Sreemutty Badam Money Dassi shall be the Shebait and managing trustee, and after her death my sons Lalit Mohun Seal, Akshoy Chunder Seal, Nilmoney Seal, and Dulal Chunder Seal jointly and severally shall be Shebaits and managing trustees, and after them their appointees and in default of appointment their heirs shall be the Shebaits and managing trustees jointly and severally for the time being and the said hereditaments and premises shall remain vested in the Shebait or Shebaits for the time being.

By the said indenture of gift, dated the 9th August 1906, the said Gopal Chandra Seal made a gift of Premises No. 13, Tiretta Bazar Street, to his son Akhoy Kumar Seal.

The present suit is brought by the plaintiff for construction of the deed of declaration of trust dated the 22nd February 1897, the indenture dated the 9th August 1906, and the Will of the testator dated the 20th August 1910, and for a declaration of the rights of the various parties to the estate of the said Gopal Chandra Seal upon such construction, and for a scheme to be framed for the daily sheba and periodical festivals of the family idols and for partition by metes and bounds of the estate of the testator. The plaintiff's contention in this suit is that upon a proper construction of the deed of declaration of trust and of the said Will, and bearing in mind that the said idols were the family idols of the testator, who was not, however, the founder thereof, the rights of worship of such idols could not in any way be affected by the said testator by his Will. The plaintiff's further contention is that Premises No. 6, Damzen's Lane, were not made an absolute debutter property, but that the same formed part of the estate of the testator, subject to a trust for spending a part of the rents, issues, profits thereof for the worship of the said family idols.

The defendants, Brojendra Nath Seal and Banamali Seal, it appears, contended that under the provisions of the will of the testator they were entitled to be the present Shebaits of the idols. It is unnecessary to refer to the contentions which were put forward by the defendants Kartick Chandra Seal and Abinash Chandra Pal, because, as far as one can make out, they supported the case set up by the plaintiff, nor is it necessary to refer to some of the other deeds executed by Gopal Chandra Seal in his lifetime in respect of some of his other properties because no question has been raised relating thereto.

The real contest between the parties at the trial before my learned brother Mr. Justice Page was with reference to Premises No. 8, Damzen's Lane, and No. 111, Belliaghatta Main Road, referred to in the will of the testator, and No. 6, Damzen's Lane referred to in the deed of declaration of trust of the 22nd February 1897 and also in the said will. Mr. Justice Page held that the two Premises Nos. 8, Damzen's Lane and No. 111, Belliaghatta Main Road, passed under the Will of the testator to the widow and to the heirs of the testator free from any charge thereon for the expenses of the worship of the family idols. As regards Premises No. 6, Damzen's Lane, the learned Judge held that the same had been dedicated by way of absolute trust for religious purposes, but that the settlor was not entitled of his own will to alter the existing line of shebaits of the family idols, of which he was as stated above not the founder.

On behalf of the appellants, four contentions have been put forward before us:

That Premises No. 8, Damzen's Lane, and No. 111, Bellaghatta Main Road, were clearly intended by the testator to be subject to a charge for the expenses of the worship of the family idols and that the testator did not intend that the said expenses should fall exclusively on 6, Damzen's Lane ;

That the learned Judge was wrong in holding that the persons named in the deed of declaration of trust of the 22nd February 1897, were not and could not be treated as Shebaits of the family idols ;

That the learned Judge was in error in directing by his decree a partition of the properties belonging to the testator in the absence of the Thakurs from the record having regard to the decision of the Privy Council in the case of *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick* 1); and

That no partition could have been directed in the absence from the record of persons who have a right of residence under the terms of the will.

It may be convenient to dispose of the last two contentions. The case of *Mullick* v. *Mullick* (1) turned upon its own peculiar facts and on the facts of that particular case it was held by their Lordships that it was in the interest of all concerned that the idol should appear by a disinterested next friend to be appointed by the Court. In my opinion the case is no authority for the broad proposition that in every case where questions of Deb Sheba arise the idol is a necessary party to be brought on the record.

As regards the last contention, the reference apparently is to the two ladies whose names are mentioned in the Will of the testator on page 10 of the paper-book. The rights of these ladies, whatever they are, have not been questioned by anybody throughout this litigation and on the facts of this case I am unable to see why the decree for partition could not have been made by the learned Judge in the form in which it was made. It may also be observed that this point has not been taken in the memorandum of appeal, neither was it taken in the pleadings nor urged before the learned Judge at the trial.

As regard the first question indicated above the appellants contend that in respect of Premises No. 8, Damzen's Lane, and 111, Belliaghatta Main Road, the intention of the testator was that the said two properties should devolve upon the widow upon certain trusts which include the payment of expenses of the worship of the family idols. Great stress has been laid by the appellants on the opening words in the Will and upon the following directions in the Will:

And I further declare and give and bequeath the room in the family dwelling house, No. 8, Damzen's Lane adjoining to the room of the family idols to my grandson, Abinash Chunder Pal, the son of my deceased daughter Sreemutty Harimoni Dassi, to be used, enjoyed and occupied by him during his lifetime without disturbance and full right of egress and ingress for himself and his family without any molestation by any person or persons dwelling in the said dwelling house and I hereby declare and give and bequeath to my wife Sreemutty Badam Moni Dassi the said dwelling-house No 8, Damzen's Lane, save and except the portion given and bequeathed to my grandson the said Abinash Chunder Pal as hereinbefore mentioned and my garden land situate on No. 111 Belliaghatta Main Road and premises No. 6, Damzen's Lane, for her absolute use and benefit during the term of her natural life with power to collect and realize the rents, profits of the said premises for her support without any claim, demand or control of my sons, Lalit Mohan Seal Akshoy Chunder Seal and Dulal Chunder Seal and to pay the expenses of the worship of the said family idols as provided in the debutter trust deed.

It is argued that it was the clear intention of the testator that the widow was to enjoy the properties during her lifetime and that she was also to pay the expenses of the worship of the family idols as provided in the debutter trust deed by which the testator referred to the deed of declaration of trust of the 22nd February 1897.

The testator who was a cashier in a solictor's office left a Will, the terms of which were in many ways contradictory and it is not easy to construe a Will of this description. He had in my opinion already by the deed of the 22nd February 1897, dedicated by way of an absolute trust for religious purposes Premises No. 6. Damzen's Lane. The reference to the said premises in the Will of the testator can only be explained on the theory that the testator was reiterating in the Will itself what he had already said in the deed of the 22nd February 1897. Reading the Will as a whole and not overlooking the opening words thereof the learned Judge's finding that the two premises in question, namely, 8, Damzen's Lane, and 111, Belliaghatta Main Road, passed under the Will to the widow and the heirs of the testator free from any charge thereon for the expenses of the worship of the family idols is in my opinion clearly right. The matter, however, can be looked at from another point of view. Assuming that there was a charge on the said two premises for the expenses of the worship of the idols, such charge, bearing strictly in mind the words used by the testator could in my opinion operate only during the life-time of the widow. There are no words in the Will itself taking away the properties from the heirs of the testator, nor are there any words indicative of the testator's intention, if there was any, that even after the widow's death the expenses

(1) A. I. R. 1925 P. C. 139=52 Cal. 809.

of the worship of the idols should be defrayed out of the rents, issues and profits of the said two properties. Therefore, as I read the Will, I am unable to deduce from the words used by the testator that he intended to make these two properties debutter in the sense that the income thereof should be laid under contribution for the expenses of the worship of the idols. This disposes of the first point raised by the appellants.

As regards the second point, I am of opinion that the learned Judge was right in the view he took that while it was open to Gopal Chandra Seal, who was a Shebait, but not the founder of certain ancestral idols, to endow property for the use and benefit of the said idols, he could not in any way alter the line of Shebaits as laid down by the founder of the idols nor affect in any way the disposition created by the original founder. The conflict of opinion noticed in the judgment of my learned brother, Mr. Justice Page, is in my opinion an apparent one. It is undoubtedly open to persons interested in the maintenance and worship of family idols to create additional endowments for the benefit of such idols. It is also undoubtedly open to such donors to lay down rules for the management of the subsequently endowed properties and to nominate the persons who should be the managers thereof. But such managers, although they may be described by the donor as Shebaits, do not become shebaits of the family idols in the sense in which the shebaits nominated by the original founder are nor do they become entitled to interfere in the management of the originally endowed properties. It is unnecessary to go through the cases on this point. Each case must depend upon its own facts, and as I read them, they can be reconciled if one keeps in mind the distinction referred to above. In my opinion there is no substance whatever in the second point urged by the appellants and this also must be negatived.

The result therefore is that in my opinion this appeal should stand dismissed with costs.

**Rankin, C. J.**—I agree.

G. B. J. *Appeal dismissed.*

---

## * A. I. R. 1927 Calcutta 265

SUHRAWARDY AND PANTON, JJ.

*Nirmal Chandra De* — Accused—Appellant.

v.

*King-Emperor*—Opposite Party.

Criminal Appeal No. 270 of 1925, Decided on 29th July 1925, from an order of the Presy. Mag., Calcutta, D/-8th April 1925.

(a) *Penal Code, S. 120B — In cases of conspiracy evidence generally available is that of police officers and therefore should be dealt with caution—Practice—Evidence.*

In cases of conspiracies it is difficult for the prosecution to secure outside and independent evidence. The prosecution has to depend upon evidence of people who are engaged in detecting crimes of this sort. In a case like this therefore the evidence of such persons should be scrutinized and received with a great deal of caution. [P 266, C 1]

(b) *Arms Act, S. 22—Scope.*

Section 22 deals with persons without licenses dealing with licensed vendors or purchasers or with persons with licenses dealing with unlicensed vendors or purchasers. [P 266, C 2]

* (c) *Penal Code, S. 120B—Arms Act, S. 19 (f) —Agreement of parties makes offence complete—Conspiracy to possess firearms—Conspiracy in respect of particular firearms need not be proved.*

An offence under S. 120B consists in the conspiracy without any reference to the subject-matter of the conspiracy. [P 266, C 2]

It is true that the law does not take notice of the intention or the state of mind of the offender and there must be some overt act to give expression to that intention, but that overt act in a case of conspiracy under S. 120B consists in the agreement of the parties : *Mulcahy* v. *The Queen*, (*L. R. 3 H.L.* 306, 1868), *Rel. on.* [P 266, C 2]

The definition of conspiracy in S. 120B excludes the agreement to commit an offence, from the category of such conspiracies, in which it is necessary that the agreement should be followed by some act. It is not therefore necessary in a case of conspiracy to possess firearms, for the prosecution to specify in the charge or to prove that the accused conspired to possess any particular firearms : 42 *Cal.* 957, *Rel. on.* [P 267, C 1]

(d) *Evidence Act, S. 30—Admission of guilt by an accused implicating a co-accused can be used against the latter.*

*Obiter.*—The statement made by an accused in Court implicating himself as well as his co-accused can be taken into account in considering the guilt of the latter. [P 267, C 2]

*Manindra Nath Banerjee*—for Appellant.

*Khundkar*—for the Crown.

**Judgment.**- In this case the accused Nirmal Chandra De alias H. K. Roy has been convicted under S. 19 (f) of the

Arms Act read with Ss. 120B and 116, I. P. C., and sentenced to nine months' rigorous imprisonment. The case for the prosecution, shortly put, is that the Accused Nos. 3 and 4 (who is the present appellant) entered into a conspiracy to possess firearms and ammunition and negotiated with Accused No. 2, a Chinaman, for the purchase of some eight pistols and ammunition. There were several meetings between the second accused, and the third and the fourth accused but the actual sale, for some reason or other, did not take place. Some portion of the price was advanced to the second accused but further negotiations broke off because either they could not come to terms or that the accused persons expected some people to come from outside and take delivery of the pistols but they did not come in time. The evidence in the case mainly consists of police officers and spies. In a case like this it is difficult for the prosecution to secure outside and independent evidence. The prosecution has to depend upon evidence of people who are engaged in detecting crimes of this sort. In a case like this therefore the evidence of such persons should be scrutinized and received with a great deal of caution. We have gone through the evidence and have considered all the submissions made on behalf of the appellant by the learned vakil appearing for him, and we have come to the conclusion that, so far as evidence goes, it has to our satisfaction established the occurrence as related by the prosecution.

The first objection taken to the conviction is with regard to the insufficiency of evidence relating to identification. The two superior police officers engaged in this matter no doubt were unable to identify the accused because they were hiding themselves in a room from where the accused could not be seen. But the other evidence on the record satisfactorily establishes the identity of the accused. In this connexion the statement of the accused must also be taken into consideration. The occurrence took place in a house in Bow Street and he admits that on the day of occurrence he was taken by the other accused who, according to him, asked him to wait within the square near the house and himself went inside the house. The presence of the accused near the place of occurrence and at about the time at which the occurrence took place is particularly admitted.

It is next argued that the conviction ought to have been under S. 22 of the Arms Act and not under S. 19 (f). That section says that whoever knowingly purchases any arms, etc., etc., or delivers any arms, etc., etc., etc., into the possession of any person without previously ascertaining, etc., etc., The learned Chief Presidency Magistrate is right in his view that this section deals with persons without licenses dealing with licensed vendors or purchasers or with persons with licenses dealing with unlicensed vendors or purchasers. It is therefore not applicable to the present case.

The real question that arises in this case and requires consideration is whether on the facts found by the learned Magistrate an offence under S. 19 (f) read with S. 120B, I. P. C., has been made out. The facts found are that the accused with another person (Accused No. 3) went to a place and met the second accused for the purpose of purchasing from him arms and ammunition. The arms and ammunition were not produced at any of the meetings and there is no evidence on the record that the second accused possessed those arms and ammunition at the time when negotiations were taking place between the parties. On these facts it is argued that the offence of conspiring to possess firearms has not been made out. It is contended that there must be some definite property about which the parties were negotiating or which they had conspired to possess. This in our judgment is not the correct view of the law. An offence under S. 120B consists in the conspiracy without any reference to the subject-matter of the conspiracy.

Criminal conspiracy consists in the agreement of two or more persons to commit an offence punishable by law. It is undoubtedly true that the law does not take notice of the intention or the state of mind of the offender and there must be some overt act to give expression to that intention. It was observed in the case of *Mulcahy* v. *The Queen* (1) by Willes, J., as follows :

> A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful

(1) [1868] 3 H. L. 306=1 C. L. 13.

means. So long as such a design rests in intention only, it is not indictable, when two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, actus contractum, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means.

This dictum has been accepted as good law. The overt act, therefore, in a case of conspiracy consists in the agreement of the parties and this is the view which has been adopted by the Indian Legislature in the definition of "conspiracy" as given in S. 120A I. P. C., in which the proviso says that :

no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

This definition excludes the agreement to commit an offence from the category of such conspiracies in which it is necessary that the agreement should be followed by some act.

This view was taken also in the case of *Amrita Lal Hazra* v. *King-Emperor* (2), where the accused was charged with conspiracy to possess explosive substances under S. 120B I. P. C., and S. 4 of the Explosive Substances Act (6 of 1908). It was there, as here, argued that the explosive substances not being in existence, the charge was bad. Their Lordships after an exhaustive consideration of the authorities observed that where the illegal act charged under S. 120B is the unlawful and malicious possession of explosive substances, it is not essential to specify in the charge the explosive substance which the accused have conspired to have in their possession or under their control ; and that a person may be guilty of criminal conspiracy even though the illegal act, which he has agreed to do, has not been done, for the "crime of conspiracy" consists only in the agreement or confederacy to do an illegal act by legal means or a legal act by illegal means. The third and the fourth accused having, according to the finding of the Magistrate, conspired to possess firearms, it is not necessary for the prosecution to specify in the charge or to prove that they conspired to possess any particular firearms. This objection, therefore, is overruled.

It is contended next that the learned Magistrate was wrong in taking into consideration the statement of the second accused which was an admission of his guilt implicating the present appellant. It does not appear from a perusal of the learned Magistrate's judgment that he has placed reliance upon the statement made by the second accused because though it was a confession of his guilt he refused to accept it and proceeded with the trial against that accused also : and in his finding against the present appellant he has nowhere relied upon the statement of the second accused. Besides, we are not convinced that the statement made by the second accused in Court implicating himself as well as the other accused conld not be taken into account in considering the guilt of the latter.

We have been asked by the learned vakil for the appellant to treat the appellant under S. 562, Criminal P. C., as this was his first offence and he is said to belong to a respectable family. Under other circumstances we would have been induced to extend the provisions of S. 562 to the accused in consideration of the fact that he belongs to a respectable family and that he is a law student : but considering the nature of the crime we are not disposed to do so. It is a very serious offence for a citizen to possess firearms without a license. The very act itself may not be very serious but it may lead to serious consequences.

We are lastly pressed to consider the sentence passed on the accused. The maximum punishment under the section is three years' rigorous imprisonment : and as the offence was not complete the learned Magistrate has in view of S. 116, I. P. C., sentenced the accused to one-fourth of the maximum punishment, namely, nine months. We have given our best consideration to the facts of this case and we do not think that it is a proper case in which we should interfere with the sentence. The accused was trying to get hold of 8 pistols with ammunition for some mofussil party. He has not succeeded in his attempt ; and we do not know how the weapons were intended to be used.

The appeal is accordingly dismissed.

G.B.J. *Appeal dismissed.*

(2) [1915] 42 Cal. 957=19 C. W. N. 670 = 29 I. C. 518=21 C. L. J. 331.

## A. I. R 1927 Calcutta 268

B. B. GHOSE AND CAMMIADE JJ.

*Lakhi Nath Bera* and *others*—Defendants—Appellants.

*Nabadwip Chandra Nandi* and *others*—Plaintiffs—Respondents.

Appeal No. 1034 of 1924, Decided on 13th July 1926, from the appellate decree of the Addl. Dist. J., Midnapore, D/- 22nd September 1923.

(*a*) *Record of rights—Party challenging correctness must show that it is incorrect—Proceedings of revenue authorities before final publication are not admissible.*

It is for the person who challenges an entry in the record-of-rights to show that it is incorrect.

When the record-of-rights has once been finally published, it cannot be attacked on the ground that certain procedure adopted by the revenue authorities in arriving at the final conclusion does not support the entry as finally published. The party challenging the record must adduce in evidence, in order to rebut the presumption, matters other than what happened during the proceedings prior to the final publication before the revenue officer. [P. 269, C. 1]

(*b*) *Bengal Tenancy Act, Ss.* 23 *and* 178 (3) (*b*)—*Cutting trees is using land within S.* 23—*Occupancy raiyat stipulating not to cut trees—Stipulation is not binding—Tenant covenanting not to appropriate trees is bound by the covenant irrespective of any custom —Bengal Tenancy Act, Ss.* 178 (3) (*b*) and 23.

One of the uses of the land under S. 23 is to cut down trees. If an occupancy raiyat covenants that he will not be entitled to cut down trees, where there is no custom to the contrary, that contract will not take away his right to cut down trees. It is otherwise with regard to the right of appropriating trees. If any tenant has covenanted not to appropriate any trees, he would be bound by that covenant even if there be a custom that the tenants on the locality are entitled to appropriate trees.

[P. 269, C. 2, P. 270, C. 1]

(*c*) *Custom—Landlord and tenant—Kabuliyats by tenants covenanting not to cut trees—Kabuliyats do not prove custom that tenants are not entitled to cut trees.*

Where kabuliyats executed by tenants simply contain a covenant by the tenant not to cut or appropriate trees, that covenant does not amount to evidence of any custom. [P. 269, C. 2]

*Amarendra Nath Bose, Arun Chandra Bose* and *Jati Nath Ghose*—for Appellants.

*Sarat Chandra Roy Chowdhury, Apurba Charan Mukherjee* and *Rama Prosad Mukherjee*—for Respondents.

**Judgment.**—This is an appeal on behalf of the defendants. The suit was brought by the plaintiffs against the defendants who were sued under O. 1, R. 8, Civil P. C., as representing all the residents of Mouza Balpai Bamanbarh. The suit was for a declaration that the defendants had no right to cut down or to appropriate trees on their holdings. A further declaration was asked for to the effect that the plaintiffs as landlords had the right to cut down and appropriate trees on the holdings of the tenants of the mouza. The record-of rights is in favour of the defendants and the plaintiffs therefore prayed that it should be declared that the record-of-rights was incorrect.

The trial Court made a decree to this effect that the tenants of Balpai Bamanbarh had no right to cut and appropriate trees on their jote without the consent of the plaintiffs landlords and that the record-of-rights was incorrect. The tenants appealed against that decision and the Additional District Judge has varied the decree of the Munsif and he declared :

that the defendants have got no right to the trees and they cannot cut and appropriate the same except on marriage occasions on payment of Re. 1-4-0 for each tree and except for cremation without payment of price but with the landlords' (plaintiffs') permission subsequently obtained and except cutting and appropriating branches of trees for fuel purpose. That the plaintiffs have got right to the trees subject to those aforesaid restrictions and that settlement record is declared erroneous.

The defendants appealed against that decree to this Court.

A preliminary objection has been taken that the appeal is not properly constituted as pro forma Defendant No. 21, who was one of the landlords has not been properly impleaded in the appeal and the appeal was dismissed as against him. We do not think that the Defendant was one of the necessary parties to the appeal. He was one of the landlords who did not join with the plaintiffs because he had interest in several jotes and his interest was adverse to the claim of the co-sharer landlords. Thereupon he was made a pro forma defendant. As he made no claim and no decree was passed in his favour he was not a necessary party in the appeal which was brought by the tenants-defendants against the plaintiffs-landlords.

The main question that has been urged on behalf of the appellants may be stated shortly thus: That the Additional District Judge has erroneously refused to give effect to the presumption of the

correctness of the record-of-rights which the law raises under S. 103 B, sub-S. (3) of the Bengal Tenancy Act; secondly, that the learned Judge has used certain kabuliyats executed by different tenants for the purpose of using them as establishing a custom as alleged by the plaintiffs; thirdly, that the Additional District Judge has wrongly refused to take into consideration judgments produced as evidence by the defendants in their favour on the gronnd that they did not appertain to the mouza in question whereas he has taken similar judgments with regard to different mouzas into conderation in order to support the plaintiff's claim; and lastly, it is said that there is no finding that the plaintiffs have by custom the right to cut down trees on the holdings of the tenants. It has also been urged that the kabuliyats which the plaintiffs have filed cannot be relied on by the plaintiffs as being in contravention of S. 178 (3) (b) of the Bengal Tenancy Act.

With regard to the record-of-rights the Additional District Judge states that the plaintiffs challenged the entry as incorrect, the defendants must thereupon show that the record-of-rights is based on a sound basis. This statement is obviously erroneous. It is for the person who challenges an entry in the record-of-rights to show that it is incorrect.

The next thing that the learned Judge has done is to take into evidence a decision of the attesting officer which was arrived at before the final publication of the record-of-rights in order to consider the question whether the record-of-rights is erroneous or not. This also in our judgment is wrong. When the record-of-rights has once been finally published it cannot be attacked on the ground that certain procedure adopted by the revenue authorities in arriving at the final conclusion does not support the entry as finally published. If the party aggieved by that entry takes objection under the provisions of S. 105 or S. 106 they might be considered by the Revenue officer. But when a record-of rights is challenged in a civil Court the party challenging this record must adduce in evidence, in order to rebut the presumption, matters other than what happened during the proceedings prior to the final publication before the revenue officer. It is well known that the settlement authorities may come to certain conclusions at one time of the proceeding which they may modify during the course of the preparation of the record. But the record which is finally published is that with which the civil Court is concerned. The learned Judge does not refer to any other evidence on which he could hold that the presumption of the correctness of the record-of-rights has been rebutted. On the other hand, he has held that no presumption can be made under it, which is again wrong.

The next point is with regard to the kabuliyats. These kabuliyats might be evidence as to the existence of the custom of the defendants' appropriating the trees or of the landlords' cutting down the trees if there had been any mention of such custom in these kabuliyats. Some of them, it is said, do not contain any reference to the custom as claimed by the plaintiffs. If there were such reference to any custom they might be admissible as evidence if they could otherwise be admissible under the law as to existence or non-existence of the custom pleaded. But if they simply contain a covenant by the tenant not to cut or appropriate trees that covenant does not amount to evidence of any custom. The parties to the kabuliyat may be bound by the terms of it, but it would not be of any effect as regards a third party. Here we may observe, with reference to the argument based on S. 178 (3) (b) of the Bengal Tenancy Act that the Additional District Judge does not seem to have been right with regard to his reading of S. 23 of the Bengal Tenancy Act. Section 178 (b) provides that

> nothing in any contract shall take away or limit the rights of an occupancy raiyat to use land as provided by S. 23.

The learned Additional District Judge holds that it does not refer to the question of cutting down trees. We are unable to accept his view. One of the uses of the land is to cut down trees and the last sentence of S. 23 provides that if there is a local custom to the contrary the raiyat shall not be entitled to cut down trees. S. 178 (3) (b) refers to the use of the land. If an occupancy raiyat covenants that he will not be entitled to cut down trees, where there is no custom to the contrary, that contract

will not take away his right to cut down trees. It is otherwise with regard to the right of appropriating trees. If there is a custom that raiyats can appropriate trees on their holdings, S. 178 (3) (b) is no bar to the raiyats entering into a covenant with the landlords that he would not appropriate trees cut down. That is the only effect which can be given to the kabuliyats of the tenants. Our conclusion therefore is that if any tenant has covenanted not to appropriate any trees he would be bound by that covenant even if there be a custom that the tenants on the locality are entitled to appropriate trees.

The third point is as regards the rejection of the judgments filed by the defendants. This cannot also be supported. If the judgments filed by the plaintiffs be taken as evidence of the custom the judgments filed by the defendants to disprove any such custom may also be accepted and the question must be decided upon the entire evidence.

With regard to the fourth point we do not find that any conclusion has been arrived at by the Additional District Judge. The plaintiffs asked for a declaration that they had the right to cut down trees as will appear from the recital of the plaintiffs' claim in the first paragraph of the judgment. This matter must also be enquired into. The declarations that were given to the plaintiffs were neither asked forby the plaintiffs nor by the defendants. Some of the declarations seemed to be so vague that they would not be workable, e. g., on marriage occasions the defendants would be entitled to cut down trees on payment of Re. 1-4-0 for each tree. What sort of tree it is not mentioned, nor is it mentioned whether they are entitled to cut down trees for timber or for fuel. It is unnecessary to criticize in detail the declarations made by the Additional District Judge.

We, therefore, set aside his judgment and decree and send back the appeal for being re-heard on all the questions that have been stated in our judgment,

Costs of this hearing will abide the final result.

G.B.J. *Case remanded.*

---

## * A. I. R. 1927 Calcutta 270

PAGE, J.

*Tilokechand Surana* and *another*—Plaintiffs.

v.

*J. B. Beattie & Co.*—Defendants.

Original Civil Suit No. 2817 of 1923, Decided on 19th May 1924.

* (a) *Assignment—Rent paid in advance to landlord who had assigned—The assignee is not bound by such payment.*

Where rent is paid in advance to the landlord, but on the dates when the rent becomes payable, the landlords, having assigned the reversions had rendered themselves incapable of giving a valid release of the same, or a valid discharge for the sums so paid as rent, payment of rent to them was not payment of rent to persons entitled to receive it, and such payments would afford no defence to a claim for payment of the rent by the person to whom the reversion had been transferred. Such payment cannot therefore be regarded as having been made as rent at all.

[P 272 C 2]

* (b) *Assignment—Property in possession of tenant—Assignee is bound to enquire from tenant as to extent of his rights in the premises.*

In cases where the proprietary title to premises in the occupation of a tenant is assigned, it is incumbent upon the assignee to make enquiries of the tenant as to the extent of his rights and interest in the premises. If the tenant in answer to such an enquiry represents his rights in the premises to be other than those which he possesses, in a case where the assignee has accepted the assignment in reliance upon such a representation he will thereafter be precluded as against the assignee from asserting his rights to be other than those which he has stated. But assuming that a correct answer is received, or that no enquiry is made by the assignee, in either case, the assignment will be subject to the tenant's rights and interests in the premises.

[ P273 C 2]

* (c) *Assignment—Mortgage—Mortgagee privy to collateral agreement between mortgagor and tenant—Assignee of mortgagee's interest is bound.*

If a mortgagee is privy to and has sanctioned a collateral agreement between the mortgagor and the tenant, a subsequent assignee of the mortgagee's interest is not to be permitted to assert that his interest in the premises is not affected by the agreement, because the agreement was entered into at a date subsequent to that on which the mortgage was executed.

[P 273 C 2]

**Judgment**.—This case raises an important question as to the rights of a mortgagee of premises which at the time when the mortgage was executed were in the occupation of a tenant of the mortgagor. The material facts are as follows:

In 1907 two persons by name Hyam and Jones, who at that time were the owners of the premises in suit, No. 3-1 Mangoe Lane, let a portion thereof to the defendants as monthly tenants at the

rent of Rs. 150 a month. On the 13th July 1914 Hyam and Jones mortgaged certain premises, including the premisss in suit to M. A. Sassoon and others. On the 13th January 1917 the mortgagees filed a mortgage suit against Hyam and Jones for an order for the sale of the mortgaged premises. On the 16th March 1917 M. A. Sassoon, one of the mortgagees, was appointed receiver of the said premises by order of the Court. On the 17th July 1917 a preliminary decree for sale was passed.

Now, Hyam was accustomed to make out the defendant's rent bills, and to obtain the rent up till the time when the appointment of the Receiver was made, and thereafter until the date of the agreement to which I am about to refer, the course adopted for the purpose of collecting the rent was that Hyam made out the rent bills and endorsed them to Sassoon and the money was collected by Sassoon's peon. In 1920 the premises in suit were in need of repair, and on the 7th June 1920 an agreement was entered into between Hyam and Jones on the one hand and the defendants on the other whereby the defendants advanced to Hyam and Jones Rs. 7,800 on that date, Rs. 1,500 on the 20th October 1920, and Rs. 2,500 on the 29th December 1920 in order to provide funds for the repair and improvement of the premises while Hyam and Jones on their part undertook to expend the money advanced on repairs, and to treat the sums so paid as rent paid in advance. It was further agreed that after the work of repair and improvement had been carried out the rent payable should be increased to Rs. 200. After the 7th June 1920 no further rent bills were made out or rent collected. I find that this agreement was made, and that the above statement of facts correctly represents the arrangement which was made, and what took place in respect there of.

Further, although the defendants were not aware that the mortgage to Sassoon and others had been executed, I am satisfied on the evidence that the mortgagees were fully apprised of the nature of the agreement of the 7th of June 1920, and from the evidence adduced before me I draw the inference that the mortgagees gave their sanction to it. I am invited by the plaintiffs to come to a conclusion from the evidence that the mortgagees neither knew nor approved of this agreement, but, in my opinion, the natural and reasonable inference to be drawn is to the contrary effect. Sassoon was not only a mortgagee, but the receiver of the rents and profits derived from the mortgaged premises. I am at a loss to understand when Sassoon after the 7th June 1920 found that the rent was no longer being paid monthly as heretofore or at all why he did not protest and demand payment of the rent unless he was aware and approved of the agreement between Hyam and Jones and the defendants. In my opinion, the true view is that the Sassoon mortgagees fully understood, and were privy to, this agreement. In July 1921 Hyam and Jones were minded to pay off the Sassoon mortgage and on the 12th July 1921 they granted a mortgage of the said premises to the plaintiffs for six lakhs, and interest thereon at 12 per cent. On the same day with the proceeds which resulted from the execution of the plaintiffs' mortgage Hyam and Jones (as appears from the petition of the Sassoon mortgagees dated 22nd February 1922) paid to the Solicitors for the said mortgagees a sum of Rupees 6,92,093 which admittedly was accepted by Messrs. Morgan & Co., their attorneys, in full satisfaction of the Sassoon mortgagee's claim for principal and interest due under the decree passed in the mortgage suit. Thereupon Morgan & Co., gave to Hyam and Jones a receipt in the following terms :

Suit No. 270-16

M. A. SASSOON v. J. I. J. HYAM.

Received from Messrs. Hyam and Jones a cheque for Rs. 7,02,000 only, viz., Rs. 6,92,093-3 in full satisfaction of the plaintiff's claim for principal and interest due under the decree herein and Rs. 9,906-13-2-0 on account of the costs of the suit. We undertake to refund excess, if any, on adjustment of the costs of his suit. (Stamped with a one-anna stamp and dated 12th July 1921).

On completion of the transaction the title-deeds were handed to Hyam and Jones' Solicitors. Subsequently it transpired, according to the computation made by Morgan & Co., that the claim of theSassoon mortgagees by mistake had been underestimated to the extent of Rs. 25,779-8-3 and on the 2nd March

1922 the said mortgagees applied by petition to the Court for an order for the sale of the mortgaged premises for recovery of the amount alleged still to be outstanding in respect of the sum due under the said mortgage-decree. An order for sale was made, and pursuant thereto, on the 24th March 1923, at an auction sale held by the Registrar of the High Court, the plaintiff purchased the mortgaged premises including the premises in suit for Rs. 1,00,000 subject to the mortgage dated 12th July 1921 in favour of the plaintiffs (see condition of sale XV, the order of 26th April 1223, and the order of 17th May 1923). It appears that the mortgage to the plaintiffs was executed on the 12th July 1921, and not on the 12th July 1922. But, in my opinion, for the purpose of this suit, it is immaterial upon which of those dates it was granted. On the 28th March 1923 B. N. Basu & Co., Solicitors for the plaintiffs, wrote to the defendants the following letter:

Dear Sirs,

Re. 3 and 3-1 Mangoe Lane.

We are instructed by our clients Messrs. Tilokechand of No. 8-3 Rupchand Roy Street, Calcutta, that at a sale held by the Registrar of the High Court on the 24th instant, the above property was sold and our clients Messrs. Tilokechand were declared the highest bidders and purchasers at the sale. We are instructed to call upon you not to pay any rent to any person other than our client. Should you do so, such payment will be entirely at your own risk and penalty, and will not be recognized by our client.

Yours faithfully
(Sd.) B. N. BASU & CO.

On the 31st May, the current rent not having been paid to the plaintiffs, the plaintiffs' Solicitors again wrote to the defendants:

Dear Sir, Re. 3-1 Mangoe Lane.

We are instructed by our clients Messrs. Tilokechand the owners of the above premises, to call upon you, which we hereby do, to quit and vacate the portion of the said premises occupied by you on expiry of the month of June 1923. Should you fail to vacate in pursuance of the above notice, legal proceedings will be taken to eject you without further reference. You have not paid rent for the above permises for a long time.

Now, the defendants did not vacate the premises as requested in accordance with the said notice to quit, or at all. If the agreement between the mortgagors and the defendants of 7th June 1920 is valid and binding upon the plaintiffs, the plaintiffs by reason of the Calcutta Rent Act are not entitled to eject the defendants. The question therefore, which I have to determine is whether or not the agreement of 7th June 1920 is valid and binding upon the plaintiffs. The plaintiffs contend that if the payments made by the defendants in June, October and December 1920 are to be treated as payments of rent in advance the payment of rent to a mortgagor, before it has accrued due, does not bar the claim of a mortgagee of the premises, after notice of his interest therein has been given to the tenant to recover the rent accruing therefrom as and when it falls due. On the other hand, if these payments are not to be treated as payments of rent, but as advances to Hyam and Jones as landlords from the defendants as tenants, upon the terms that on the dates when the rent becomes due, such advances were to be treated as the fulfilment of the tenant's obligation to pay rent, the plaintiffs contend that such a transaction amounted to a collateral agreement which will not affect or control the mortgagees' rights and interest in the premises and is one which the plaintiffs as mortgagees or as auction purchasers are not under any obligation to respect.

As regards the first contention, if the premises upon which it is based are sound, I am not disposed to disagree with the conclusion which is drawn therefrom. But, in my opinion, these sums were not, and are not to be regarded as having been paid as rent for this reason: that on the dates when the rent becomes payable, the landlords, having assigned the reversion, had rendered themselves incapable of giving a valid release of the same, or a valid discharge for the sums so paid as rent. Payment of rent to them was not payment of rent to persons entitled to receive it, and such payments would afford no defence to a claim for payment of the rent by the person to whom the reversion had been transferred. As Mr. Justice Willer pointed in *De-Nicols* v. *Saunders* (1).

It is clear that the Common Law authorities which say that payment before notice is good against a mortgagee, and which are represented by *Watts* v. *Ognoll* (2), have no application to the present case, they apply only to a person fulfilling his obligation to one who, at the time it is fulfilled, is the apparent reversioner, which is similar to payment to a creditor who has assigned the debt without notice to the debtor.

(1) [1870] 5 C. P. 58=18 W. R. 1106=39 L.J. C. P. 297=22 L. T. 661
(2) [1791] Cro. Jac. 192=79 E. R. 167.

These cases depend upon a rule of general jurisprudence not confined to choses in action, though it seems to have been lost sight of in some recent cases, viz., that if a person enters into a contract, and without notice of any assignment, fulfils it to the person with whom he made the contract, he is discharged from his obligation; that is a rule which is declared rather than enacted by 4 Anne, C. 16, S. 10. That Statute did away with the necessity for attornment, but protected the tenant in cases where he had paid the rent due from him before notice of the assignment; this provision of the Statute, however, clearly applies to the fulfilment of an obligation to pay rent imposed by the lease. There has been no such payment here for payment of rent before it is due is not a fulfilment of the obligation imposed by the covenant to pay rent, but is, in fact, an advance to the landlord, with an agreement that on the day when the rent becomes due such advance shall be treated as a fulfilment of the obligation to pay the rent.

Although the correctness of this decision appears to have been doubted by Farwell, L.J., in *Green* v. *Rheinberg* (3), in my opinion the ratio decidendi of Mr. Justice Willes' judgment which was repeated by the Court of Common Pleas to which decision he was a party in *Cook* v. *Guerra* (4), is unimpeachable and is an accurate statement of the law. [See *Ashburton* v. *Nocton* (5).]

As regards the second contention which counsel for the plaintiffs has urged before me, I find as a fact that the agreement of the 7th June 1920 was prior in date to the mortgage of the 12th July 1921 and, in my opinion, the plaintiffs must be deemed to have received constructive notice of this agreement before they became parties to the mortgage, and are under an obligation to the defendants to respect the terms thereof. The equitable principle to be applied in the circumstances of this case may be gathered from a perusal of the following cases: *Daniels* v. *Davison* (6); *Allen* v. *Anthony* (7); *Barnhart* v. *Greensheilds* (8); *Holmes* v. *Powell* (9); *Morrogh* v. *Aileyne* (10); *Hunt* v. *Luck* (11); *Hunt* v. *Luck* (12); *Green* v. *Rheinberg* (3), and *Ashburton* v. *Nocton* (13); *Ashburton* v. *Nocton* (5).

In cases where the proprietary title to premises in the occupation of a tenant is assigned, it is incumbent upon the assignee to make enquiries of the tenant as to the extent of his rights and interest in the premises. If the tenant, in answer to such an enquiry, represents his rights in the premises, to be other than those which he possesses no doubt in a case where the assignee has accepted the assignment in reliance upon such a representation he will thereafter be precluded as against the assignee from asserting his rights to be other than those which he has stated. But assuming that a correct answer is received, or that no enquiry is made by the assignee, in either case, in my opinion, the assignment will be subject to the tenant's rights and interests in the premises. And the principle is to be applied alike in cases where the assignee is a mortgagee as in cases where he is a purchaser of the premises. [See *Green* v. *Rheinberg* (3)]. It would offend the conscience were it to be held that the rights of the tenants in such circumstances were subject to defeasance or curtailment and, in my opinion, the mortgagor by transferring his interest in the reversion is not entitled thereby to resile from his agreement or to derogate from his grant and the assignee takes the reversionary interest subject to the rights and interest of the tenant in the premises. In *Daniels* v. *Davison* (6), Lord Eldon (Lord Chancellor) observes that

> there is considerable authority for the opinion I hold, that, where there is a tenant in possession under a lease, or an agreement, a person, purchasing part of the estate, must be bound to enquire, on what terms that person is in possession.

Again in *Allen* v. *Anthony* (7), Lord Eldon re-stated the principle, which was an interesting case in which a bill was filed in Chancery by the owner of the fee simple of an estate for an account of timber felled by the defendant on the estates of the plaintiff and for incidental relief. It appeared that the predecessor of the plaintiff in 1799 had agreed to demise to one Izard for 21 years, at a certain rent, the premises in question, with reservation to herself

(3) [1911] 104 L. T. 149.
(4) [1872] 7 C. P. 132=26 L. T. 97=41 L. J. C. P. 89=20 W. R. 367.
(5) [1915] 1 Ch. 274=59 S. J. 145=84 L. J. Ch. 193=111 L. T. 895=31 T. L. R. 122.
(6) [1809] 16 Ves. Jun. 249=10 R. R. 171.
(7) [1816] 1 Mer. 282=15 R. R. 113.
(8) [1853] 9 Moo. P. C. 18=105 R. R. 1.
(9) [1856] 8 Deg. M. & G. 572=114 R. R. 255.
(10) [1869] 7 Eq. 487.
(11) [1901] 1 Ch. 45=49 W. R. 155=70 L. J. Ch. 30=17 T. L. R. 3=83 L. T. 479.
(12) [1902] 1 Ch. 428=71 L. J. Ch. 239=18 T. L. R. 265=50 W. R. 291.
(13) [1914] 2 Ch. 211=83 L. J. Ch. 831.

and her heirs of all the timber and timber-like trees and liberty to cut and carry away the same. Nine years later the defendant obtained possession of the premises under an execution in an action brought by him against Izard, and in the following year 1809 the then owner of the estate, Sarah Kier, agreed to sell to the defendant all the timber except fruit trees for £200. Subsequently Sarah Kier conveyed the reversion to Archer from whom the plaintiff's father purchased it, and the question in the case was whether the proprietary interest of the plaintiff in the estate was subject to the agreement which had been made by Sarah Kier with the defendant.

In the course of his judgment Lord Eldon observed :

It is so far settled as not to be disputed, that a person purchasing, where there is a tenant in possession, if he neglects to inquire into the title, must take, subject to such rights as the tenant may have ; *Douglas* v. *Whitterwrong* (14). And there is no doubt that, if the defendant had been entitled to the trees on the estate, under the agreement by which he held the estate itself, the plaintiff would be bound by the authority of the several cases in which it has been so decided. But the question here is, whether there is any difference in the case when the right of the tenant to the timber arises by a contract made independent of, and posterior to, the contract under which he holds possession of the estate, and on the best consideration that I am able to give to the subject, I think it would be going on a distinction much too thin to determine that he may be restrained from the exercise of that right in the latter case, although he could not have been so restrained if his title to the timber had been coincident with his title to the possession of the estate. There is no more reason in the one case than in the other to say that the purchaser was not bound to make enquiry as to the nature and extent of the tenant's interest. He must, therefore, suffer the consequence of his neglect to take that obvious precaution.

In *Barnhart* v. *Greensheilds* (8), Mr. Pemberton Leigh (afterwards Lord Kingsdown), stated the principle thus :

With respect to the effect of possession merely, we take the law to be, that if there be a tenant in possession of the land, a purchaser is bound by all the equities which the tenant could enforce against the vendor, and that the equity of the tenant extends not only to interests connected with his tenancy, as in *Taylor* v. *Stibbert* (15), but also to interests under collateral agreements as in *Daniels* v. *Davison* (6) and *Allen* v. *Anthony* (7) the principle being the same in both classes of cases ; namely, that the possession of the tenant is notice that he has some interest in the land, and that a purchaser having notice of that fact, is bound, according to the ordinary rule, either to enquire what that interest is, or to give effect to it, whatever it may be.

The language of Lord Eldon in *Daniels* v. *Davison* (6) is to the same effect, and when some years after he had again to consider the circumstances, he states the rule in these words :

It is so far settled as not to be disputed that a person purchasing, where there is a tenant in possession if he neglects to enquire into the title, must take subject to such right as the tenant may have.

In *Holmes* v. *Powell* (9) Lord Justice Knight Bruce states the principle in somewhat different language. In the course of his judgment he observes :

I apprehend that by the law of England when a man is of right and de facto in the possession of a corporeal hereditament, he is entitled to impute knowledge of that possession to all who deal for any interest in the property conflicting or inconsistent with the title or alleged title under which he is in possession or which he has a right to connect with his possession of the property. It is equally a part of the law of the country, as I understand it, that a man who knows or cannot be heard to deny that he knows another to be in the possession of a certain property, cannot for any civil purpose. as against him at least, be heard to deny having thereby notice of the title or alleged title under which or in respect of which the former is and claims to to be in that possession.

Lord Justice Swinfen Eady in *Ashburton* v. *Nocton* (5) laid down that :

A pre-payment will be good, as to the amount of the rent which becomes actually due before notice has been given to the tenant by the mortgagee, although not as to the residue : *Cook* v. *Guerra* (4). *Green* v. *Rheinberg* (3) was a clear case, as there the landlord had, prior to the mortgage, released the rent to the lessee and tenant in possession, and under the doctrine of *Daniels* v. *Davison* (6) the subsequent mortgagee was affected with notice of the interest which the tenant had in the land. If the arrangement between mortgagor and tenant for pre-payment of rent, or for setting off future rent against money due from the mortgagor to the tenant, be made subsequent to the date of the mortgage, such arrangement will be treated as a collateral bargain between those parties and not binding upon the mortgagee.

The decision in *Municipal Permanent Building Society* v. *Smith* (16), to which I was referred, turned upon the true contruction te be given to certain sections of the Conveyancing Act of 1881, and is not an authority adverse to the principle of law to which I have referred. The plaintiffs admitted in the plaint which they filed in this suit that at the date when they became auction purchasers of the premises they were

(14) [1802] 7 Ves. Jun. 436 N.
(15) [1794] 2 Ves. Jun. 437=2 R. R. 278.
(16) [1889] 22 Q. B. D. 70=37 W. R. 42=58 L. J., Q. B. 61.

first mortgagees of the same and purchased the same subject to their mortgage.

Did the plaintiffs obtain any higher rights against the defendants than they possessed as first mortgagees by becoming purchasers at the auction-sale? What was it that they purchased? The property subject to their own mortgage, and the rights and interest of the defendants in the premises. In other words, they purchased for one lakh the equity of redemption of the premises being or including the interest of the mortgagors therein. But if the interest which they possessed as first mortgagees was subject to the rights of the defendants under the agreement of 7th June 1920, did they become exempted from their obligations under the agreement of 7th June 1920 by acquiring subsequently the equity of redemption? In my opinion, clearly not. I go further and say that as at the date when they purchased the equity of redemption the mortgagor's interest in the premises was subject to the agreement, the interest of the mortgagors which in effect the purchasers acquired at the auction sale, was saddled with the mortgagor's obligation under the agreement. It was further contended that by acquiring the property at the auction-sale the plaintiffs became entitled to the interest of the Sassoon mortgagees and that as the Sassoon mortgage was not subject to the agreement of the 7th June 1920 (having been executed on a date prior to that on which the agreement was entered into) their interest as assignees of the Sassoon mortgage was not affected thereby. For the reasons which I have given, in my opinion that is not the true effect of the transaction, but assuming this contention to be so far in accordance with the fact that it might reasonably be urged that after the purchase the plaintiffs stood in the place of the Sassoon mortgagees, in my opinion, the plaintiffs remained equally bound by the agreement of the 7th June.

As I have already stated the Sassoon mortgagees were aware and approved of the agreement of the 7th June 1920 and if a mortgagee is privy to, and has sanctioned a collateral agreement between the mortgagor and the tenant [see the observations of Denman, C. J., in *Evans* v. *Elliot* (17)], in my opinion, a subsequent assignee of the mortgagee's interest is not to be permitted to assert that his interest in the premises is not affected by the agreement, because the agreement was entered into at a date subsequent to that on which the mortgage was executed. Upon what basis of reason or fairness is a contention to the contrary to be supported? I can see none and I know of no authority in favour of so inequitable a proposition. On the contrary, in my opinion, the principles and authorities to which I have referred are opposed to any such contention. For these reasons, in my opinion, the plaintiff's claim cannot be sustained and the suit must be dismissed.

D.D.

*Suit dismissed.*

(17) [1838] 9 Ad. & E. 342=8 L. J., Q. B. 51=48 R. R. 520=1 P. & D. 256.

---

## * A. I. R. 1927 Calcutta 275

RANKIN, C. J., AND C. C. GHOSE, J.

*Chuni Lal Dutt* and *others*—Defendants—Appellants.

v.

*Gopiram Bhotica*—Plaintiff—Respondent.

Appeal No. 6 of 1926, Decided on 1st December 1926, from the original decree of Pearson, J., D/- 18th November 1925.

* *Transfer of Property Act, S. 107—Terms of lease for three years settled by oral agreement—Parties intending to execute a lease—Lessee allowed to take possession—Oral agreement can be enforced.*

Where parties settled by oral agreement the terms of a lease of a house for a period of three years but intended a written lease to be executed and the lessee as a matter of fact paid a deposit and was allowed to take possession on the strength of the oral agreement.

*Held*: that the oral agreement would not be a mere nullity under S. 107, Transfer of Property Act. [P. 277, C. 1]

*N. N. Sircar* and *R. N. Sircar*—for Appellants.

*B. C. Mitter* and *A. K. Roy*—for Respondent.

**Rankin, C. J.**—In this case two questions have been argued on behalf of the appellant. It appears that the plaintiff and the defendant appellant were in treaty for letting out to the defendant certain premises 176 Harrison Road, belonging to the plaintiff. The

first document with which we have to deal is a document which came into existence on the 22nd March 1922 and it is contended by the appellant that the learned Judge should have excluded that document from evidence altogether. It is also contended by the appellant that the agreement founded on by the plaintiff is not proved and that the parties have not shown to have been ad idem as to the question whether or not anything in the way of carrying on business was to be allowed to the defendant on these premises.

The question arose by reason of the fact that although according to the plaintiff the defendant was in possession having taken these premises for three years he suddenly vacated them altogether and refused any further to carry out the covenants. Accordingly the learned Judge has at the instance of the plaintiff awarded certain damages against him.

We are not concerned in this appeal save with the two points to which I have already referred.

It was contended by Mr. Sircar on behalf of the appellant that the letter of the 22nd of March although only signed by the defendant's son and although addressed to Mr. N. C. Bose—a solicitor—was really a document which was an agreement for a lease operating to transfer a present interest in the premises and that consequently it was hit by S. 49 of the Registration Act.

Upon the evidence the learned Judge has not taken that view. The learned Judge has dealt with the letter on this basis that the plaintiff and the defendant's son on behalf of his father made a verbal agreement with regard to the terms upon which a formal lease should be given to the defendant by the plaintiff. Having come to this verbal agreement and concluded it to that extent they then went together to the plaintiff's solicitor to see that necessary instructions were given him for the drawing up of a lease.

It appears when one looks to the pleadings that the defendant was making all sorts of defences which have now been held to be unfounded, but he said that he was a monthly tenant of these premises.

Leaving the pleadings aside, however, we come to the correspondence and it is clear that the moment he was challenged the plaintiff made the case that the agreement upon which he was relying was a verbal agreement and he took a view of this letter according to which, no doubt, it was very valuable evidence of what the agreement between the parties had been but according to which it was not the intention of the parties by this letter to effect or embody an agreement between themselves.

When one comes to the evidence one finds that the parties first of all went to Chandi Babu, an Assistant in the plaintiff's solicitor's office and himself an Attorney, and according to his evidence it certainly looks as if the parties had completely effected an agreement between themselves and accordingly came to him to give instructions to draw up a lease.

It appears, however, that there was one complication. Having written out a letter stating in the form of instruction to Mr. N. C. Bose what sort of a lease the parties wanted him to draw up, Chandi Babu sent the parties to Mr. A. C. Bose Mr. A. C. Bose seems to have asked something about the rights of the defendant to sub-let. Whether the two new clauses that were then put in were really new terms or not does not seem to me to matter because the question must turn upon whether this letter was intended by the parties to be the embodiment or repository of an agreement between themselves or whether it was drafted on the basis that the parties had themselves concluded an agreement but that as it was an agreement for execution of a lease they desired to give instructions about a lease to the solicitor in a way that would prevent disputes or trouble and enable the transaction to go on.

I am not of opinion upon the evidence that this Court should interfere with the findings of the learned Judge to the effect that the letter was intended as a letter of instruction to the solicitor and was not intended as an agreement between the parties. That disposes of the first question.

On the question whether the parties were ad idem or not I see nothing whatever to quarrel with in the view taken by the learned Judge. But it is contended by Mr. Sircar that if this letter of the 22nd of March is regarded as a mere letter of instruction to the solicitor any verbal agreement to the same effect a this letter would be a verbal agreement

intending to operate as passing a present interest in the land for three years. Accordingly, he says that being so, even a verbal arrangement would be nugatory in spite of the fact that it provided for the arrangement being subsequently embodied in the terms of a formal lease. It is said that such an oral arrangement would be intended to pass an immediate interest in the property and is by itself a lease within the meaning of the Transfer of Property Act, and although naturally an oral agreement cannot be hit by the Registration Act it would be entirely void because it would attempt to operate as such within the meaning of Ss. 105 and 107 of the Transfer of Property Act. In my judgment, that is an argument which is not to be accepted at all and there are a great many cases in which oral agreements and terms such as these for leases have been specially enforced in this Court, and I am not prepared to say that an oral agreement to the effect in the present case would be a mere nullity notwithstanding the fact that the parties were intending a lease to be executed. In point of fact, it appears that the defendant some little time after paid a deposit and was allowed into possession on the strength of this verbal agreement.

In my judgment, the contentions that have been so ably urged on behalf of the defendant in this case come to nothing and the appeal must be dismissed with costs.

**C. C. Ghose, J.**—I agree.

G.B. *Appeal dismissed.*

---

## * A. I. R. 1927 Calcutta 277

CUMING AND PAGE, JJ.

*Bhupendra Narayan Sinha*—Defendant 1—Appellant.

v.

*Chandramoni Gupta*—Plaintiff—Respondent.

Appeal No 412 of 1924, Decided on 2nd June 1926, from the appellate decree of the Dist. J., Murshidabad, D/- 7th September 1923.

* *Probate and Administration Act, S. 89—Doctrine of* actio personalis moritur cum persona *does not apply in India—Right to sue for damages for negligence survives against the representatives of the wrong doer—Tort—Negligence.*

In India the doctrine of *actio personalis moritur cum persona* does not form part of the law. Right to sue for damages for negligence survives against the representatives of the deceased wrongdoer : 31 *Cal.* 993 *Foll. Remarks of Sadasiva Ayer, J. in A. I. R.* 1921 *Mad.* 1 (*F. B.*); *Appr* : *A. I. R.* 1923 *Bom.* 408, and 4 *Pat. L. J.* 676, *Diss. from.* [P 278, C 1]

*Sitaram Banerjee*—for Appellant.

*Jadu Nath Kanjilal* and *Purna Chandra Chandra*—for Respondent.

**Page, J.**—The suit out of which this appeal arises was brought to recover damages for negligence. The father of the first defendant, Maharaja Ranjit Sinha, was the executor of the estate of the plaintiff's husband and the certificated guardian of her property. During the period in which he bore this relationship towards the plaintiff he lent out of the estate of the plaintiffs' husband a sum of Rs. 2,000 upon the security of a promissory note. In substitution of that note a new promissory note was executed by the parties to the previous note for Rs. 2,500 on the 14th March 1914. No steps were taken by the Maharaja to recover the amount of this promissory note which was payable on demand, the result being that on the 14th March 1917 the cause of action upon the promissory note became barred by limitation. On the 3rd May 1918 the Maharaja died, and was succeeded by his son the first defendant. Between 1918 and 1920 when the plaintiff reached her majority the Defendant No. 1 was her certificated guardian. On the 3rd May 1921, the plaintiff instituted the present suit against the Maharaja's eldest son and his two brothers, as heirs of the Maharaja. The relief sought, however, was claimed against the first defendant as representing the estate of his father. The plaintiff in the suit claimed damages caused by the negligence of the Maharaja in permitting the cause of action upon the promissory note of 1914 to become time-barred. She also claimed interest. Under the promissory note interest was fixed at six per cent.

Both the lower Courts decreed the suit in favour of the plaintiff, but whereas the trial Court decreed the suit against the estate of the late Maharaja for the amount of the principal and proportionate costs and interest at the rate of 6 per cent. per annum up to the date of his death, the lower appellate

Court varied the decree by allowing additional interest at the same rate from the death of the Maharaja until the majority of the plaintiff in 1920.

On farther appeal to the High Court the learned vakil on behalf of the 1st defendant contended that the doctrine of *actio personalis moritur cum persona* applied to this cause of action, and inasmuch as the Maharaja's estate admittedly has not been benefited as the result of the tort, the cause of action against the Maharaja did not survive against his executors and administrators.

In our opinion, this contention is misconceived. In India the doctrine of *actio personalis moritur cum persona* does not form part of the law. Claims by and against the representatives of a deceased person are regulated by S. 89 of the Probate and Administration Act (5 of 1881) and also by the Legal Representatives' Suits Act of 1855 so far as the latter enactment is not inconsistent with the former. It is, therefore, not necessary to refer to the English case law in connexion with the doctrine of *actio personalis moritur cum persona*. Under S. 89 of the Probate and Administration Act of 1881 it is provided that

> all demands whatsoever and all rights to prosecute or defend any suit or other proceedings existing in favour of or against a person at the time of his decease survive to and against his executors and administrators except causes of action for defamation, assault as defined in the Indian Penal Code or other personal injuries not causing the death of the party and except also cases where after the death of the party the relief sought could not be enjoyed or the granting of it would be nugatory.

In *Krishna Behari Sen* v. *The Corporation of Calcutta* (1) the words

> other personal injuries not causing the death of the party

were construed by Chief Justice Maclean, Mr. Justice Sale, and Mr. Justice Bodilly

> to refer to physical injuries to the person which do not cause death.

On the other hand, in *Rustomji Dorabji* v. *Nurse* (2), in *Mati Lal Satya Narayan* v. *Har Narayan Premsukh* (3), and in *Punjab Singh* v. *Ramautar Singh* (4) these words were construed to mean:

> wrongs to the person which do not necessarily cause damage to the estate of the person wronged.

In *Rustomji Dorabji* v. *Nurse* (2), Sadasiva Ayyar, J., referring to the doctrine of *actio personalis moritur cum persona* observed that

> the maxim has been always considered as an unfair and even barbarous maxim, especially when applied to a case where the injured party is denied redress because the wrongdoer died. I may add that it seems to me to be based upon no principle of justice, equity, and of good conscience, and that the technical Common Law rules as to forms of action, and the distinction between real and personal actions might have had much to do with its survival in modern days.

We agree with these observations. Having regard to the language used we do not think that the Legislature intended to perpetuate in this country a doctrine so archaic and unjust, and with all due respect to the learned Judges who have taken a different view we think that the construction which has been placed upon the section by the Calcutta High Court is clearly correct. Whichever construction, however, is adopted the cause of action for negligence in the circumstances proved in this case is clearly within the general rule laid down in S. 89. For these reasons, therefore, this contention on behalf of the appellant fails.

As regards the question of interest, in our opinion, the additional interest allowed by the lower appellate Court which was claimed against the Defendant No. 1 for breach of duty as the plaintiff's certificated guardian was not part of the cause of action in this suit which is brought against the defendant as representing the estate of the Maharaja and therefore could not be recovered. The decree below will be varied to the extent that the additional interest claimed under the cross-objection between the death of the Maharaja and the date of the institution of the suit will be disallowed, but the principal sum will bear interest at 6 per cent. per annum from the date of the suit until realization.

The cross-objection by the respondent has in part succeeded, and in part failed.

The appellant will bear the respondent's costs both of the appeal in which substantially he has failed and also of the cross-objection.

**Cuming, J.**—I agree.

D.D. *Decree varied.*

(1) [1904] 31 Cal. 993=8 C. W. N. 745.
(2) A. I. R. 1921 Mad. 1=44 Mad. 357 (F. B.).
(3) A. I. R. 1923 Bom. 408=47 Bom. 716.
(4) [1919] 4 Pat. L. J. 676=52 I. C. 348=(1910) P. H. C. C. 52.

## A. I. R. 1927 Calcutta 279

DUVAL AND MITTER, JJ.

*Munshi Safar Ali Master*—Plaintiff—Appellant.

v.

*Abdul Majid* and *another*—Defendants—Respondents.

Appeals Nos. 1794 and 1997 of 1924, Decided on 22nd December 1926, from the appellate decrees of the Addl. Sub J., Noakhali, D/- 2nd May 1924.

(a) *Transfer of Property Act, S. 116—Holding over—Possession for eleven years after expiry of lease—Holder holding under kobala from tenant is not a trespasser.*

Where the land continued to be in possession of the tenant after the expiry of the lease, and after his death his mistress continued in possession under a kobala executed by him in her favour, the total period for which the land was held over and above the term of lease being eleven years :

*Held*: that in the circumstances the inference would be that the tenancy did not determine and the possession of the mistress who must be taken to have been holding over was not that of a trespasser but of a person whose rights were to be determined on notice to quit. [P. 280, C. 1]

(b) *Bengal Tenancy Act—Lease of homestead within Municipal area—Bengal Tenancy Act does not apply.*

*Per Mitter, J.*—Lease of homestead land within the Municipality cannot be governed by the Bengal Tenancy Act. [P. 279, C. 2]

*Per Duval, J.*—The mere fact that the land lies within the Municipality is not necessarily sufficient to bring the case under the Transfer of Property Act. [P. 280. C. 2]

*Jitendra Kumar Sen Gupta*—for Appellant.

*Bijan Kumar Mukherjee* and *Raj Kumar Chakravarti*—for Respondents.

**Mitter, J.**—These two appeals arise out of one suit commenced by the plaintiff for khas possession of Plots Nos. 1158 and 1159 of the cadastral survey from the Defendants on the allegation that he took settlement of the lands from Waliulla in osat raiyati right of Plot No. 1158 which was in his khas possession and of Plot No. 1159 which was let out to one Arif Meah in meadi osat raiyati right, and that after his death it came into the khas possession of the landlord as it was an under-raiyati right and was neither heritable nor transferable. The defence is that she acquired an interest in the land in suit with reference to both the plots by virtue of her kobala from her husband Arif Meah in consideration of her dower. The first Court held that Plot No. 1158 was outside the kobala and that in Plot No. 1159 Arif had only a meadi right and was holding the land from year to year and that the Defendant was never recognized by the superior landlord. The first Court decreed the suit with regard to both the plots. On appeal by the defendants the lower appellate Court dismissed the suit with reference to Plot No. 1159 and confirmed the decree with reference to Plot No. 1158. The plaintiff has appealed to this Court with reference to Plot No. 1159, his second appeal being numbered 1794 of 1924 while the defendants have appealed with reference to Plot No. 1158 and their second appeal is numbered 1997.

It has been contended before us that the decision of the lower appellate Court is wrong seeing that the Court finds the kobala in favour of the defendant who was mistress of Arif was without consideration, and that after Arif's death, although the defendant continued to be in possession for 11 years, there was no holding over and that Arif's lease expired after five years which was the time fixed in the lease, and the Court was wrong in holding that from the mere possession one can infer implied consent of the landlord to the tenant's holding over within the meaning of S. 116 of the Transfer of Property Act. In this connexion reference was made on behalf of the appellant to the case of *Ratan Lal Giri* v. *Farashi Bibi* (1). It has been argued for the respondents on the other hand that the case is governed not by the Transfer of Property Act, but by the Bengal Tenancy Act and that the lease being a lease in favour of the plaintiff and being an under-raiyati lease for a period exceeding nine years the plaintiff acquired no interest as such lease is void and that consequently the plaintiff has no title to this plot. We are of opinion, however, that the case is governed by the Transfer of Property Act, and that the word raiyati does not necessarily indicate a jote within the meaning of the Bengal Tenancy Act. The record-of-rights shows that both the plots are bagan lands and we find that in 596, the subject-matter of this appeal, there is a house and that the defendants and Arif enjoyed it for a long time. This land being homestead land within the Municipality the case cannot be governed by the Bengal Tenancy Act. We, therefore, overrule the contention of the Respondents in this behalf.

(1) [1907] 34 Cal. 396=11 C. W. N. 826.

Now let us proceed to consider the contention of the appellant that the case being governed by the Transfer of Property Act, and the lease having expired after five years, there has been no holding over simply because the tenant has established his possession for a period of 11 years after the date of the expiry of the lease. S. 116 of the Transfer of Property Act says :

> If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee or otherwise assents to his continuing in possession, the lease is in the absence of an agreement to the contrary renewed from year to year or from month to month according to the purpose for which the property is leased.

It has been argued on the authority of the case of *Ratan Lal Giri* v. *Farashi Bibi* (1), that mere possession is not sufficient to justify the inference that there was holding over. I may point out that in the case of *Ratan Lal Giri* v. *Farashi Bibi* (1) the suit was instituted within one year and seven months of the expiry of the lease, whereas in the present case the tenant continued in possession for some time after the expiry of the lease and after his death his mistress, the present defendant, continued in possession under the kobala, the aggregate period being eleven years. In the circumstances the Court was justified in drawing the inference that the tenancy did not determine and that the possession of the defendants was not that of a trespasser, but of a person whose rights were to be determined on notice to quit. In this view we are supported by an unreported decision of this Court in the case of *Chaturbhuj Nanda* v. *Gopal Dolai* (2). It is true that there the case was under the Bengal Tenancy Act, but the principle as to what would amount to a holding over is the same whether we are considering the provisions of the Bengal Tenancy Act or those of the Transfer of Property Act. I will quote a passage from that decision to show that this decision supports the view which we take. The learned Judges say :

> It is true that a mere omission by a landlord to sue in ejectment immediately after the tenancy had expired would not be a ground for saying that the tenant was holding over and was not a trespasser.

(2) S. A. No. 3359 of 1910, Decided by Chitty and Tennon, JJ.

This was decided in the case of *Ratan Lal Giri* v. *Farashi Bibi* (1). There the suit was brought a year and seven months after the period of the lease had expired. Here the case is quite different. The tenant Chandra executed a kobala and held over for five years. He then died and his sons continued to hold the lands. Altogether there was an interval of eight years between the expiry of the lease and the present suit. We think that it may be reasonably inferred that the tenancy was in the possession of the tenants holding over after the expiry of the lease as the Subordinate Judge has found.

In this view we think that the decision of the Subordinate Judge in appeal No. 1794 was right. The appeal consequently fails and is dismissed with costs.

With regard to the other appeal numbered 1997 having regard to the view which we have taken that the case is governed by the Transfer of Property Act, the plaintiff's title under the lease is good and as the said plot was outside the kobala of the defendents the lower appellate Court was right in confirming the decree of the first Court.

**Duval, J.**—In the Case No. 1794, which relates only to Plot No. 1159 on which admittedly there was a homestead the first question appears to me to be as to whether the case is governed by the Transfer of Property Act. The learned Subordinate Judge appears to have thought that the mere fact that the land lay within the Municipality of Noakhali was sufficient to bring the case under that Act. I am not prepared myself to say that that is necessarily so. But in this particular case there is the evidence that the land is homestead land. Neither the original tenant nor the heirs of Khosh Bibi who now appear before us are shown to be cultivators or agriculturists at all ; and in this view I agree that the Transfer of Property Act applies. The mere fact that in the record-of-rights the land, which is only a few cottahs in area, was shown as a bagan is not sufficient to show that it was used for horticultural purposes.

Coming to the question of whether the lessee held over within the meaning of S. 116 of the Transfer of Property Act and so cannot be ejected without notice, it appears that Arif held the land

under a lease which expired in 1911. Out of affection, apparently, for the lady with whom he lived, he executed a deed of transfer in 1917. It does not seem to me necessary for this purpose to discuss whether it was a hebanama or a gift. He died in 1919 and after that the lady contiuued to be in possession of the homestead. It was not till 1921 that the plaintiff got his lease and after his lease he at once instituted this suit. Now it may be noted that the landlord is no party to this litigation. It is also found that there was no collection of rent from Arif or his successor in occupation after 1911.

Section 116 says that if a lessee remains in possession after the determination of his lease and the lessor accepts rent from him or otherwise assents to his continuing possession there is a holding over. The question, therefore, is ( as there was no acceptance of rent ): Has there been consent? It will be noted that for ten years the landlord did nothing and as a presumption of fact from the evidence the learnad Subordinate Judge has come to the finding that therefore the lessee was holding over. Reference was made in the course of argument to the case of *Parmahand Singh* v. *Syjou Singh* (3), where Mr. Justice Ashutosh Mookerjee has discussed at length a large number of reported cases and the conclusion come to is that a notice is not necessary unless the landlord assents to the continuing of possession. In the present case the finding of fact which I do not think incredible in second appeal is that the landlord tacitly did consent to continuance of possession and on that finding of fact the defendants must have been held to have been holding over. I do not think that there is anything in the contention in view of S. 108 (J) the Transfer of Property Act that Arif had not the power so long as he was in possession to make any transfer of whatever interest he had, how small it might have been.

Appeal No. 1997 is concerned with another plot of only six cottahs which is described also a bagan. The defendant Khosh Banu was impleaded in respect of that plot of land on the ground that there had been a bandabusti taken of it from the landlord. But at the hearing it subsequently transpired that the present defendants and Khosh Banu before them had no interest at the time of the suit in that land. This is a finding of fact and so the appellants were not really interested either to defend the suit in respect of that plot or to appeal in the matter.

In this view I consider that this appeal also must stand dismissed with costs.

G.B. *Appeal dismissed.*

(8) [1915] 24 C. L. J. 80=37 I. C. 901.

---

## A. I. R. 1927 Calcutta 281

SANDERSON, C. J., AND PANTON, J.

*Pran Kumar Pal Chaudhury*—Appellant.

v.

*Darpahari Pal Chaudhury*—Respondent.

Appeal No. 81 of 1926, Decided on 2nd July 1926, from the judgment of Gregory, J., D/- 23rd March 1926.

(a) *Letters Patent (Calcutta), Cl. (13)—"Suit" includes contested probate proceedings.*

Proceedings for the grant of probate which are contested come within the meaning of the word "Suit" within Cl. (13); *In the goods of Colonel John Shelton, deceased* (1846) *Montriou's Rep.* 167, *Rel. on.* [P 283 C 1]

(b) *Letters Patent (Calcutta), Cl. (13)—Order under, transferring probate proceedings to High Court—No appeal lies.*

The judgment of a Judge on the Original Side transferring probate proceedings to the High Court under Cl. (13) is not appealable: 47 *Cal.* 1104, *Rel. on.* [P 282 C 1]

*N. N. Sircar* and *B. K. Ghose*—for Appellant.

*Advocate General* and *S. R. Das*—for Respondent.

**Sanderson, C. J.**—This is an appeal by Pran Kumar Pal Chaudhury against the judgment of my learned brother Mr. Justice Gregory, delivered on the 23rd of March 1926. It appears that certain probate proceedings were pending in the Court of the learned District Judge of Barisal in which the appellant was the plaintiff and the respondent was the defendant.

A Rule had been granted by a learned Judge, sitting on the Original Side of this Court, calling upon the appellant to show cause why the Probate Suit No. 2 of 1925 pending in the Court of the District Judge of Barisal should not be removed from the said Court at Barisal to this Court for trial of the same by the High Court.

That Rule was heard by Mr. Justice Gregory and on the merits, he came to the conclusion that, for the purpose of justice and on considerations of convenience, it was proper that the probate case pending at Barisal should be removed and tried and determined in the High Court. He, therefore, made the Rule absolute and, in the exercise of the power conferred by Cl. 13 of the Letters Patent, he directed that Probate Case No. 2 of 1925 then pending in the Court of the District Judge of Barisal should be removed from that Court and should be tried and determined in the High Court.

The facts which it is necessary for me to mention are as follows :

The testator died at Faridpur in March 1925, and it was alleged that he made a Will, dated the 9th of August 1907. On the 26th of August 1925 the appellant, who had been appointed executor under the Will, applied for probate in the Barisal Court. On the 9th of September 1925 the widow of the testator filed a caveat objecting to the granting of probate The respondent, who is the minor son of the testator, filed a written statement on the 28th of October 1915, and the ground of his objection to the Will was that the Will was a forgery, and it was alleged that the deceased man had been of unsound mind since the year 1903. The proceedings in the Barisal Court were headed "Probate Suit No. 2 of 1925."

The grounds upon which the learned Judge decided this application have not been investigated in this Court, because the learned advocate, who appeared for the appellant, stated that, if the learned Judge had jurisdiction under Cl. 13 of the Letters Patent to direct that the case should be tried in the High Court on the ground that the proceedings were a "suit" within the meaning of Cl. 13 of the Letters Patent, he was bound by the decision of the late Mr. Justice Mookerjee and another learned Judge of this Court in the case of *Khatizan* v. *Sonniram* (1), that there was no appeal in such a case.

The point on which the learned advocate relied was not taken before the learned Judge on the Original Side. Shortly stated, it was as follows :

The argument was that the learned Judge had no jurisdiction, because the proceedings in the Barisal Court were not a "suit" within the meaning of Cl. 13 of the Letters Patent. Cl. 13 is as follows :

> And we do further ordain that the said High Court of Judicature at Fort William in Bengal shall have power to remove, and try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court, whether within or without the Bengal Division of the Presidency of Fort William, subject to its superintendence when the said High Court shall think proper to do so, either on the agreement of the parties to that effect or for purposes of justice, the reasons for so doing being recorded in the proceedings of the said High Court.

The argument presented on behalf of the appellant was that the Letters Patent contemplated an application for a grant of probate and the proceedings in connexion therewith as something different from a civil suit, such as was contemplated by Cl. 13 and the main ground for the argument was that Cl. 34 of the Letters Patent conferred a jurisdiction on the High Court

> in relation to the granting of probates of last Wills and Testaments, and letters of administration of the goods, chattels, credits and all other effects whatsoever of persons dying intestate, whether within or without the said Bengal Division.

It was argued that Cl. 34 was headed 'Testamentary and Intestate Jurisdiction" and that it was the intention of the Letters Patent that the proceedings in connexion with the grant of probate or letters of administration should be treated as being different from a "suit" which is referred to in Cl. 13, which clause was contained in that part of the Letters Patent which related to "Civil Jurisdiction of the High Court."

In my opinion, the object of Cl. 34 was to confer jurisdiction upon the High Court with regard to the matters which are mentioned in that clause, and the fact that probate and administration proceedings were dealt with in a separate clause of the Letters Patent is not sufficient to show that the proceedings in connexion therewith could not be a suit within the meaning of Cl. 13.

In the first place, I propose to consider what is the nature of the proceedings in connexion with an application for a grant of probate. There is no doubt that in such proceedings the question of title to property does not arise. The question is whether one or other of the parties to the proceedings is entitled to represent

(1) [1920] 47 Cal. 1104=60 I. C. 963.

the estate. But, when the proceedings are contested, as in this case, the Court has to try an issue which arises between the parties and which involves the question whether the plaintiff is entitled to have a grant of probate or whether the person, who has entered a caveat and who has become a defendant, has substantiated and proved the defence which he has set up.

I refer to a passage in Sir John Woodroffe's book on the Code of Civil Procedure, 2nd Edition, at page 44, which is as follows :

Contentious proceedings for the grant of probate were held to be a suit, as an order granting probate, though spoken of in the Probate Act as an order, is for the purposes of the Code a decree, because, so far as the Court granting the probate is concerned, it decides not only a right to have the probate granted, but also the defence set up against the grant.

The learned Chief Justice in the case of *In the goods of Colonel John Shelton, deceased* (2), at page 173, described probate proceedings as follows :

A contest for probate is a suit to try the question of testacy or intestacy, and that administration is a matter of civil right.

In my opinion, these passages correctly describe the nature of the proceedings for the grant of probate which are contested and, in the ordinary acceptation of the word, there is no doubt that proceedings for the grant of probate, which are contested, would come within the meaning of the word "suit."

The Letters Patent of 1865 of this Court were dated the 28th December 1865. In March 1865, an Act which is called the Indian Succession Act (10 of 1865) had been passed. Under that Act, jurisdiction was given to District Judges to grant and revoke probates and letters of administration in all cases within their districts. That jurisdiction was given by S. 235 of the Succession Act of 1865.

Section 236 of that Act provided :

The District Judge shall have the like powers and authority in relation to the granting of probate and letters of administration, and all matters connected therewith, as are by law vested in him in relation to any civil suit or proceeding pending in his Court.

Section 238 provided :

The proceedings of the Court of the District Judge in relation to the granting of probate and letters of administration shall, except as hereinafter otherwise provided, be regulated so far as the circumstances of the case will admit by the Code of Civil Procedure ;

and S. 261 provided :

In any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who may have appeared as aforesaid to oppose the grant shall be the defendant.

Those provisions were in force at the time when the Letters Patent of this Court were issued, and those who were responsible for the Letters Patent must have known of the provisions of the Succession Act of 1865.

It appears from those provisions that proceedings in connexion with an application for the grant of probate did not acquire the character of a "suit" until a caveat had been entered ; or, to put it in another way, when a caveat had been entered and a written statement had been filed, in my judgment, the probate proceedings reached the stage of a contentious suit : and the words which I quoted from the judgment of the learned Chief Justice in *In the goods of Colonel John Shelton, deceased* (2) are peculiarly applicable. The proceedings have then become

a suit to try the question of testacy or intestacy and that administration is a matter of civil right.

The sections of the Indian Succession Act, to which I have referred, have been reproduced in the Probate and Administration Act of 1881. I do not propose to read the sections. The material ones are Ss. 51, 53, 55 and 83.

The learned Advocates, who argued this case on behalf of the appellant, have not convinced me that probate proceedings, which are contested and which have taken the form of a suit by reason of the statutory provisions to which I have referred, do not come within the meaning of the word "suit" in Cl. 13 of the Letters Patent.

In my judgment, when my learned brother Mr. Justice Gregory was called upon to adjudicate in respect of the Rule, which had been granted, and had to consider whether the Rule should be made absolute, the proceedings in the Barisal Court had become a "suit" within the meaning of Cl. 13 of the Letters Patent and he had jurisdiction to make the transfer.

There is nothing more for me to say except that in an unreported case which

(2) [1846] Montrion's Rep. 167.

was headed, *In the goods of Nripendra Chandra Basak, deceased* (*unreported*), this point was specifically raised before my learned brother Mr. Justice C. C. Ghose and the judgment was delivered on the 1st of June 1925. The learned Judge decided that he had jurisdiction to transfer the proceedings, which were contested testamentary proceedings in a subordinate Court, to the High Court. The matter came on appeal to this Court and was heard by my learned brother Mr. Justice Buckland and me. It was dismissed on the ground that the appeal did not lie, the Court relying upon the decision in *Khatizan* v. *Sonairam* (1). It is only material to notice that the point, which had been taken before the learned Judge (Mr. Justice C. C. Ghose) on the Original Side was not raised at the hearing of the appeal in this Court.

For these reasons, in my judgment, this appeal should be dismissed with costs.

**Panton, J.**—I agree.

R.D. *Appeal dismissed.*

---

## * A. I. R. 1927 Calcutta 284

CHOTZNER AND DUVAL, JJ.

*Hamid Ali* and *others*—Accused—Petitioners.

v.

*Madhu Sudan Das Sarkar*—Opposite Party.

Civil Revision No. 6 of 1926, Decided on 23rd September 1926, from an order of the Dist. J., Tipperah, D/- 22nd May 1926.

* (*a*) *Criminal P. C., S. 476—(Chotzner, J.)—Complaint under — Appeal from is regulated by Criminal P. C., S. 424—(Duval, J.)—Civil P. C., O. 41 applies.*

*Chotzner, J.*—When a complaint has been made under S. 476, the person affected by the complaint may take an appeal to the Court to which the Court making the complaint is subordinate and that appeal must be dealt with as an ordinary appeal under the Criminal P. C., as is provided for in S. 424 of the Code. [P 284 C 2]

*Duval, J.*—The appeal must be treated as a miscellaneous appeal and regulated by O. 41, Civil P. C., and not by Ss. 422-424, Criminal P. C. [P 285 C 1]

(*b*) *Criminal P. C., S. 476—Sanction under—Appeal—Sanctioning Court cannot be asked to correct defects in complaint—Summary disposal of appeal is bad.*

When an appeal has been preferred against an order granting sanction under S. 476 the appellate Judge has no jurisdiction to require the Subordinate Judge to answer arguments which he is required to answer himself. Also summary disposal of the appeal without giving any reasons is improper. [P 284 C 2, P 285 C 1]

*Narendra Kumar Basu* and *Debendra Narain Bhattacharjee*—for Petitioners.

*Birendra Kumar Dey*—for Opposite Party.

**Chotzner, J.**—We are of opinion that this Rule must be made absolute on the first ground upon which it was issued, namely that the judgment of the learned District Judge is not in accordance with law. It seems that the Subordinate Judge drew up an order directing the prosecution of the present petitioner on certain grounds. An appeal was taken from that order under S. 476-B, Criminal P. C., to the District Judge. The learned Judge, however, seems to have regarded the complaint drawn up by the Subordinate Judge as defective and he therefore sent instructions to the Subordinate Judge

> to frame a proper complaint more or less in the form of a charge giving the date of the alleged offence or offences, the way in which they were committed (i. e., in the case of the charge under S. 471 the mode of user)

and then he goes on to say "let him send me the complaint in this form" and he then proceeded to state what apparently was one of the grounds of appeal which was

> that judgment-debtors Nos. 2 and 3 took no active part in the prosecution of the case and cannot be bound with anything which Judgment-debtor No. 1 may have done. The Subordinate Judge should meet that objection.

This order was made on the 1st May 1926. On the 22nd May the learned Judge notes :

> Heard arguments for appellants and read the Subordinate Judge's reply to the points referred to in my order. I am not prepared to interfere or order withdrawal.

Now, it is plain from the wording of S. 476B that when a complaint has been made under S. 476, the person affected by the complaint may take an appeal to the Court to which the Court making the complaint is subordinate and that appeal must be dealt with as an ordinary appeal under the Criminal P. C., as is provided for in S. 424 of the Code. The procedure, however, adopted by the learned District Judge was not in accordance with that section. We doubt whether he had jurisdiction when an appeal had been preferred against an order of the Subordinate

Judge to require the Subordinate Judge to answer arguments which he was required to answer himself. We are also of opinion that the summary method he had followed in disposing of the appeal without giving any reason cannot be supported. We consider therefore that the Rule must be made absolute and the case remitted to the Court of the District Judge so that he may re-hear the appeal and write a judgment in accordance with law.

**Duval, J.**—I agree with my learned brother that the appeal must be heard according to law. In my opinion, however the appeal must be treated as a miscellaneous civil appeal and regulated by O. 41 of the Code of Civil Procedure and not by Ss. 422-424, Criminal P. C., it being an appeal against an order of a civil Court to a superior civil Court and the procedure in civil Court being provided for by the civil and not the Criminal P. C.

G.B. *Rule made absolute.*

---

## * A. I. R. 1927 Calcutta 285

GREAVES AND MUKERJI, JJ.

*Gnanada Sundari Mojumdar*—Appellant.

v.

*Chandra Kumar De*—Respondent.

Appeal No. 273 of 1925, Decided on 30th March 1926, from the appellate order of the Addl. Sub.-J., Noakhali, D/- 20th April 1925.

* *Civil P. C., S. 151—Order under S. 151 in exercise, by analogy, of jurisdiction under S. 144 is appealable—Civil P. C., S. 144.*

Where an order is made under the provisions of S. 151, but in fact in exercise, by analogy, of the jurisdiction under S. 144 an appeal does lie from the order: 2 *P. L. J.* 361 and 2 *P. L. J.* 206; *A. I. R.* 1922 *P. C.* 269, *Ref.* [P. 286, C. 1]

*Hem Kumar Bose*—for Appellant.

*Jitendra Kumar Sen Gupta*—for Respondent.

**Greaves, J.**—This is an appeal by the judgment-debtor against a decision of the Subordinate Judge of Noakhali reversing the order of the 1st Munsif of Lakhipur.

**Facts.**—The Opposite Party No. 1 held an under-raiyati under the appellant. In execution of a decree in ejectment the appellant obtained khas possession of the under-raiyati against the Opposite Party No. 1. The superior landlords subsequently obtained a rent decree against the appellant and in execution thereof the holding was brought to sale and purchased by the Opposite Party No. 3. The Opposite Party No. 1 obtained settlement of the land from the auction-purchaser at the execution sale, the Opposite Party No. 3.

After this the judgment-debtor applied to set aside the sale by the landlord in execution of the rent decree. This was contested by the auction-purchaser, but a compromise was arrived at and the sale was set aside. Thereupon the appellant applied for restoration of possession against the Opposite Party No. 1 who held the under-raiyati. The Munsif said that he had no jurisdiction to deal with the matter under the provisions of S. 144, Civil P. C., but that as he considered the applicant was entitled to be restored to the position in which he would have been if the execution sale had never taken place, he passed an order under S. 151, Civil P. C., for possession against the Opposite Party No. 1 who had been settled on the land after the purchase by the Opposite Party No. 3. Possession under this order was given to the appellant and he is now in possession. Thereafter an appeal was preferred by the Opposite Party No. 1 against the decision of the Munsif, and the Subordinate Judge reversed the order of the Munsif for reasons which he has indicated in his judgment. As a result this appeal has been preferred to this Court.

Two points have been urged before us on behalf of the appellant. First, it is said that as the Munsif acted not under S. 144, Civil P. C., but under his inherent jurisdiction under S. 151, Civil P. C., no appeal lay to the Subordinate Judge and that in the result the judgment of the Munsif should be restored; secondly, it was said that on the merits, by virtue of the provisions of O. 21, R. 92, the appellant was entitled as against the Opposite Party No. 1 to the order which the Munsif had made. It was urged that he was entitled when the auction-sale was set aside to be placed in exactly the same position as he would have been if the sale had never taken place and that consequently he was not merely entitled to have the sale set aside as against the Opposite Party No. 3, but to have an order for possession of the land against the Opposite Party No. 1 who had been settled on the land by the Opposite Party No. 3 after the Opposite Party No. 3 had purchased at the sale in execution of the rent decree.

So far as the first point is concerned, namely that there was no appeal, we were referred to the decision of the Patna High Court in *Sukhdeo Dass* v. *Kito Singh* (1). In that case it was held that

(1) [1917] 1 Pat. L. W. 551=39 I. C. 763=2 Pat. L. J. 361.

as the order of the executing Court must have been made under S. 151, Civil P. C., and that as O. 43, R. 1, does not provide for an appeal against such an order, the lower appellate Court had no jurisdiction to set aside the order of the first Court; that is to say, it was held that there was no appeal to the Subordinate Judge from an order made by the Munsif under the provisions of S. 151, Civil P. C. There is another case of *Jagdip Narain Singh* v. *F. H. Holloway* (2); the point was not actually decided there, but one of the learned Judges who formed the Division Bench expressed an opinion, which no doubt is obiter, that an appeal did lie, as it was an adjudication between the parties and not an order against which an appeal lies as an appeal from an order.

There does not seem to be any direct authority in this Court dealing with the actual point, but the learned vakil who appears for the respondents says that in many cases an appeal has been entertained against an order passed under S. 151, and he refers us in support of this contention to a decision of the Judicial Committee: *Jai Barham* v. *Kedar Nath Marwari* (3). But I do not think that that case really covers the point which we have to decide. But I am inclined to think that an appeal does lie. It certainly seems a curious position that if the Court deals with the matter under S. 144, Civil P. C., an appeal lies whereas if the Court under S. 151 exercises the same jurisdiction which S. 144 gives him, but exercises that jurisdiction under S.151 because S. 144 is not strictly applicable, no appeal lies; and the view I take is that if as here the order is made under the provisions of S. 151, but in fact in exercise, by analogy, of the jurisdiction under S. 144 an appeal does lie. The first point therefore accordingly fails.

So far as the second point is concerned I think that the Subordinate Judge was right. I do not see how the Opposite Party No. 1 can be brought into the execution proceedings and an order such as is sought against him be passed in those proceedings. It seems to me that the remedy of the appellant does not lie in this direction. He can either recognize the Opposite Party No. 1 as tenant on the land and take rent from him, or recognizing him as a tenant he can terminate his tenancy by notice, and if possession is not given sue for ejectment, or he can treat him as a person who, under the facts and circumstances of this case, is no better than a trespasser, and has no right whatever on the land, and sue in ejectment to recover possession of the land. It seems to me that one or other of these courses is the proper course for the appellant to adopt and that he cannot get the order which he seeks as against the Opposite Party No. 1 in the execution proceedings to which the Opposite Party No. 1 is not a party.

We are pressed with the fact that the present appellant is in possession and it is said that it would be therefore inequitable to make any order which might have the effect of disturbing that possession. But I do not think that that fact can influence us. If the appellant is wrong in his contention then the order of the Subordinate Judge was correct and we are bound to say so whatever the consequence may be.

In the result therefore the appeal fails and it is dismissed with costs, the hearing-fee is assessed at one gold mohur.

The connected application is rejected.

**Mukerji, J.**—I agree.

G.B. *Appeal dismissed.*

(2) [1917] 2 Pat. L. J. 203=3 Pat. L. W. 423=39 I. C. 653=(1919) P. H. C. C. 282.

(3) A. I. R. 1922 P. C. 269=2 Pat. 10.

---

## * A. I. R. 1927 Calcutta 286

SUHRAWARDY AND CAMMIADE, JJ.

*Ashutosh Seal*—Applicant—Appellant.

v.

*Gouripore Co. Ltd.*—Opposite Party—Respondent.

Appeal No. 92 of 1926, Decided on 29th November 1926, from the original order of the Commr. Workmen's Compensation, Bengal, D/- 16th December 1925.

* *Workmen's Compensation Act, S. 4—Words "Result from" are wider than "directly attributable to"—Even if injury is unnatural result of the accident, law is satisfied.*

The words "result from" in S. 4 are wider than "solely and directly attributable" and the requirement of the law is satisfied even if the injury can be traced to the accident as the unnatural cause thereof.

The true test is not whether the disablement is the direct or even probable result of the injury or the injury the natural cause thereof, but

whether the disablement can be traced to the injury even as an unusual, but not unconnected result thereof: *Dunham* v. *Clare*, (1902) 2 *K. B.* 292, and *Ystradowen Colliery, Co. Ltd.* v. *Griffiths*, (1909) 2 *K. B.* 533, *Ref*

[P 287 C 2, P 288 C 1]

*Atul Ch. Gupta* and *Satis Ch. Singha*—for Appellant.

*Pannalal Chatterjee*—for Respondent.

**Judgment.**—This is an appeal under S. 30 of the Workmen's Compensation Act (8 of 1923). The facts are that the Appellant—a workman employed by the Gouripore Company, Ltd.—suffered an injury to his left hand causing, according to the medical evidence, an abrasion on the outer side of the left index finger and an injury exposing the subcutaneous tissue It is not disputed that the injury was caused by accident arising out of and in the course of his employment. This happened on the 25th June 1925. He was treated by the doctor attached to the Mill till the 30th June. He then, it appears, went to the Imambara hospital in Hughly on the opposite side of the river where he was treated from the 2nd to the 8th July. On the 8th July he wanted to become an indoor-patient of the hospital, but he was asked by the doctor to get a letter to that effect from the Mill. On that day, according to the appellant's evidence at about noon he went to the Mill and obtained the necessary letter. Sometime after that it was found that gangrene had set in and that operation was necessary. In the result, two of his fingers (index and thumb) had to be amputated. He then applied under the Act for compensation for the injury thus caused to his person. It is a case of partial disablement as defined in Cl. (g) of S. 2 of the Act.

It is not disputed before us that if the workman is found entitled to any compensation, he would, under the schedule to the Act, be able to recover Rs. 367 odd from the defendant. The learned commissioner appointed under S. 20 of the Act dismissed the workman's claim and hence this appeal. Under S. 30 of the Act an appeal lies to this Court on two conditions: (1) that a substantial question of law is involved in the appeal; and (2) that the amount in dispute on the appeal is not less than Rs. 300. The second ground is satisfied because the value of the appeal is more than Rs. 300. As regards the first point, the question of law involved is as to whether the Commissioner approached the case from the correct standpoint and whether the workman's claim was not dismissed on a wrong interpretation of the law. We are of opinion that in the present case the appeal is competent and that it is open to us in this first appeal to decide all questions of law and fact that arise in it.

The learned Commissioner framed an issue in the case which is to this effect:

Was the loss of applicant's left index finger and thumb solely and directly attributable to the accident?

It is argued that the issue as framed does not on the law as it stands properly arise in the case. Under S. 3 an employer shall be liable to pay compensation if the injury is caused to a workman by accident arising out of and in the course of his employment. Under S. 4 the employer is liable to compensate the workman according to the scale given in the Act where permanent partial disablement results from the injury. The wording employed by the legislature following the English law of compensation to workmen is that the disablement must result from the injury. The law does not insist and has nowhere indicated that the disablement should be solely and directly attributable to the accident. There are cases where the disability cannot be said to be due soley and directly to the accident. The true test is not whether the disablement is the direct or even probable result of the injury or the injury the natural cause thereof, but whether the disablement can be traced to the injury even as an unusual, but not unconnected, result thereof. In the case of *Dunham* v. *Clare* (1) the deceased met with an accident which caused the wound to his toe. He was treated for that wound in the hospital but after a certain interval erysipelas set in and he died of blood-poisoning. It was held that the death was the result of the injury within the meaning of the Workmen's Compensation Act, 1897, even though in fact it might not be the natural or probable consequence thereof. In *Ystradowen Colliery Company, Ltd.* v. *Griffiths* (2), a workman got a severe injury in the thigh and as he had to walk some distance to get to his home he caught cold which made

(1) [1902] 2 K. B. 292=71 L. J. K. B. 683.
(2) [1909] 2 K. B. 533=78 L. J. K. B. 1044=100 L. T. 869=25 T. L, R. 622.

him subject to bronchitis and chronic asthma and permanently incapacitated him for work. Cozens-Hardy, M. R., observed thus :

It is not the law to say that a disease which has been accelerated, still more if produced, by the accident, is not a matter which comes within the four corners of the Act of Parliament.

In another passage he observed as follows :

"I think, we are bound to give him" (the County Court Judge)

this direction that the test is not whether the present conditionof the man is the natural result of the injury, but he must consider the result in fact. It may be an improbable result—I will even go so far as to say, as Collins, M. R., said, possibly even an unnatural result—but the question is whether the man's present condition is the result of the accident in this sense that it is occasioned by his debilitated condition immediately after the accident and occasioned by the accident which he has met with.

There are many cases which have taken the same view, the result of which is that if the disability can be traced to the injury caused by accident in the course of his employment the workman will be entitled to compensation. The case of *Humber Towing Coy., Ltd.* v. *Barclay* (3) does not depart from the principle thus stated. In that case the workman's fore-arm was broken by accident. He had it set by a bone-setter who did the work so negligently that the man's arm became stiff, and incapacitated him for further work. The Master of the Rolls (Cozens-Hardy, M. R.) very rightly observed that the employer is responsible for the injury caused to the workman but he does not insure against lack of skill or competency of any doctor or physician who might treat the workman.

In our opinion the words "result from" in S. 4 are wider than "solely and directly attributable" as the learned Judge takes them to mean, and the requirement of the law is satisfied if the injury can be traced to the accident even as the unnatural cause thereof.

In our judgment the plaintiff's claim can only be defeated by the provisions of cl. (6) of S. 11 of the Act, That clause says that a workman becomes disqualified and cannot claim compensation if he refuses to be attended by a qualified medicial practitioner whose services have been offered to him by the employer or having accepted such offer has deliberately disregarded the instructions of such medicial practitioner and it is thereafter proved that the workman has not been regularly attended by a qualified medical practitioner and that such refusal, failure or disregard was unreasonable in the circumstances of the case and that the injury has been aggravated thereby. To claim exemption the employer has to prove the circumstances mentioned in the section disentitling the workman from claiming compensation. It has been proved in this case that the appellant was offered the services of a medical practitioner. We do not know the qualifications of Mr. Sarat Chandra Chatterjee, the Mill doctor, who has been examined in this case on behalf of the respondent. Assuming that he was a qualified medical practitioner, it has further to be proved that the Appellant refused to accept the offer. The evidence is that the doctor treated him for five days. There is no evidence that he deliberately disregarded the instructions of the doctor. It has further to be proved that the appellant was not attended thereafter by a qualified medicial practitioner. The evidence in the case is that after leaving the Mill doctor, the appellant went to the Imambara hospital where it cannot be said that he was not attended by a qualified doctor. On the face of it therefore the respondent has not been able to discharge the onus placed upon him by law.

We next examine the evidence in the case. The appellant, supported by his witness, tells the story as stated above. The doctor, Sarat Chandra Chatterjee, examined on behalf of the Mill, says that when on the 8th July the appellant came to him his hand was wrapped up in a very dirty rag, soaked in mustard oil, and the gangrenous condition of his hand was due to sepsis from using dirty rags. The appellant and his witness, however, deny that the rag on the day he came to the Mill was a dirty rag. Their case is that the appellant was dressed in the morning of that day by the doctor at the hospital and he came to the Mill soon after for the letter. It is unfortunate that the learned Commissioner did not do his best to secure the evidence of the doctor who had treated the appellant at the hospital. An application was made on behalf of the appellant for the issue of process for the attendance of the doctor as a witness on his behalf. But it was returned unserved for want of time. This was on the 26th November 1925 though the learned

(3) 5 Butterworth's Workman's Compensation Cases, 142.

Commissioner did not deliver his judgment till the 16th December 1925. But on the evidence as it stands we are not prepared to accept the story as given by the respondent's witness.

It seems to us on a reading of the entire evidence and on a consideration of all the facts that the man received the injury, the exact nature of which may be what the doctor has described. He got himself treated for a few days by the Mill doctor, but not getting much benefit he went to the Imambara hospital for better treatment. It seems to us that as the appellant was not improving as he had expected he wanted to be an indoor-patient of the hospital and for that purpose he came to the Mill for a letter, When he came there he had the bandage put by the hospital doctor and there is no reason to disbelieve it. The story that his hand was wrapped up in a dirty rag soaked with mustard oil seems to us to be an invention. The doctor further says that the wound was making progress under his treatment and it would have taken 10 or 12 days to cure. This statement does not appear to us as true. There was no reason why the appellant when deriving benefit from the treatment of the Mill doctor should take the trouble of crossing the river and visiting the hospital. It cannot therefore be doubted that the disablement which the appellant complains of was the result of the injury received from the accident in the course of his employment and that the employer respondent cannot claim exemption from liability for compensation under S. 11 (6) of the Act. We accordingly allow the appeal, set aside the order of the Commissioner and decree the claim of the appellant for Rs. 367-8 with costs of this Court only. We assess the hearing-fee at three gold mohurs.

D.D. *Appeal allowed.*

---

## A. I. R. 1927 Calcutta 289

C. C. GHOSE AND DUVAL, JJ.

*Radhanath Mandal*—Accused — Appellant.

v.

*Emperor*—Opposite Party.

Criminal Appeal No. 742 of 1925, Decided on 1st March 1926.

*Criminal P. C., S. 465—The moment the question of insanity is raised Judge must put it to the jury as a preliminary issue.*

The moment the question of insanity of the accused is raised, the Judge must put to the jury as a preliminary issue to be tried by them as to whether or not the jury are satisfied that the accused is a person of unsound mind and incapable of standing his trial and in a position to understand the proceedings which are going on in Court. Evidence must be led on that point and the Judge must come to a finding on the basis of such evidence. [P. 289, C. 2]

*Suresh Chandra Talukdar*—for Appellant.

*Khundkar*—for Opposite Party.

**Judgment.**—The appellant in respect of whom the appeal was admitted is named Radhanath Mandal. It appears that after the trial had commenced this particular accused, Radhanath, showed signs of insanity. The learned Judge's attention being drawn to the facts because of what was observed by him in Court and because of the fact that the surety of Radhanath and his pleaders had given him up on the evening of the second day of trial, he asked the jury to observe closely Radhanath in Court and to form their own conclusions as to whether Radhanath was a person of unsound mind or not. The trial proceeded and in the end the jury gave their opinion that they did not consider that Radhanath was a person of unsound mind.

It appears to us, however, that according to the provisions of S. 465, Criminal P. C., the learned Judge ought to have put to the jury as a preliminary issue to be tried by them as to whether or not the jury were satisfied that Radhanath was a person of unsound mind. This ought to have been done the moment the question of the insanity of Radhanath was raised. On that point evidence should have been given or required as to whether Radhanath was a person who could stand his trial and was in a position to understand the proceedings which were going on in Court.

No evidence whatever was led on that point, and although we are not unmindful of the fact that the learned Judge did put to the jury the question of the insanity of this particular accused, it was not put in the way and form required by S. 465, Criminal P. C.

We feel, therefore, that we have no other alternative but to set aside the conviction of and the sentence passed on the accused Radhanath Mandal and to direct that the matter should go back to the learned Judge to try the issue referred to above before a fresh jury. In the event of the jury being of opinion that Radhanath is a person of unsound mind, further proceedings in the case against Radhanath should be postponed and the jury discharged in terms of S. 465, Criminal P. C. If, however, on the other hand the jury are of opinion that Radhanath is a person of sound mind and is perfectly able to understand the proceedings against him, then the trial should go on.

R.D. *Case remanded.*

---

## A. I. R. 1927 Calcutta 290

RANKIN, C. J., AND C. C. GHOSE, J.

*Hyat Mahomed* and *others*—Defendants—Applicants.

v.

*Shaikh Mannu* and *others*—Plaintiffs—Opposite Party.

In the matter of an application in Suit No. 1016 of 1925, Decided on 22nd December 1926.

*(a) Civil P. C., S. 2 (4)—District Court will not in every instance mean and include a High Court on the Original Side.*

Though the word "District" in the Civil P. C., does include the local limits of a High Court in its ordinary Original Civil jurisdiction, still it is not legitimate to construe the words "District Court" wherever they appear to mean and include a High Court in its ordinary Original Civil jurisdiction : 12 *C. W. N.* 446, *Diss. from.* [P. 290, C. 2]

*(b) Civil P. C., S. 23—Original side Judge is a High Court—Application under S. 23 to a Divisional Bench for transfer of case pending before him is incompetent.*

A Judge of the Original Side is not a Court subordinate to the High Court, but is a High Court itself, and so an application for the transfer of a suit pending before him will not lie before a Bench of the same High Court : 26 *Cal.* 133, *Rel. on.* [P. 291, C. 1]

*H. S. Suhrawardy*—for Applicants.

*I. C. Seth*—for Opposite Party.

**Rankin, C. J.**—In this case a mortgage suit was tried and decreed at Arrah, It would appear that a preliminary decree was passed on the 24th of June 1921 and the final decree on the 27th of January 1922. The sale was in April 1922 at which the mortgagees purchased the properties. It is true that a writ for delivery of possession was issued in September 1922 by way of execution on the Original Side of the High Court.

The present application concerns a suit brought by the defendants to that mortgage suit on the 20th of April 1925. It appears that that suit was brought to set aside the decree of the Subordinate Judge of Arrah on the ground of suppression of processes. Curiously enough the writ of summons was not served for more than a year. An application is now made to us by the defendants in the suit for an order that that suit be transferred to the Court at Arrah which is within the limits of the Province of Behar and Orissa.

It is said that the application is competently brought before this Division Bench by virtue of the terms of S. 23 of the Code of Civil Procedure. In our opinion, S. 23 of the Code of Civil Procedure does not govern this case so as to make this Division Bench a proper forum to which such an application can be made. It is quite true that the word "District," in the Civil P. C., includes not merely the local limits of what is ordinarily called a District Court, but includes the local limits of a High Court in its ordinary original civil jurisdiction. That is a very different thing indeed from saying that the words "District Court," wherever they appear in the Code of Civil Procedure mean and include a High Court in the exercise of its ordinary original civil jurisdiction. If that is what was intended to be laid down by Mr. Justice Fletcher in the case of *Kedarnath Mondal* v. *Ganesh Chandra Adak* (1), I do not agree with it.

A case has been referred to—which seems to me very much in point—the case of *Fakaruddin* v. *G. L. Garth* (2) and speaking for myself and bearing in

(1) [1907] 12 C. W. N. 446.
(2) [1898] 26 Cal. 133=3 C. W. N. 91.

mind the terms also of S. 3 of the Civil P. C., I decline altogether to hold that a learned Judge of the Original Side is Court subordinate to the High Court. He is the High Court and, in my judgment, we would be going contrary to authorities and upsetting well-settled principles if we entertained the present application. It may be that one consequence of this ruling is that there is no machinery provided by express terms in the Civil P. C. for the particular occasion which has arisen. Even so the applicants may take steps on the ground of malicious abuse of process or on the ground of forum conveniens. We are not here to advise. We will not for the sake of dealing with this case lay down a principle which would interfere with the settled practice and constitution of this Court. In my opinion, this application is incompetent and must be dismissed with costs.

**C. C. Ghose, J.**—I entirely agree.

J.V. *Application refused.*

---

## A. I. R. 1927 Calcutta 291

SANDERSON, C. J., AND RANKIN, J.

*Meghraj Kanyalal* and *others*—Plaintiffs—Appellants.

v.

*Durga Sahai Buldeodas* and *others*—Defendants—Respondents.

Appeal No. 66 of 1925, Decided on 17th May 1926, from the original civil decree of Buckland, J., D/- 24th April 1925.

(a) *Contract — Construction—Sale and purchase on printed form in English—One of the clauses providing that anything written in Hindi would be null and void—Description of shipment and quality entered in Hindi by buyer while signing—Such description is void.*

Plaintiffs entered into a contract with defendants whereby plaintiffs agreed to sell and defendants agreed to purchase certain goods. One of the clauses of the contract provided that "anything besides plain signature written by the buyers in any native language on the contract shall be null and void and shall not be construed in any way as a part of the terms and conditions of this contract." [P 292 C 1]

The defendants while signing the contract wrote description in Hindi about shipment and quality of goods which differed from the description given in the contract in English.

*Held* the terms contained in the Hindi writing must be treated as null and void, and cannot be construed or taken as part of the contract by reason of the provisions of the clause above mentioned.

The defendants entered into the contract contained in the English terms and such terms cannot be modified or altered by reason of the addition of the Hindi writing. [P 293 C 2]

(b) *Contract — Construction — Sale and purchase.*

A contract whereby defendants agreed to purchase a certain number of cases of cloth, shipment July-August and September provided: "If in any one month one package be shipped in excess of that month's instalments the buyers agree to accept such one package so shipped in excess as aforesaid along with the instalments of that month. If in any one month one package less than that month's instalments be shipped, the buyers agree to take that instalment less the one package so short shipped as aforesaid."

*Held*: the clause could not be intended to make the buyer take more than the total amount for which he had contracted. The clause must have been intended to arrange for a month's instalment containing a package in excess of the quantity provided by the contract for that particular instalment, the delivery being within the total amount of ths contract quantity. [P 295 C 1]

*Langford James* and *D. N. Basu*—for Appellants.

*N. N. Sircar*, *A. K. Roy* and *Arun Sen*—for Respondents.

**Sanderson, C. J.**—This is an appeal by the plaintiffs against the judgment of my learned brother Mr. Justice Buckland which was delivered on the 24th of April 1925.

The suit was brought to recover Rs. 6,520 which was made up of Rs. 4,496 the principal sum claimed with interest amounting to Rs. 2,023.

The plaintiffs alleged that a contract had been made between him and the defendant firm on the 1st of April 1920, whereby the plaintiff agreed to sell to the defendant firm five cases of Hazel Poplins of a certain quality to be shipped in July, August and September 1920 at Re. 1-4-0 per yard on the terms and conditions which are set out at the end of the contract. The plaintiffs further alleged that the defendants raised certain objections as to the quality, finish and shades but that upon a reference to the Tribunal of Arbitration it was ordered that the goods which had been offered to the defendants were a fair tender and it was further ordered that the defendants should take delivery in terms of the contract. The defendants, however, failed to take delivery and it is alleged that time was extended till the 31st of May 1922 but that even then the defen-

dants failed to take delivery and the plaintiffs resold the goods and the sum claimed was claimed as the difference on the resale or as damages.

The defendants by their written statement admitted that they entered into a contract on the 1st day of April 1920 but they alleged that the shipment was to be in July and August instead of July, August and September as alleged by the plaintiffs, and they further alleged as follows :

> At the time of signing the said contract, the defendants entered in Hindi at the foot of the English writings in the printed contract form the terms and condition regarding quality, number of cases, size, finish and delivery due dates which were as follows. A translation in English was set out in the written statement.

The translation made by the official translator is set out in the learned Judge's judgment and is as follows :

> Durga Sahay Baldeo Das. Tussore cases 5 (five cases). Inches 28,29. Than of 40 yards. quality No. 10859 at Re. 1-4 per yard. Shipment July, August. Godown due 90 days from the arrival of goods in godown. Finish as given by us.

In short, the defendants' case was that there was a concluded contract, which included the writing in the vernacular language which was agreed to by the plaintiffs and by which the plaintiffs were bound.

Issues were settled and they are to be found at page 13 of the Paper Book. The main issue was the first one

> Was there a binding agreement between the parties and if so, what were the terms thereof as to shipment and sample.

The learned Judge found that there was no concluded agreement between the parties but that the terms contained in the vernacular writing in the contract constituted a counter-proposal by the defendants. The plaintiffs appellants relied upon the terms of the contract which were in English. The description of the goods was as follows :

> 5 (five cases each to contain 30 pieces 27"-28." About 40 yards. Quality No. 10859. Hazel Poplin. Shipment July August September 1920 at Re. 1-4 yer yard, (rupee one annas four only per yard), and all instructions as advised by mail.

Clause 21 provided as follows :

> Anything besides plain signature written by the buyers in any native language on the contract shall be null and void and shall not be construed in any way as a part of the terms and conditions of this contract.

Sewrattan, a member of the plaintiff firm, gave evidence and stated that he could not read the Hindi writing and I think that according to the evidence on both sides it appeared that the member of the plaintiff firm could not read this particular Hindi-script. It was suggested on behalf of the defendants that the form of the contract, which was a printed form, with the description of the goods in type, was for the use of European firms. There is no evidence as to that, and in this case the form was used by two Indian firms : the plaintiffs and the defendants.

It was argued on behalf of the plaintiff that no evidence was admissible except the contract in suit, that Cl. 21 excluded any modification which might be contained in the Hindi writing, and that if it was admissible to look at the verbal evidence given on behalf of the defendants such evidence was not reliable and, in short, the contract between the parties was as alleged by the plaintiffs. The defendants' case was that the contract, as originally proposed by the plaintiffs and contained in the printed and type-written terms, was modified as stated in the Hindi writing and they relied on the verbal evidence of the witnesses who were called on their behalf. If the evidence of the defendants' witnesses were to be accepted, the contract in the printed and type-written English terms would not represent the real contract, which was, in fact, arrived at, and this might be a good ground for rectification of the contract. In that case it would not be right to allow the plaintiffs' claim for damages for breach of contract to succeed in this suit. The first question, therefore, is whether the defendants' case should be accepted.

The learned Judge said that he did not come to any definite finding as to the facts, as he decided the case upon the document itself, but he stated that if he had to decide he would accept the defendants' case in preference to that of the plaintiffs. The learned Judge in his judgment did not deal with the evidence in detail, but he mentioned two grounds : first, he found it difficult to believe that Sewrattan was exclusively engaged in the matter and that the document was put away without any notice being taken of the vernacular writing. Secondly, because Sukumull was supported by the broker, Ganesh Prosad Khettry, and he saw no reason for disbelieving him.

It is necessary therefore for this Court to consider the evidence more closely

than was done by the learned Judge. (After examining the evidence his Lordship continued.) Upon consideration of the evidence I am of opinion that the defendants' case, viz., that there was a completed contract made on the 2nd April 1920, upon the terms contained in the Hindi writing on the contract, should not be accepted. I am satisfied that the contract was returned to the plaintiffs by the broker, as described by Sewrattan. There is no doubt that the contract, when so returned, bore upon it the Hindi writing. This writing consists in the first place of the signature of Durga Sahai Buldeodas; then follow the Hindi words the translation of which is set out in the learned Judge's judgment.

It remains to consider what is the proper construction of the document. The learned Judge, as already stated, held that

> the vernacular words were intended to and do modify the preceding terms in typewriting. Their effect is that of a counter-proposal made by the defendant firm

and he decided the case on that footing. In my judgment that is just the kind of thing at which Cl. 21 of the contract was aimed, and which it was intended to prevent. There is no doubt that Sukumull signed the contract in the name of the defendants. He alleged that he signed it on the 2nd April. The putting of the signature to the paper was undoubtedly intended as a signing of the contract. It is clear that Sukumull knew about Cl. 21 and the terms thereof. His evidence on this point was not given satisfactorily. When he was first asked in cross-examination about the clause he said:

> I am not sufficiently conversant with English so as to read the whole of it and I do not know anything about this term

—a very explicit statement. Yet, on being further pressed, he had to admit that he had been in the habit of entering into contracts in the form of this contract and that "in every contract that clause is to be found" and that he knew that it was in every contract. He went on to say that he knew the clause was in the contract in suit, and so he wrote out his own terms therein.

It must therefore be taken that Sukumull had read the terms of the contract including Cl. 21 and understood the effect of them.

What then was the effect of his signing the contract?

The learned advocate for the defendants argued that the signature should not be detached from the endorsement in Hindi and that the construction should be that the defendants were willing to sign in respect of the sale of goods as specified by the defendants.

Again, this seems to me to be just what the terms of Cl. 21 were designed to prevent.

I do not intend to express any opinion except so far as the facts of this case are concerned, and my decision is confined to these facts. Where, as in this case, the person signing the name of the defendants, signed it intending to enter into a contract, and for his own convenience or for some other reason, wrote a description of the goods in Hindi which differs from the English description of the goods in the contract. I am of opinion that the terms contained in the Hindi writing must be treated as null and void, and cannot be construed or taken as part of the contract by reason of the provisions of Cl. 21. It is not really necessary to consider the reason why the Hindi writing was put in the contract. Apparently it is not an uncommon thing for parties to do, otherwise there would be no reason for the existence of Cl. 12 in all similar contracts, as stated by Sukumull.

In this case there is really no material difference between the typed description and the Hindi description except that "September" shipment was omitted from the Hindi writing, for, as already stated, the "finish" was provided for in the phrase "all instructions as advised by mail." The reason therefore in this case for the addition of the Hindi writing may be that Sukumull may have preferred to have the description in Hindi as well as in English and the omission of 'September' may have been an oversight, as suggested by the learned advocate for the plaintiffs.

It is, however, unnecessary to speculate as to this. The conclusion at which I have arrived on the construction of the document is that the defendants entered into the contract contained in the English terms and that such terms cannot be modified or altered by reason of the addition of the Hindi writing.

Yesterday the learned adovcate, who appeared for the plaintiffs, drew our attention to tl.e case of *Gopi Nath Nandy and others* v. *Nilambar Sita Nath Kundu* which was decided in December 1914 by Sir Lawrence Jenkins and Mr. Justice Woodroffe. The case was not reported : the learned advocate stated that he had given notice to the defendants that he would mention it. A clause in the contract in that case was in terms very similar to Cl. 21 in the contract in this case and was as follows :

Anything besides plain signatures written by the buyers in any native language on this contract shall be null and void and shall not be construed in any way as part of the terms or condition of this contract.

The suit was brought by the plaintiff claiming damages for non-delivery of certain goods. The contract, which was in English, was for 200 tons galvanized corrugated iron sheets. There were written upon the contract in Bengali character above the signature of the plaintiffs' Gomasta the following words, as translated in English : "We have purchased 37½ tons out of 200 tons, July, August shipment. We shall not take more goods."

The defendats relied upon these terms for the purpose of showing that they were not liable to deliver more than 37½ tons. The plaintiffs alleged that the terms added in Bengali were a perjury. The learned Judge who tried the case came to the conclusion that he was unable to hold that what was challenged as a forgery was a forgery, but he gave judgment for the plaintiff in respect of the balance of the contracted amount which was undelivered. The matter came before the Court of appeal and I propose to read the learned Chief Justice's judgment which is short and runs thus :

The only question that arises on this appeal is whether the contract was for 200 tons or 37½ tons. The contention that it was 37½ tons rests upon something written in a native language on the contract. But by the express agreement of the parties 'anything besides plain signatures written by the buyers in any native language on the contract shall be null and void'. We are therefore compelled on the very terms of the contract to disregard the provision written in the vernacular, and it does not appear to be profitable to consider whether it was inserted or not under circumstances of suspicion. On this ground, and on this alone, we dismiss the appeal with costs.

It is satisfactory to find that the decision of Sir Lawrence Jenkins and Mr. Justice Woodroffe was to the same effect as the conclusion at which I had arrived without knowing of their decision.

My learned brother and I are of opinion that this case should be disposed of by this Court on the evidence already on the record. We, therefore, propose to hear the arguments of learned advocates on both sides on the other issues, as hitherto our attention has not been drawn to those issues at all.

**Rankin, J.**—I agree.

(After hearing further arguments the following judgments were delivered :)

**Sanderson, C. J.**—This appeal has been already partly disposed of by a judgment of this Court upon the construction of the contract. The learned Judge who tried the case did not dispose of the other issues. The result of this Court's judgment was that it became necessary for this Court to deal with the other issues and the learned advocate for the respondents stated the points upon which he intended to rely and the case was argued upon that basis.

The first point was that as regards the two cases Nos. 185 and 186 the suit was barred by the Act of Limitation. The second point was that there was late shipment as regards three cases. The third point was that three out of the five cases were not in accordance with the sample, and the fourth point, which was raised, was with regard to damages.

It was stated by the learned advocate who appeared for the appellants that the issue that the cases were not in accordance with the sample was not raised at the trial ; and accordingly in this Court that point was abandoned.

There remain, therefore, three points which I have mentioned.

There is no doubt that the claim is barred so far as the two cases Nos. 185 and 186 are concerned, unless it can be shown that there was an agreement for extension of time for taking delivery. I will deal in detail with that question at present, but I am of opinion that so far as the contract which is the basis of this suit, namely No. 228, is concerned the plaintiffs appellants have not proved that there was an extension of time for taking delivery, and consequently in

my judgment the suit fails as far as these two cases are concerned.

The suit as regards cases 233, 234 and 235 is not barred by limitation for the due date was the 9th of February 1921 and the suit was brought on the 10th of January 1924; the point, therefore, which has to be considered in connexion with these three cases is the question of late shipment. These three cases were shipped in September. The defendants' case is that under the contract the plaintiffs were bound to tender one case at least of July shipment as the provision of the contract was for the sale of five cases and the shipment was to be in July, August and September.

The learned advocate argued that as the plaintiff was bound to tender one case of July shipment and as the two cases Nos. 185 and 186 were August shipments, the defendants could not be called upon to take more than two of the September shipment. In my judgment that contention is right, unless it can be shown that the plaintiff's position is saved by Cl. 13 of the contract.

Clause 13 of the contract is to this effect:

> If in any one month one package be shipped in excess of that month's instalments the buyers agree to accept such one package so shipped in excess as aforesaid along with the instalments of that month. If in any one month one package less than that month's instalments be shipped, the buyers agree to take that instalment less the one package so short shipped as aforesaid.

In my opinion, Cl. 13 does not avail the plaintiffs in this case. It is clear that it was the intention of the parties that each instalment should be regarded as a separate contract. That is made plain by the provisions of Cl. 18 of the contract. The result, therefore, is that the July, August and September shipments must be regarded as separate contracts and, as stated already, the September contract, in the events which had happened, could not be for more than two cases. In my opinion Cl. 13 could not be intended to make the buyer take more than the total amount for which he had contracted. The clause must have been intended to arrange for a month's instalment containing a package in excess of the quantity provided by the contract for that particular instalment, the delivery being within the total amount of the contract quantity.

Clause 14 was also relied on by the learned advocate for the plaintiffs. I find Cl. 14 is difficult to understand. In any event, in my opinion, it is of no avail to the plaintiff. The blank is not filled in; and I am of opinion that this clause as well as the 13th clause must be subject to the implied provision that the buyer is not liable to take delivery of a larger quantity of cases than the total amount provided by the contract. I am, therefore, of opinion that neither the 13th nor the 14th clause is of any avail to the plaintiff in this particular respect.

There is a further question whether it can really be said that Cl. 13 applies at all. The contract was for five cases. Cl. 13 deals with "packages." Whether it can be said that "packages" are the same as "cases" with regard to the facts of this case is doubtful.

The result as regards this part of the case, in my opinion, therefore, is that the plaintiff is entitled to recover in respect of two cases only of the September shipment.

I have now to deal with the question whether there was an extension of time for delivery. (His Lordship then discussed the evidence and proceeded.) For these reasons. I am of opinion, as already stated, that the alleged agreement for the extension of time for taking delivery has not been proved.

The result, in my judgment, therefore, is that the plaintiff is entitled to recover in respect of two cases of the September shipment only.

The plaint is based upon a resale and the difference between the amount produced on the resale and the amount which would have been realized if the contract had been carried out by the defendants. The resale, however, did not take place till the end of May 1922. Having regard to the fact that I have come to the conclusion that there was no agreement for the extension of time for taking delivery, the resale which took place in May 1922, cannot be relied upon by the plaintiffs. The plaintiffs therefore are relegated to any claim for damages which they can prove against the defendants for the breach of their contract in not taking delivery of the two cases of the September shipment at the time when delivery ought to have been taken. There is no evidence as to the market price of these particular goods at the due date, viz., February 1921 on

the record. The parties, however, have agreed that there will be judgment for the plaintiff for Rs. 750 as the amount of damages in respect of the two cases of the September shipment.

The appeal is allowed and there will be a decree entered for the plaintiffs for Rs. 750. The plaintiffs will be entitled to their costs of the suit in the trial Court and in our opinion it was a fit case to be tried by the High Court. The costs will be on Scale No. 2. The plaintiffs-appellants will be entitled to recover two-thirds of their taxed costs of the appeal from the defendants.

**Rankin, J.**—I entirely agree and have nothing to add.

G.B. *Appeal allowed.*

---

## A. I. R. 1927 Calcutta 296

MUKERJI AND ROY, JJ.

*Ali Mia* and *others*—Petitioners.

v.

*Emperor*—Opposite Party.

Criminal Revisions Nos. 493 and 494 of 1926, Decided on 16th August 1926, from the order of the S. J., Chittagong, D/- 4th May 1926.

*Criminal P. C., S. 196-A (2) — Consenting order by Local Government—Only existence of such order is necessary for giving Court jurisdiction.*

Under S. 196-A, Cl. (2) it is only the existence of an order by Local Government consenting to the initiation of proceedings that is necessary to enable a Court to assume jurisdiction.

[P 297, C 1]

*Camell* and *Paresh Chunder Sen*—for Petitioners.

*A. K. Basu*—for the Crown.

**Order.**—Rule No. 493 has been issued at the instance of two persons, Ali Mia and Ismail. Rule No. 494 has been obtained by five persons, Makhlas Rahaman, Oliar Rahaman, Shafarali, Mofizulla and Nizamali. These seven persons were tried by the Sadar Subdivisional Magistrate of Chittagong. He convicted all these seven accused persons under S. 9 of the Opium Act read with S. 120B of the Penal Code, and he also convicted two of them viz., Ali Mia and Makhlas Rahaman under Cls. (c) and (e) of S. 9 of the Opium Act and the remaining five, viz., Ismail, Oliar Rahaman Shafarali, Mofizulla and Nizamali, under Cls. (c), (d) and (e) of that section. The Sessions Judge, on appeal, has upheld the convictions of Ali Mia and Makhlas Rahaman under S. 9 of the Opium Act read with S. 120B of the Penal Code, but set aside their convictions under the Opium Act, and he has upheld the convictions of the other accused persons. He has, however, modified the sentences passed on all the petitioners.

The contention involved in the Rules is that the trial of the petitioners was void as cognizance of the offence under S. 120B of the Indian Penal Code, read with S. 9 of the Opium Act, was taken in contravention of the provisions of S. 196-A of the Code of Criminal Procedure.

The proceedings before the Court were started upon a report made by the Inspector in charge of Excise and Salt, Chittagong, and dated the 14th August 1925. In the column in which the "Nature of Case" has to be set out, the following was what was stated :

Illicit import, transport and possession of opium under S. 9, Act 1 of 1878, read with S. 120B of the Indian Penal Code.

Warrants of arrest were prayed for against five of the accused, two of them being produced in Court. The report, it must be said, was somewhat ambiguous, as it is not clear whether a case of conspiracy only was intended to be started or a case relating to substantive offences under the Opium Act. The question, however, is immaterial, for, in point of fact, the warrants that were issued, on the 18th August 1925, upon the said report against the five persons who were not before the Court, specified only an offence under S. 9 of the Opium Act. From the numerous petitions, etc., that were filed in the course of the trial by all the seven accused persons also it is clear that the proceedings went on as being under S. 9 of the Opium Act, and not in relation to an offence under S. 120B of the Penal Code. Whether there were sufficient materials in the aforesaid report to justify cognizance of a substantive offence under S. 9 of the Opium Act being taken is a question which does not now arise.

Witnesses for the prosecution were examined on the 25th November 1925 and the 26th November 1925; and on the last mentioned date the Excise Superintendent of Chittagong, when being examined as Witness No. 9 for the pro-

secution, produced an order of the Government of Bengal consenting to the initiation of proceedings under S. 120B of the Penal Code read with S. 9 of the Opium Act. This order bears date the 12th September 1925, and it was marked as Ex. (6) in the case. The charge under S. 120B, read with S. 9 of the Opium Act, was framed against the accused persons on the 18th December 1925.

For these facts it is clear that the Magistrate did not take cognizance of the offence of conspiracy until after the order consenting to the initiation of the proceedings for that offence was passed by the Local Government, and as far as may be gathered from the record he took cognizance of that offence only when he framed the charges on the 18th December 1925. Under S. 196A, Cl. (2) of the Criminal Procedure Code, it is only the existence of such an order that is necessary to enable a Court to assume jurisdiction.

There is no substance, therefore, in the contention urged on behalf of the petitioners, and the Rules must accordingly be discharged. The petitioners should now surrender to their bail to serve out the unexpired portions of their sentences.

R.D. *Rules discharged.*

---

## A. I. R. 1927 Calcutta 297

BUCKLAND, J.

*Subhash Chandra Bose*—Plaintiff.

v.

*R. Knight & Sons*—Defendants.

Original Civil Suit No. 261 of 1925, Decided on 23rd June 1926.

*Tort—Defamation—Libel—Plea of fair comment—Facts other than those contained in the libel cannot be introduced.*

Where, in an action for damages for libel, the defendants stated that in so far as the words complained of consist of expressions of opinion they are fair comment made in good faith and without malice " upon the said facts " which are matters of public interest.

*Held* : that facts other than those contained in the passage complained of, as introductory to the comment, cannot be introduced as forming the subject of that comment: *Aga Khan* v. *The Times Publishing Co.*, (1924) 1 *K. B.* 675, *Foll.*

[P. 297, C.2]

*N. N. Sircar, A. K. Roy, B. K. Ghose* and *A. C. Batra*—for Plaintiff.

*Langford James, T. Ameer Ali* and *W. W. K. Page*—for Defendants.

**Buckland, J.**—This is an action for damages for libel. The words complained of are contained in an issue of the "Statesman" newspaper published on the 26th November 1924. The case was opened by Mr. Sircar, and Mr. Langford James on behalf of the defendants, submitted the following issues :

1. Are the words defamatory ?
2. Are they fair comment ?
3. Where they published on a privileged occasion ?
4. Damages ?

Mr. Sircar has submitted that to Issue No. 2 the words should be added " on the facts set out in the alleged libel." The reason for that is because paragraph 5 of the written statement states that in so far as the words complained of consist of expressions of opinion they are fair comment made in good faith and without malice " upon the said facts " which are matters of public interest. Upon the authority of *Aga Khan* v. *The Times Publishing Co.* (1) he has submitted that where the plea takes that form. facts other than those contained in the passage complained of as introductory to the comment, cannot be introduced as forming the subject of that comment. This contention, in my opinion, is correct, and upon that learned counsel for the defendants has asked to amend by striking out from the concluding passage of paragraph 5 of the written statement the words " the said." Immediately that is done, the result is that he is no longer tied down to any particular set of facts and the plaintiff thereupon requires particulars. Learned counsel has indicated, though I do not wish to bind him by anything which he has said this morning, that he desires to introduce the remainder of the article published in the newspaper and a speech made by Lord Lytton shortly before, which appears to have formed among other things the text for the article in question as the facts upon which the comment is made. Of such matters and any others introduced for such purpose the plaintiff would be entitled to particulars.

As regards the third issue : I enquired of learned counsel what the privileged occasion was and he has indicated to me to some extent the facts upon which his client will rely, as to which, though particulars have not up to now been

(1) [1924] 1 K. B. 675.

asked for, learned counsel for the plaintiff desires to take this opportunity to do sc and asked for particulars of the privileged occasion referred to in paragraph 6. This, in the circumstances, I also think, he is entitled to have.

There is no need to insist upon a formal application for amendment of the written statement and the order therefore will be that the written statement be amended by deleting from paragraph 5 the words "the said" where they appear between the words "malice upon" and "facts which."

The defendants will furnish particulars within ten days of facts said to be matters of public interest upon which the matter complained of is alleged to be fair comment made in good faith and without malice. The defendants will also within the time specified furnish particulars of the circumstances and/or, as the case may be, of the occasion referred to in paragraph 6 of the written statement as render the publication of the article in question privileged.

Costs will be reserved. The further hearing will stand over the long vacation to which the parties by their respective counsel agree, and it should be mentioned to me within a week of the reopening of the Court. In default of that being done the case will appear on my list on Monday the 15th November.

Liberty to apply.

R.D. *Order accordingly.*

---

## A. I. R. 1927 Calcutta 298

SANDERSON, C. J., AND B. B. GHOSE, J.

*Mohini Mohan Banerjee* and *others*—Claimants—Appellants.

v.

*Secretary of State*—Opposite Party—Respondent.

Appeal No. 251 of 1924, Decided on 31st May 1926, from the decree of the Addl. Dist. J., Howrah, D/- 9th June 1924.

*Land Acquisition Act* (1 *of* 1894), *S.* 23—*Capability of land to be used as brick-field should be considered.*

The fact that the land might in all probability and within a reasonable time be used as "brick-field" land should be considered in awarding compensation. [P. 299, C. 1]

*Charu Chandra Biswas* and *Manindra Kumar Bose*—for Appellants.

*Sarendra Nath Guha*—for Respondent.

**Sanderson, C. J.**—This is an appeal by the claimants Mohini Mohan Banerjee and others against the judgment of the learned Additional District Judge of Hooghly, D/- the 9th of June 1924.

The case arises out of certain land acquisition proceedings. The Collector made his award and upon the request of the claimants he made a reference to the learned District Judge of Howrah.

The land in question is a small piece, 10 cottas 10 chittacks in area, and it is described in the Collector's reference to the learned Judge as "brick-field" land.

The claimants contended before the learned Additional District Judge that the valuation of the land should be taken on the basis that the land was "brick-field" or that there was a reasonable probability of its being used as a "brick-field" but for the acquisition in question.

The learned Judge decided that the claimants had not made out the case on which they relied and confirmed the award.

There is no doubt that the plot of land which is No. 27 was in the neighbourhood of lands which were used as brick-fields. There was some evidence that it had actually been used as a brick-field; but that evidence the learned District Judge discarded.

Consequently, in my judgment, this case must be decided upon the assumption that the finding, that the land has not been used as a brick-field, stands.

The learned Judge referred to the evidence which was adduced. The claimants stated that the land in question was of more value as "brick-field" land than certain other land which was half a mile away. I need not refer to that evidence; but when dealing with the reference of the Collector, the learned Judge said:

> I can only suppose that the description of the land as such in the land acquisition proceedings was either a mistake or in loose definition due possibly to the fact that there were brick-fields in the vicinity and that some one employed in the proceedings thought that the land might be used as a brick-field.

With great respect to the learned Judge, I am not satisfied that he was entitled to dispose of the description which the Collector had applied to this land, in the manner in which he did. I understand that it was part of the duty of the

Collector to view the land; and after such view the Collector apparently came to the conclusion that this small plot was land which might in all reasonable probability and within a reasonable time be used as "brick-field" land.

I am of opinion that when the conclusion of the Collector is taken into consideration in conjunction with the other evidence that has been adduced on behalf of the claimants, there was sufficient evidence to show that the claimants' case was well-founded, namely, that there was a reasonable probability of the plot of land being used as a brick-field within a reasonable time, had it not been for the acquisition.

The result is that in my judgment this appeal must succeed.

There is no question as regards the actual valuation because the learned Judge in his judgment said that the rate to which the claimants would be entitled would be that which was awarded in the reported case to which he referred and the learned Advocate who appeared for the claimants stated that his clients were willing to accept that rate of Rs. 1,300 a bigha. It would be necessary, therefore, for the claimants and those representing the Secretary of State for India to make a calculation upon that basis and to mention the matter to this Court to-morrow morning in order that the actual amount which will be awarded to the claimants may be inserted in the decree.

**B. B. Ghose, J.**—I agree.

G.B. *Appeal allowed.*

---

## * A. I. R. 1927 Calcutta 299

GREAVES AND RANKIN, JJ.

*National Coal Co., Ltd.*—Defendants—Appellants.

v.

*Gyan Ranjan Bhattacharya*—Plaintiff—Respondent.

Appeal No. 16 of 1925, Decided on 25th January 1926, from the original decree of C. C. Ghose, J., D/- 3rd February 1925.

(a) *Company—Borrowing powers—Articles of Association providing for the powers to be exercised in a certain way—Directors cannot borrow on basis of general delegation of the powers.*

**Where the Articles of Association of a company provide for the borrowing powers of the company to be exercised in a particular manner then in the absence of an express provision delegating such powers to the directors, the directors cannot exercise those powers.** [P 301 C 1]

* (b) *Company — Articles of Association— Person dealing with company must take the articles only as filed in the Registrar's Office.*

A person dealing with the company must take the articles to be such as appear at the office of the Registrar of Companies to be in force. If the directors propose to do something in excess of their powers thereunder, he is not entitled to assume that their powers have been extended by a special resolution, for such a resolution, if passed, would be registered: (1896) *L. R. 2 Ch.* 93 and (1877) *L. R. 2 App. Cas.* 366, *Relied on.* [P 302 C 1]

*N.N. Sarkar, S.C. Bose* and *J.C. Sett*—for Appellants.

*B. C. Mitter* and *A. K. Roy*—for Respondent.

**Facts.**—The plaintiff instituted a suit for the recovery of a sum of Rs. 5,000 with such interest thereon as may be allowed by the Court and the action arose under the following circumstances:

The plaintiff alleged that on the 24th September 1923, he lent and advanced to the defendant company a sum of Rs. 5,000. The loan was obtained from the plaintiff through one Jogendra Nath Mookerjee, who was one of the Managing Directors of the defendant company. A hundi was executed by the defendant company in favour of the plaintiff, whereby the defendant company agreed to repay the said sum of Rs. 5,000 after 90 days. The plaintiff further alleged that the loan in question was duly confirmed by the defendant company at a meeting of their directors held on the 10th October 1923, and that the said sum was utilized by the defendant Company in its business. The plaintiff demanded of the defendant company repayment of the said sum, but the defendant company notwithstanding demands failed and neglected to pay the said sum or any portion thereof.

The defendant company in their written statement stated that the plaintiff was a cashier under the said Jogendra Nath Mookerjee in the latter's firm of Patel and Mookerjee and that the said Jogendra Nath Mookerjee had no authority to borrow money on behalf of the defendant company or to execute any hundi, or otherwise create any liability, so as to bind the defendant company. The defendant company did not admit that there was any loan as alleged by the plaintiff and they denied that they

ever agreed to repay the said sum of Rs. 5,000 after 90 days as alleged by the plaintiff. They further added that the said Managing Director having had no authority to execute the hundi in question on the 24th September 1923, the plaint disclosed no cause of action. Lastly it was alleged that the plaintiff was a mere benamidar of the said Jogendra Nath Mookerjee, who owed money to the defendant company and who had really set up the plaintiff to urge a claim against the defendant company. In these circumstances the defendant company urged that the suit should be dismissed with costs.

**Greaves, J.**—In this appeal the defendant company appeals against a judgment of my learned brother Mr. Justice Ghose decreeing the suit in favour of the plaintiff for a sum of Rs. 5,160-13-4 together with interest and costs. The suit was brought on a Hundi dated the 24th September 1923 which is in these terms :

> Ninety days after sight without grace we promise to pay Babu G. R. Bhattacharjee or order the sum of rupees ten thousand only for value received.

It is signed for and on behalf of the National Coal Co. Ltd., J. N. Mookerjee Managing director, and accepted as due on 22nd December 1923, by the same gentleman, J. N. Mookerjee. The learned Judge in the Court below has found first that there was presentation to the company ; and I think he was entitled to so find, having regard to the affidavit of Srimani which is an exhibit in the case ; secondly he has found that the plaintiff paid to the company through J. N. Mookerjee a sum of Rs. 5,000 which was claimed in the suit ; thirdly, that these moneys were utilised for paying the debts for which the company had incurred legal liability, and fourthly, he has found that the plaintiff's version as to what passed at the director's meeting held on the 10th October 1923 is correct and that the entry in the minute book is not correct. The effect of this last finding he holds is to establish the plaintiff's contention that Mookerjee's borrowing of the sum of Rs. 5,000 was confirmed by the directors of the company. As a result of these findings the learned Judge has applied the equitable principle that as legal liabilities of the company had been paid off out of the money advanced the plaintiff was entitled to stand in the place of those creditors who had been paid off with such money.

The main contentions urged on behalf of the appellant are as follows : (1) That the directors as a body under the Articles of Association had no power to borrow and consequently the directors' meeting of the 10th October 1923 had no power to ratify the borrowing. (2) There was no presentment to the acceptor or notice of dishonour to him and therefore no cause of action is disclosed on the pleadings. (3) That on the facts the equitable doctrine applied by the learned Judge had no application (4) that the company were guarantors and not principal debtors and that if the sum in suit was taken by Mookerjee and spent to recoup himself for the money advanced by him to the company, the plaintiff had not in fact paid the company's debts as it was really money advanced to Mookerjee himself. The finding of the learned Judge as to the factum of the advance and as to the correctness of the entries in the minute book as to the resolution of the 10th October 1923 were also called in question and we were asked to hold that on the facts and circumstances of the case the equitable principle applied by the learned Judge should not have been applied. In my view the learned Judge was justified in finding on the evidence that the advance was made and that the plaintiff's version of the resolution of the 10th October 1923 was correct and I do not think we should be justified on the evidence in differing from those findings.

The two main points which arise in this appeal are first whether the directors had any power to borrow ; and secondly, whether, if there was no such power in the directors, the plaintiff was entitled to be put in the place of the creditors of the company who had been paid off with this money. As to the first point if there was no such power no question of ratification arises as there was admittedly no ratification by the company itself. The first point involves an examination of the memorandum and Articles of Association which so far as I can see was not placed before the learned Judge in extenso with the result that he was probably misled as to what they contained. (His Lordship then construed

the different provisions of the Articles of Association and continued). It seems therefore clear that under the Articles themselves no power is given to the directors to borrow money on behalf of the company. Now, it appears that the first managing agents ceased to be managing agents some years ago and that no managing agents have been appointed in their place nor has the company appointed, as it was entitled to do under Art. 85, any manager who as I have already stated under the provisions of that Article might be entrusted with the same powers as the managing agents. On behalf of the respondent two arguments have been addressed to us based on this. The first argument is that in the absence of managing agents or a manager the directors have an inherent power to borrow money on behalf of the company. My own view is that, if the Articles had been silent as to who was to exercise the borrowing powers, in a trading company this will probably be so though I should like to reserve consideration of the question as to whether this is so, if there is no general delegation of the company's powers to the directors such as are ordinarily to be found in properly drawn articles of association. But I think, if, as here, the Articles give borrowing powers in a certain manner, the shareholders and the corporation itself are entitled to say that the safeguards of the Articles should be observed. Now, under these articles, as I have already stated, the powers to borrow are in the managing agents or in the manager if in fact a manager was appointed. I think it may well be that it was the object of the framers of these Articles to provide certain safeguards in regard to borrowing, that is to say, to give those powers to the managing agents or the manager and to have a controlling power in the directors and I do not think it possible to say that you can abrogate the Articles so as to remove the safeguards which are laid down therein. I therefore think that upon a true construction of the Articles of Association of this company the directors in the present state of articles had no power to borrow.

The second argument that has been raised is that the plaintiff as a stranger to the company is entitled to assume that a valid resolution of the company had been passed entrusting those powers to the managing director or the managing directors. I am not prepared to accede to this argument. This would involve an alteration of the Articles themselves and I do not think that anyone dealing with the company is entitled to assume that such an alteration had been made. Such alteration could only be made by a special resolution which has to be filed with the registrar of joint stock companies and any one dealing with a company is fixed with notice of the powers of the company under its Articles and of any modification in those powers created by any special resolution which has been passed. I think that this statement of the law is in accordance with the authorities and it is only nessessary to refer to one or two of them. In the case of *Biggerstaff and Howard* v. *Rowatts' Wharf, Ltd.* (1) the head-note states that

> persons dealing bona fide with a managing director are entitled to assume that he has all such powers as he purports to exercise if they are powers which according to the constitution of the company a managing director can have.

As I have pointed out, without an alteration of the Article of Association no managing director has power to borrow under the Articles before us. The next case to which I would refer is the case of *William Irvine and the Union Bank of Australia* (2). This I think is also an authority for the proposition I have just stated and Sir Barnes Peacock in delivering the judgment in the case states (at p. 379) :

> In the present case, however, the Bank would have found that by the Articles of Asscoiation the directors were expressly restricted from borrowing beyond a certain amount and they must have known that if the general powers vested in the directors by Article 50 had been extended or enlarged by a resolution of a general meeting of the shareholders under the provisions of S. 31 a copy of that resolution ought in regular course, to have been forwarded to the Registrar of joint stock companies in pursuance of S. 53 of the Companies Act and would have been found amongst his records.

The whole of the law is, if I may say so, admirably summed up in Vol. 1, Palmer's Company Precedents, 11th Ed., p. 81 which is edited by the late Sir Francis Palmer himself. The pages to which I would refer are pages 79, 80 and 81 and at the bottom of page 81 occurs this passage :

(1) [1896] 2 Ch. 93=65 L. J. Ch. 536=44 W. R. 536=74 L. T. 473.
(2) [1877] 2 A. C. 366=46 L. J. (P. C.) 87=37 L. T. 761=25 W. R. 682.

A person dealing with the company must take the Articles to be such as appear at the office of the Registrar of Companies to be in force. If the Directors propose to do something in excess of their powers thereunder he is not entitled to assume that their powers have been extended by a special resolution for such a resolution, if passed, would be registered.

Then the learned author refers to *Irvine* v. *Union Bank of Australia* (2) to which I have just referred.

Suppose, therefore, in this case that the plaintiff was entitled to assume that a valid resolution of the Company had been passed appointing a manager who under the articles had the power of borrowing to which I have referred, he is met with this difficulty that the promissory note or hundi is signed not by any manager of the Company but by the Managing Director who, acording to the Articles, according to my reading of them, had no power to borrow whatsoever. So I do not think that this is a case in which one is entitled to say that the plaintiff was justified in assuming that the internal regulations of the Company had been so used as to confer a power of borrowing upon the Managing Director having regard to the terms of the Articles to which I have referred. I therefore think, as I have already stated, that there was no power to borrow and the the plaintiff was not entitled to assume that the Managing Director had such powers.

This, however, does not dispose of the case for one has got to consider whether the equitable principle to which the learned Judge has referred in his judgment, which is not disputed, has any application to the facts and circumstances of the present case. This involves a consideration of the accounts which are in evidence and especially of the account for September. (After examining the accounts His Lordship continued.) I think therefore in this state of things that it would be impossible to apply the equitable principle which the learned Judge refers to in his judgment and which he himself has applied.

Two other points were, however, urged on behalf of the respondent; first, the question of estoppel; and, secondly, the question of acquiescence; and the learned counsel who appeared for the respondent argued that if we were against the respondent we should remand the case in order that the question of estoppel might be considered. But I do not think it is open to us to do this. Issue 9 of the issues which are set out fully in the judgment of the learned Judge expessly raises this question of estoppel and it does not seem to me that on the evidence any question of estoppel is made out.

Then it was sought to argue that the Company had acquiesced. I am afraid the unfortunate Company in this case never had any chance of acquiescing or otherwise for I cannot find on the evidence in this case that any proper meeting was held, that any proper accounts or balance sheets circulated to the share holders or that the shareholders were ever kept informed of the circumstances and position of the Company. In these circumstances, I do not see how the shareholders or the Company can be said to have acquiesced in anything that was done or purported to be done on their behalf by the Managing Director.

The only question that remains is the question of presentment which was raised by the learned counsel for the appellant. I do not think it is necessary for us in the view I take to decide this question; but I should have been inclined, I think, so far as I can see at the present time, to decide this in the plaintiff's favour having regard to the fact that Mookerjee was merely an accommodation acceptor; but I do not desire to express any final opinion on that point.

The result, therefore, is that I think that there was no power in the Managing Director to borrow and that there is no case made out for applying the equitable principle referred to in the judgment of the learned Judge.

In these circumstances the appeal succeeds and the suit will be dismissed with costs here and below.

Either the warbonds deposited by the defendant under the Court's order dated the 18th of March 1925 will be returned or the value thereof will be refunded.

**Rankin, J.**—I agree.

It does not appear to me that upon the regulations of this Company it was possible for the borrowing power to be exercised by the Managing Director. The plaintiff was not bound to concern himself with what is called the indoor management of the Company but he was bound to concern himself with the

external position as disclosed by the regulations. The instrument in question purported to be signed by Mookerjee as the Managing Director and the evidence of the plaintiff shows that he took Mookerjee to be exercising powers of the Managing Director. There is no evidence that Mookerjee purported to have any other type or kind of position and it seems to me, therefore, that one would be casting away altogether the principle that a stranger is obliged to look to the external position if we were to hold that in this case the doctrine allowed the plaintiff to secceed.

As regards the question whether this loan has been applied to discharge liabilities due by the Company it is for the plaintiff to make out his equity. To my mind it is clear on the evidence and on the account that this loan was taken for the purpose of paying off Patel and Mookerjee and for no other purpose. (His Lordship discussed the evidence on the point and proceeded.) In substance this money was borrowed and used to pay off an alleged debt due to Patel and Mookerjee which has not been proved. The money came out of no banking accounts and,went into no banking account. Patel and Mookerjee credited the Company with receipt of these sums. In these circumstances, I do not think that the plaintiff has established the equity upon which the learned Judge has given a decree.

I agree that this appeal should be allowed and the suit should be dismissed with costs.

G.B. *Appeal allowed.*

---

## A. I. R. 1927 Calcutta 303

DUVAL AND ROY, JJ.

*Fakir Prasad Ghose*—Petitioner.

v.

*Kripasindhu Pal Bhuti* — Opposite Party.

Criminal Revision No. 538 of 1926, Decided on 6th August 1926, against the order of the S. J., Bankura, D/- 8th May 1926.

***Penal Code, S. 500—Pleader must use common-sense and caution in asking defamatory questions to a witness—Questions asked in bad faith.***

**A pleader must use a certain amount of common-sense and caution in asking a defamatory question. There may be cases where, under proper instructions, he is entitled to ask questions which are defamatory to the person, so as to impeach his credit.** [P 304, C 2]

But where the questions were asked with utter recklessness, and without regard to seeing whether there was any truth in them, and with absolute disregard of whether he was entitled to ask them or not and they were asked not for the good of the case but with no other view than publicly to injure the reputation of the witness,

*Held* : that the questions were asked in absolutely bad faith. [P 304, C 2]

*B. C. Chatterjee, Mirtunjoy Chatterjee* and *Sachindra Nath Banerjee*—for Petitioner.

*Narendra Krishna Bose* and *Raj Kumar Chakrabutty*—for the Opposite Party.

**Duval, J.**—In this matter the petitioner, a pleader in the Munsif's Court at Vishnupur, has obtained a rule against an order of the Sessions Judge of Bankura, upholding a sentence under S. 500 of the Indian Penal Code for defamation, and reducing a fine from Rs. 500 to one of Rs. 100, as to why the conviction and sentence should not be set aside. The case for the prosecution is that there was a suit before the Munsif of Vishnupur in which the petitioner was a pleader appearing for the plaintiff, and the complainant was one of the defendants. The suit was in respect of certain fishery rights, and it appears that the complainant was made a party as he was a mukhia of a social group and as that group claimed the fishery, and he also produced a sanad under which that group of persons claimed a right of fishery in the tank in dispute.

While the case was being heard the complainant went into the box, and he was asked by the petitioner whether he was a gambler, whether he was a thief, whether he dined in prostitutes' houses, whether he had driven away his wife from his house, and whether his wife is leading the life of a prostitute. He protested against these questions, but the Munsif apparently took little notice of his protest, and he categorically denied them. He then brought a criminal case for defamation, and after a long and careful trial by the Deputy Magistrate the pleader was convicted and sentenced to a fine of Rs. 500 which fine, as I have stated, was reduced on appeal by the Sessions Judge to one of Rs. 100. The grounds on which the rule has been obtained are

firstly, that the questions having been put by the petitioner in the course of judicial proceedings and with reference thereto, and to support the case of his client under instructions, the conviction is bad in law and ought to be set aside; and, secondly, that the questions having been put by the petitioner, while performing his duty as a pleader, the Courts below ought to have presumed good faith on his part, and, in the absence of any evidence of actual malice and without any cogent proof that the petitioner had taken any unfair advantage of his position as pleader for any indirect purpose, the conviction in unsustainable.

Now there are certain findings of facts in the first Court, and certain facts which appear from the record and which have not been controverted on appeal. One of these facts is this that some of the defendants in the suit compromised their case with the plaintiff, and that the present complainant was asked by this pleader and by the man who was conducting the plaintiff's case also to compromise the case, and that he refused, and there is evidence that thereupon he was threatened that it would be the worse for him. The evidence is that this took place about a month before the complainant was examined. Further, the complainant was summoned in the case as being a mukhia, and the complainant admitted, and the pleader knew that it was admitted, that the present complainant was there in his capacity as a mukhia. Therefore, it was not a question to ask in the cross-examination to show that he was not a mukhia as it was the plaintiff's case that he was a mukhia.

As to the first point the first Court has found, as a matter of fact, that this threat was given, and in appeal there was apparently nothing urged against this finding of fact, and the judgment being one of concurrence it must be held that the Judge also accepted this as a finding of fact. As to the question of his being a mukhia, I refer to it because it was argued before us that the question as to the alleged misconduct of the complainant's wife was put simply to show that the complainant was not fit to be mukhia. As admittedly he was a mukhia, it was perfectly irrelevant to ask this question. There is one other finding of fact and that is this. Vishnupur is not a large town, and the petitioner is a person living there, and there is a finding that the complainant is well known in the town. It is difficult to believe that the pleader did not know enough about the reputation of the witness he was examining, and that he did not know whether he was entitled to ask these questions or not. These three points appear to me to dispose of any effort which counsel made in the argument which was addressed to us to prove that he acted in good faith. It is also perfectly clear from the latest authorities that the pleader must use a certain amount of common-sense and caution in asking a defamatory question. There may be cases where, under proper instructions, he is entitled to ask questions which are defamatory to the person, so as to impeach his credit.

In the present case, unless he had known (I do not see any reason to believe that he did not know) of the good character and the reputation of the witness he was examining, he might have well asked the questions such as whether he was a gambler or a thief, so as to cast doubt on the truth of his examination, if he was instructed that this man did bear this character. But here it appears to me abundantly clear that these questions, and especially the subsequent ones about his wife, were asked with utter recklessness, and without regard to seeing whether there was any truth in them, and with absolute disregard of whether he was entitled to ask them or not. It seems to me that on this point lack of good faith has been found by the first Court, and this finding has not been upset by the second Court. The evidence is overwhelming to show that these questions were asked not for the good of the case set up by the complainant, but with no other view than publicly to injure the reputation of the complainant. In this view I cannot hold that it is necessary to go into intricate points of law as to how far defamatory questions may be asked, for in this case the findings of fact, in my opinion, clearly show that these questions were asked in absolutely bad faith. In my opinion, therefore, the rule must be discharged.

**Roy, J.**—I agree.

R.D. *Rule discharged.*

# A. I. R. 1927 Calcutta 305

SUHRAWARDY AND GRAHAM, JJ.

*Ahamuddin* and *others*—Petitioners.

v.

*Banku Behary Dutt* and *others*—Opposite Party.

Civil Rule No. 407 of 1926, Decided on 16th July 1926, from an order of the Rent Controller, Calcutta, D/- 10th April 1926.

(a) *Calcutta Rent Act—Order fixing standard rent is judgment in rem and cannot be altered on application by subsequent tenant.*

An order passed by the Rent Controller fixing the standard rent is an order which affects the house, and it is therefore one which operates as a judgment in rem and the question cannot be re-opened on the application of a subsequent tenant. [P. 305, C. 2]

No doubt the standard rent can be altered or varied under certain circumstances, for instance, when there has been any alteration in the premises or an additional burden has been cast upon the landlord or similar circumstances, but that does not show that the judgment fixing the standard rent is not a judgment in rem and that it can be re-opened at any subsequent time. [P. 305, C. 2]

(b) *Calcutta Rent Act, S. 15—S. 15 applies only where rent has been fixed.*

Section 15 of the Calcutta Rent Act contemplates a decision of the Rent Controller fixing the standard rent and therefore it does not apply where no rent is fixed. [P. 306, C. 1]

*Hira Lal Ganguli*—for Petitioners.

*Sushil Chandra Sen*—for Opposite Party.

**Judgment.**—This Rule was issued upon the Opposite Party to show cause why the order of the Rent Controller in Standard Case No. 3 of 1926, dated the 10th April 1926, should not be set aside or such other order made as to this Court might seem fit and proper. The facts relevant to the present case are that the premises belonged to the Opposite Party representing the estate of one Raj Narain Dutt, deceased. The present petitioner became the tenant under the Opposite Party in 1925 in respect of the premises No. 29/1, Phear Lane. These premises were in the occupation of tenants previously and in 1921 one of the sub-lessees applied for standardization of rent to the Rent Controller against his sub-tenant and the rent was fixed at a certain figure under the Rent Act. In the present case the petitioner applied to the Rent Controller for fixing the standard rent in the presence of the landlord. The Rent Controller was of opinion that the rent of these premises being once fixed the matter cannot be re-opened and he has rejected the petitioner's application.

It is argued before us in support of the Rule that the order of the Rent Controller fixing the standard rent in 1921 was not passed in the presence of the landlord (the Opposite Party in the Rule) and therefore it was not binding on him or any of his tenants or sub-tenants. It has been held that a decision fixing the standard rent attaches to the premises and not to the person or parties to the suit and therefore such a decision is a judgment in rem and not in personam: see the cases of *Chapsey Umersey* v. *Keshavjidamji* (1) and *King* v. *York* (2). The passage in the English case above quoted is:

> The Act applied to house and not to person. The Act operated in rem and not in personam. It stereotyped the rent of a house.

The order passed by the Rent Controller in 1921—it does not matter on whose application—was an order which affected the house, and it is therefore one which operates as a judgment in rem and the question cannot be re-opened on the application of a subsequent tenant. The proposition pressed before us on behalf of the petitioner that a decision fixing the standard rent may be re-opened, if accepted, will lead to disastrous results. Any new tenant who from time to time happens to be on the premises may apply for standardization of rent of premises of which standard rent might have been fixed by the Rent Controller. Such a state of things cannot be tolerated. The present petitioner came to be a tenant of the Opposite Party four years after the standard rent had been fixed by the Rent Controller on the application of the then occupier of the premises. We have been referred to several sections of the Calcutta Rent Act to show that the standard rent can be altered or varied. There is no doubt that it can be done under certain circumstances, for instance, when there has been any alteration in the premises or an additional burden has been cast upon the landlord or similar circumstances. That does not show that the judgment fixing the standard rent is not a judgment in rem and that it can be re-opened at any subsequent time.

(1) A. I. R. 1921 Bom. 224=45 Bom. 744.
(2) [1919] W. N. 29.

Lastly, it is argued that the application of the petitioner having been made before the Rent Controller under S. 15 of the Calcutta Rent Act, he was bound to fix the standard rent, even at the figure which was fixed in 1921 and to issue a certificate to the applicant which would enable him under S. 18 of the Rent Act to go to the President of the Tribunal to revise the order. S. 15 of the Calcutta Rent Act contemplates a decision of the Rent Controller fixing the standard rent. If on an application by a party the Rent Controller fixes the standard rent, he should issue a certificate certifying the rent so fixed by him and under Cl. (5) of that section a certified copy of the order should be affixed to a conspicuous part of the premises to which it relates; and under Cl. (6) any person affected by any order of the Controller shall be entitled to be furnished with a copy thereof. There is no doubt that what the section means is that if the standard rent is fixed by the Controller he shall issue a certificate to that effect and affix a copy thereof in some conspicuous part of the premises and also furnish a copy thereof to any person affected by it. In the present case the Controller has fixed no standard rent. He says that he cannot re-open the question, the standard rent having already been fixed in 1921. The petitioner, if he thinks that he is entitled to it, may apply for a copy of the standard rent fixed in 1921.

In this view of the matter the application fails and the Rule is discharged with costs, three gold mohurs.

G.B. *Rule discharged.*

---

## A. I. R. 1927 Calcutta 306

CUMING AND GREGORY, JJ.

(*Skeikh*) *Abdul* and *others*—Accused—Petitioners.

v.

*King-Emperor*—Opposite Party.

Criminal Revision No. 840 of 1926, Decided on 19th November 1926, against an order of the Addl. Presy. Mag., Calcutta.

*Penal Code, S.* 188 — *Order under S.* 144 *Criminal P. C.—Simply promulgation order is not sufficient — Knowledge of order must be proved.*

It is not sufficient in order to affect a person with the knowledge of an order under S. 144 and to render him liable to conviction under S. 188 to show that the order had been duly promulgated. It is necessary to prove by positive evidence that he has the knowledge that the order has been made: *A. I. R.* 1927 *Cal.* 28 and 22 *Cr. L. J.* 705, *Ref.* [P 307 C 1]

*Narendra Kumar Bose* and *Probodh Chandra Chatterji*—for Petitioners.

*Khundkar*—for the Crown.

**Judgment.**—This Rule was issued by my learned brothers Mr. Justice Rankin and Mr. Justice Duval on three grounds: first, that the learned Magistrate should have acquitted the accused holding that the knowledge which was the main ingredient of an offence under S. 188 of the Indian Penal Code was not brought home to the accused; secondly, that the learned Magistrate considered the merits and demerits of the prosecution and defence cases in a vague and general manner without considering the evidence of individual defence witnesses with reference to the accused for whom they deposed and the accused had been seriously prejudiced on account of this procedure. The petitioners have not pressed the third ground on which this rule was issued.

In disposing of the rule it is only necessary for me to deal with the first ground. Mr. Bose who appears for the petitioners has contended that it is not sufficient for the prosecution to prove that notice has been duly promulgated. The prosecution must prove by positive evidence that notice has been brought to the knowledge of the persons whom it is sought to affect by it. The learned vakil points out that in dealing with the present case the Magistrate has held that as notice was duly promulgated the petitioners must be presumed to have had the knowledge of it. This, the petitioners contend, is entirely a wrong view of law. In support of their contention we have been referred to the case of *Ramdas Singh* v. *Emperor* (1), to an unreported decision of this Court in *Sheikh Aiyab* v. *Emperor* (2) and also to a decision of the Lahore High Court in the case of *Emperor* v. *Abdulla* (3). The contention

(1) A.I.R. 1927 Cal. 28.
(2) Revision Case No. 754 of 1926.
(3) [1921] 22 Cr. L.J. 705=63 I.C. 865.

of the petitioners is obviously correct. It is not sufficient in order to affect a person with the knowledge of an order under S. 144 and to render him liable to conviction under S. 188 to show that the order had been duly promulgated. It is necessary to prove by positive evidence that he has the knowledge that the order has been made. The Magistrate has not approached the case from this point of view and he has not found that the accused persons in this case had the knowledge of the order for the disobedience of which he has punished them under S. 188.

The result is the conviction of, and the sentences passed on, the petitioners are set aside.

G.B. *Rule made absolute.*

---

## A. I. R. 1927 Calcutta 307

SANDERSON, C. J., AND PANTON, J.

*Gallagher* and *another*—Applicants.

v.

*Emperor*—Opposite Party.

Application for leave to appeal from Original Criminal Jurisdiction, Decided on 25th June 1926, against the decision of Chotzner, J., and a jury.

(a) *Criminal P. C., S.* 342 (4)—*Applicability.*

Sub-Section (4) of S. 342 was intended to relate to the proceedings which are specified in S. 342. [P 308 C 2]

(b) *Oaths Act, S.* 5—*Accused.*

Section 5 was intended to apply to an accused person while he is under trial. [P 308 C 2]

(c) *Criminal P. C., S.* 449 (1) (c)—*Application for leave to appeal—Affidavit as to nationality is admissible.*

Affidavits of the applicants as to their nationality on the applications for leave to appeal under S. 449 (1) (c) are admissible : 45 *Cal.* 720, *Rel. on.* [P 308 C 2]

(d) *Criminal P. C., S.* 449 (1) (c)—*Application for leave to appeal comes within Limitation Act, Art.* 155.

An application for leave to appeal under Criminal P. C., S. 449 (1) (c) is within Art 155 of the Limitation Act. [P 308 C 2]

*A. N. Sen* and *R. K. Chatterjee* —for Applicants.

*R. C. Bonnerjee*—for Opposite Party.

**Sanderson, C. J.**—These are two applications by Mandelli and Gallagher, who are prisoners in the Alipore Jail, for leave to appeal. The two convicted men were tried at the High Court Criminal Sessions by my learned brother Mr. Justice Chotzner and a jury.

Mandelli was charged with dishonestly using as genuine a forged document, knowing the same to be forged, forgery for the purpose of cheating, and other charges which I need not enumerate ; and Gallagher was charged with abetment of the same. They were both convicted and sentenced to a term of imprisonment on the 3rd of December 1925. I propose to deal with the application of Gallagher in the first instance.

The learned advocate, who appeared at the request of the Court for him and to whom we are much obliged for the assistance which he has given, relied upon S. 449 (1) (c) of the Code of Criminal Procedure. This section was enacted by Act 12 of 1923 and under that section it is necessary for the Court to be satisfied that if this case had been tried outside the Presidency town it would have been triable under the provisions of Ch. 33.

In order to see whether it would be triable under the provisions of that chapter, it is necessary to refer to S. 443 (1) (a), and the provision, which applies to this case, is that the complainant and the accused persons, or any of them, are respectively European and Indian British subjects or Indian and European British subjects.

There is no doubt that the complainant in this case was an Indian British subject ; and, in order to bring himelf within that provision, Gallagher has to show that he is a European British subject within the meaning of the Criminal P. C. "European British subject" is defined in S. 4 (1) (i) as follows :

European British subject means any subject of His Majesty of European descent in the male line born, naturalized or domiciled in the British Islands or any Colony, or any subject of His Majesty who is the child or grand child of any such person by legitimate descent.

Gallagher has filed an affidavit, in which he states that he was born on the 3rd of September 1899 in Bombay, and that he is the legitimate son of Michael Patrick Gallagher and Ruth Censtancia Gallagher. To that affidavit is attached a certified copy of the certificate of marriage, which shows that Michael Patrick Gallagher and Ruth Constancia Jones were duly married at St. Thomas Church Middleton Row Calcutta, on the 4th July 1897, that the parents of M. Patrick

Gallagher were Martin and Ann Gallagher and the parents of Ruth Constancia Jones were John and Constancia Jones.

In my opinion, there is sufficient proof before the Court that Gallagher is a European British subject within the meaning of the Code of Criminal Procedure ; and consequently if this case were tried outside a Presidency town it would have been triable under the provisions of Ch. 33 of the Code. That being so, in my judgment, this Court ought to grant leave to Ghallagher to appeal on the ground mentioned in S. 449 (1) (c).

Mandelli filed an affidavit, which in my opinion, is not sufficient to show that he is a European British subject within the meaning of the Code of Criminal Procedure. But the learned advocate, who appeared for the Crown in this case, drew our attention to S. 415 (A) of the Code of Criminal Procedure which was passed by Act, 18 of 1923 and which is to the following effect :

> Notwithstanding anything contained in this chapter, when more persons than one are convicted in one trial, and an appealable judgment or order has been passed in respect of any such persons, all or any of the persons convicted at such trial shall have a right of appeal.

By reason of the provisions of that section I am of opinion that leave to appeal should be granted to Mandelli in view of the fact that I have come to the conclusion that the judgment or order in respect of Gallagher is appealable.

During the course of the argument a question was raised whether this Court ought to admit the affidavits of Gallagher and Mandelli. Our attention was drawn to certain cases which went to show that, to say the least, it was doubtful whether it was competent to the applicants to swear affidavits in support of their applications. No decision of this Court, which is in point has been brought to our attention.

The two relevant provisions are S. 342 of the Code of Criminal Procedure and S. 5 of the Indian Oaths Act which is Act 10 of 1873.

Section 342 is the well-known section which deals with the examination of an accused at his trial and sub-S. (4) is as follows : "No oath shall be administered to the accused."

Section 5 of the Oaths Act provides "that oaths or affirmations shall be made by the following persons." The "persons" are enumerated in Cls. (a), (b) and (c) ; and then the following provision is to be found :

> Nothing herein contained shall render it lawful to administer in a criminal proceeding an oath or affirmation to the accused person.

I am not prepared to hold that these provisions prevent the applicants from filing affidavits in support of their petitions in this matter. It is to be noticed that the abovenamed provisions refer to "the accused" and "the accused person." I am not prepared to go so far as to hold that, because the applicants were accused and were tried and have been convicted, they are still within the provisions of these two sections.

In my opinion sub-S. (4) of S. 342 of the Code was intended to relate to the proceedings which are specified in S. 342, and that S. 5 of the Oaths Act was intended to apply to an accused person while he is under trial. I am confirmed in that opinion by the observations, which were made by two learned Judges of this Court. I refer to Mr. Justice Teunon and Mr. Justice Richardson who were considering these two sections in the case of *Akhoy Kumar Mookerjee* v. *Emperor* (1), the following passage is to be found :

> It is undisputed, therefore, that an accused person actually under trial cannot be sworn as a witness, and that if two or more persons are being jointly tried, none of them is a competent witness for or against the others. But in our opinion this exception to the general rule goes no further, and has no application to an accused person who is not at the time under trial.

For these reasons, in my opinion, the affidavits of the applicants upon the applications for leave to appeal under S. 449 (1) (c) are admissible. I confine my judgment to the facts of this case and to the particular applications with which the Court is dealing.

There is one other matter, which it is necessary to mention. The learned advocate for the Crown referred to a decision of my learned brothers Mr. Justice C. C. Ghose and Mr. Justice Duval to the effect that an application of this kind was within Art.155 of the Limitation Act. I see no reason to differ from that decision and it seems to me that these applications ought to have been made within sixty days from the date of the sentence appealed from.

It appears, however, that the Superintendent of the Alipore Central Jail had

(1) [1917] 45 Cal. 720=27 C. L. J. 91=45 I. C. 999=22 C. W. N. 405.

before him a document, which was signed by the Chief Presidency Magistrate which is headed "Form to be attached to all warrants of commitment". In that form there is a column which is headed as follows: "Whether sentence appealable or not" and in that column the word "no" is to be found. I am looking at a copy of the form which relates to the case of Gallagher. I assume that the same entry was made with regard to Mandelli.

The Superintendent of the Jail relying upon that statement did not forward Gallagher's petition in the usual manner. The Superintendent pointed out that Gallagher's petition was not handed to him for dispatch until the 20th of February 1926, which would be more than sixty days from the date of the sentence.

But judging from the history-ticket of Gallagher, of which a copy is before the Court, it is clear that Gallagher took steps within a short time of his conviction to get the necessary documents from the Court in order that he might present a petition of appeal under S. 449 (1) (c) of the Code and he did not get the necessary documents until the 21st of January 1926, so that having regard to the provisions of S. 12 of the Limitation Act I think that this application should be entertained.

If it is necessary for the Court to exercise its discretion under S. 5 of the Limitation Act, I am of opinion that Gallagher has shown sufficient cause for not making the application within the specified time.

With regard to Mandelli, it is stated that he wanted to appeal, but he was informed by the Superintendent of the Jail that it was a non-appealable sentence and consequently it was no good to appeal.

I desire to make it plain that no blame attaches to the Superintendent of the Jail. Apparently it had not been recognized that under the somewhat new provisions of S. 449 of the Criminal P. C., this sentence might be an appealable sentence. That explains the delay which has taken place.

Leave to appeal in both the cases is granted.

**Panton, J.**—I agree.

R.D. *Leave granted.*

---

## * A. I. R. 1927 Calcutta 309

B. B. GHOSE AND CAMMIADE, JJ.

*Sm. Mabia Khatun*—Petitioner.

v.

*Sheikh Satkari* and *others*—Opposite Party.

Civil Revision No. 544 of 1926, Decided on 12th July 1926, from the order of the Sub-J., Burdwan, D/- 26th April 1926.

* (*a*) *Civil P. C., O. 33, R. 1—Plaintiff suing in representative capacity—His personal property should not be taken into account.*

When a plaintiff sues in a representative character, such as a mutwalli, trustee or a shebait, unless it is shown that the plaintiff has in his possession property belonging to the wakf estate or trust or the idol for whom he sues, sufficient to enable him to pay the requisite Court-fee prescribed by law he may be allowed to sue as a pauper even if it is shown that he has sufficient personal property of his own. The capacity of a person suing in a representative character must be kept distinct from his personal capacity. [P. 310, C. 2]

* (*b*) *Civil P. C., O. 33, R. 1—Debt due to applicant from third person cannot be taken into account.*

A debt which is due to the applicant from a third person cannot be said to be means of which the applicant is possessed. The words "is not possessed of" must mean that the applicant has not actual control over it. [P. 310, C. 2]

(*c*) *Civil P. C., O. 33, R. 1—Ornaments which a woman ordinarily wears should be excluded in determining her means.*

Ornaments which a woman ordinarily wears are of the same class of personal property as her wearing apparel and cannot be taken into consideration in determining whether she has a sufficient means to pay the Court-fees. [P. 310, C. 1 & 2]

*Sarat Chandra Bose* and *Narendra Krishna Bose*—for Petitioner.

*Biraj Mohan Mojumdar*—for Dy. Registrar.

*Sarat Chandra Basak* and *Pramatha Nath Bandopadhaya* — for Opposite Party.

**Judgment.**—This Rule arises out of an order of the Subordinate Judge of Burdwan refusing the application of the petitioner to sue as a pauper under O. 33, Civil Procedure Code. The petitioner proposed to sue the opposite party as mutwalli with regard to certain wakf property. The learned Subordinate Judge presumably after taking the preliminary steps laid down in Rr. 3, 4 and 5, did not reject the application. He issued notices to the opposite party and the Government Pleader and received evidence as to the proof of the pauperism of the appli-

'cant. The Government Pleader did not raise any objection as to the pa iperism of the applicant. But the application was opposed by the opposite party. The value of the property sued for is over Rs. 9,000 and the ad valorem Court-fee payable on the plaint is said by the Subordinate Judge to amount to Rs. 735. The learned Subordinate Judge has held that the applicant has no property in her possession as mutwalli, but he considers that she has personal property out of which she could pay the Court-fee payable on the plaint and that she should not be allowed to sue as a pauper.

With regard to the question as to whether she has got any personal property the Subordinate Judge has held that she is entitled to prompt dower from her husband which she has not realized. He considers that her husband is a person capable of paying the dower debt as he has some properties and is in receipt of an allowance of Rs. 41 per month from the Government for looking after preserved monuments. The Subordinate Judge has not come to any finding as to what the amount of the prompt dower is. The Subordinate Judge was, however, of opinion that the amount of the dower, whatever it may be, should be taken into acco int as part of the means of plaintiff.

The Subordinate Judge next observes that the ornaments, belonging to the petitioner, have been under-valued. During her examination on commission at her husband's house she was asked to show her ornaments but she would not produce them saying that they were with her husband. Under the circumstances the Subordinate Judge held that the applicant had sufficient means to pay Court-fees on the plaint.

Taking the last point first it seems strange that without taking evidence as to the value of the ornaments of the applicant the Subordinate Judge should think that the value of the ornaments would in any way enable her to pay the Court-fee. She was not asked to produce the ornaments in a proper way and she certainly could refuse to produce her ornaments at the time of her examination. Besides if the ornaments were such as are ordinarily worn by women of her class, those ornaments could not have been taken as means enabling her to pay the prescribed fee. Ornaments which a woman ordinarily wears are of the same class of personal property as her wearing apparel. Without any finding that the ornaments were something beyond and more valuable than what a woman of her class ordinarily uses the Subordinate Judge's conclusion cannot be accepted as correct.

Nor can we accept his conclusion as to the dower. The explanation to R. 1, O. 33, runs thus:

> A person is a pauper when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit...".

Can a debt which is due from a third person be said to be means of which the applicant is possessed? We do not think that it can be said to be so. The words 'is not possessed of' must mean that the applicant has not actual control over it. Whether the husband has sufficient means to pay the debt is another question. But the plaintiff is not possessed of the dower. On this ground we hold that the Subordinate Judge's conclusion that the applicant was possessed of sufficient means of her own so as to enable her to pay the prescribed fee is not correct.

With regard to the first point we are of opinion that when a plaintiff sues in a representative character, such as a mutwalli, trustee or a shebait unless it is shown that the plaintiff has in his possession property belonging to the wakf estate or trust or the idol for whom he sues, sufficient to enable him to pay the requisite Court-fee prescribed by law he may be allowed to sue as a pauper even if it is shown that he has sufficient personal property of his own. The capacity of a person suing in a representative character must be kept distinct from his personal capacity. If a person sues as executor with regard to the estate of a deceased person without having been in possession of any of the assets of the deceased he cannot be said not to be a pauper even if he has got sufficient private means of his own, but is not possessed of anything appertaining to the estate.

The decision of the Subordinate Judge on both the points cannot, in our opinion, be upheld. The Rule must therefore be made ab-olute and the petitioner should be allowed to sue as a pauper.

The petitioner is entitled to her costs as against the opposite party. Hearing-fee three gold mohurs.

G.B. *Rule made absolute.*

# A. I. R. 1927 Calcutta 311

BUCKLAND, J.

*Satish Chandra Das*—Plaintiff.

v.

*Secretary of State*—Defendant.

Original Civil Suit No. 1445 of 1925, Decided on 19th May 1926.

*Government of India Act* (1919), *S.* 96*B*—*Rules under, regarding Civil Services—R.* 14—*Before a police officer may be dismissed, R.* 14 *must be followed.*

The provisions of R. 14 of the rules regarding Civil Services in India which are manifestly intended for the protection and benefit of the officer, are inconsistent with importing into the contract of service the term that the Crown may put an end to it at pleasure and therefore, before a police officer may be dismissed, the procedure laid down by R. 14 must be followed: *Gould* v. *Stuart*, 1896 *A.C.* 575, *Foll.* [P 311, C 2]

*S. C. Bose* and *M. N. Ghose*—for Plaintiff

*B. L. Mitter* and *H. R. Panckridge*—for Defendant.

**Buckland, J.**—This matter comes before me for trial of one issue. The suit was instituted by the plaintiff who was an officer in the Bengal Police Service for damages for wrongful dismissal. It is unnecessary to deal with the various allegations in the plaint at this stage. The defence was taken that the plaint disclosed no cause of action but the plaintiff relied on certain regulations, an aspect of the matter with which I dealt when I directed that an issue should be tried. The issue of which I directed a trial is as follows:

> Does the plaint disclose any cause of action by reason of any regulation having the force of law and providing for the ground or manner in which the plaintiff could be dismissed.

Under S. 96 (b) of the Government of India Act, 1915, it is provided that subject to the provisions of the Act and of the rules made thereunder every person, in the Civil Service of the Crown of India, holds office during His Majesty's pleasure but no person in that service may be dismissed by any authority subordinate to that by which he was appointed. Sub-S. (2) provides that the Secretary of State may make rules for regulating the classification of the Civil Service in India, the methods of their recruitment, their conditions of service, pay and allowances and discipline and conduct. Then Sub-S. (4) provides:

> For removal of doubts it is declared that all rules or other provisions in operation at the time of the passing of Government of India Act, 1919, whether made by the Secretary of State in Council or by any other authority relating to the Civil Service of the Crown in India were duly made in accordance with the powers in that behalf and are confirmed etc.

Under these provisions a rule, Numbered 14, published in the *Gazette of India* on the 21st June 1924, and appearing in the *Bengal Police Gazette* on the 4th July 1924, was, at the period with which the suit is concerned, in force, as is conceded on behalf of the Crown. That rule which is the only rule or regulation to which learned counsel for the plaintiff has drawn my attention provides:

> Without prejudice to the provisions of the Public Servants Enquiries Act, 1850, in all cases in which the dismissal, removal or reduction of any officer is ordered, the order shall, except when it is based on facts or conclusions established at a judicial trial, or when the officer concerned has absconded with the accusation hanging over him, be preceded by a properly recorded departmental enquiry. At such an enquiry a definite charge in writing shall be framed in respect of each offence and explained to the accused, the evidence in support of it and any evidence which he may adduce in his defence shall be recorded in his presence, and his defence shall be taken down in writing. Each of the charges framed shall be discussed and a finding shall be recorded on each charge.

It appears to me on the authority of *Gould* v. *Stuart* (1) that, as in that case, these provisions, which are manifestly intended for the protection and benefit of the officer, are inconsistent with importing into the contract of service the term that the Crown may put an end to it at pleasure, which is the language used in the case cited. Stated in other words what it comes to is that before a police officer may be dismissed, the procedure laid down by R. 14 must be followed. In so far as the plaintiff alleges that such regulation was not complied with, the plaint discloses a cause of action. I am not now concerned with any other questions that arise in this suit and so far as the opinion which I have expressed requires questions of fact to be determined, they will have to be decided at the hearing of the suit.

As the plaintiff has succeeded substantially on this issue, I think he is entitled to the costs of this hearing, but no costs are to be recovered under this order until the determination of the suit,

(1) [1896] A. C. 575 = 65 L. J. P. C. 82 = 75 L. T. 110.

in which event the plaintiff, if he succeeds, will be entitled to add them to any costs which may then be awarded to him. If, on the other hand, he fails in the suit, these costs will be set off against any costs which he may be ordered to pay. The costs of the settlement of issues will be costs in the cause.

R.D. *Order accordingly.*

---

## A. I. R. 1927 Calcutta 312

MUKERJI AND GRAHAM, JJ.

*Kasiswar Roy* and *others*—Judgment-debtors—Petitioners.

v.

*Satya Brahma Das*—Decree-holder—Opposite Party.

Civil Revision No. 956 of 1926, Decided on 14th December 1926, in the matter of Transfer Case No. 97 of 1926 of the District J.'s Court, Bakarganj (Barisal).

*Bengal Civil Courts Act* (1887), *S.* 13 (1) *and* (2)—*Under S.* 13 (2) *District Judge cannot divest a Subordinate Judge of the jurisdiction conferred or him by S.* 13 (1).

By assigning some particular civil business to a particular Judge and thus arranging for the administration under S. 13 (2) the District Judge cannot divest that Judge of the jurisdiction which has been conferred on him by the Local Government under the provisions of sub-S. (1) of S. 13 and therefore, where a petition under O. 21, R. 90 has been filed before the Subordinate Judge of the 2nd Court and is dismissed for default by him and subsequently he is put in charge of the business attaching to the Court of the first Subordinate Judge, he does not become incompetent to hear an application for review of the order dismissing the application for default : 27 *Cal.* 272 ; *A. I. R.* 1922 *Cal.* 41 ; and 6 *P. L. J.* 304, *Rel. on.* [P. 313, C. 1]

*Suresh Chandra Taluqdar*—for Petitioners.

**Mukerji, J.**—There was a proceeding under O. 21, R. 90 of the Code of Civil Procedure, for setting aside a sale. It was on the file of Mr. K. K. Sen who was then the Subordinate Judge of the second Court at Barisal. The proceeding was dismissed for default by Mr. K. K. Sen on the 20th of March 1926. On the 16th of April 1926 Mr. K. K. Sen was put in charge of the business attaching to the Court of the first Subordinate Judge of the district. On the 20th of April 1926 the petitioners, against whom the aforesaid order of dismissal for default was passed, made an application under O. 47, R. 1 of the Code of Civil Procedure before Mr. K. K. Sen who, as I have already said, had by this time become the presiding Judge of the first Court. This application was dealt with by Mr. K. K Sen as the Subordinate Judge, first Court of Barisal, on the 3rd May 1926 with the following order :

> Let the petition be returned to the filing pleader, Babu Lakshmi Prasanna Banerjee for filing it in the proper Court.

This order, it may be mentioned here, was passed on a note which was submitted by the office to the learned Judge and which was to the effect that it appeared from the order-sheet that the petition had been filed in that Court by mistake because the miscellaneous case in question had been disposed of by the Subordinate Judge, second Court, Barisal. On the same day the petitioners, in accordance with the order passed as aforesaid by Mr. K. K. Sen, refiled the application in the second Court and the Subordinate Judge who presided in that Court directed it to be registered and notices to issue on it upon the parties.

Thereafter, presumably because the officer who was presiding in the second Court would have no jurisdiction to deal with the petition by reason of the provisions of O. 47, R. 2 of the Code of Civil Procedure, an application was made by the petitioners before the District Judge of Bakarganj praying for a transfer of the petition from the second Court to the first Court. The learned District Judge by an order passed on the 8th July 1926 refused the said application. He relied upon the decisions of this Court in the cases of *Peary Lall Mozumdar* v. *Kamal Kissori Dassia* (1) and *Ramnarain Joshy* v. *Parmeswar Narain Mahta* (2) as supporting the view that he took, namely, that inasmuch as the petition was then pending in a Court which had no jurisdiction to deal with it there could be no order of transfer made by him in respect of that petition. The petitioners have now moved this Court and obtained a rule to show cause why the case should not be transferred to the first Court of the Subordinate Judge or why such other or further order should not be passed as to this Court may seem fit and proper.

(1) [1880] 6 Cal. 30.
(2) [1897] 25 Cal. 39.

The Opposite Party has not entered appearance in this rule. We have, therefore, looked into the matter as carefully as we could and we have come to the following conclusion.

The petition in the present case was filed before the officer who had dismissed the previous proceedings for default. He was asked by this petition to review his own order. The only difficulty which apparently struck the learned Subordinate Judge as being insurmountable was that whereas he had dealt with the original proceedings and dismissed them for default as the Judge of the second Court, when the petition was presented before him he had become the Judge of the first Court. Looking at the provision of the Bengal Civil Courts Act (Act 12 of 1887) it seems to me to be clear that under S. 3 of that Act, it is the Court of the Subordinate Judge which forms a class of civil Courts within the meaning of that Act, and under S. 13, sub-S. (1) the Local Government fixes the local limits of the jurisdiction of any civil Court under that Act. The particular officer who had dismissed the original proceedings was, no doubt, at the time when he passed that order, the presiding Judge of the second Court, and when the application for review was presented before him he had become the presiding Judge of the first Court. That apparently was by reason of the provisions of Cl. (2) of S. 13 which empowers a District Judge to assign to each of the Subordinate Judges such civil business as is cognizable by a Subordinate Judge. By assigning some particular civil business to the learned Judge and thus arranging for the administration, the District Judge could not have divested the learned Judge of the jurisdiction which had been conferred on him by the Local Government under the provisions of sub-S. (1) of S. 13. The view we take of the matter is in accord with what was expressed in the cases of *Bachu Koer* v. *Golab Chand* (3), *Munshi Mohamed Kazemali* v. *Munshi Niamuddin* (4) and *Raja Jagannath Prasad* v. *Sheo Nandan* (5). In our opinion, the learned Subordinate Judge was in error in supposing that because he had by the 20th of April 1926 become the Subordinate Judge of the first Court of Barisal, there was any impediment in his way in dealing with the application for review that was presented before him and, in our opinion, he should not have returned the petition. We are also of opinion that the learned District Judge was in error in supposing that under the peculiar circumstances of the present case the authorities upon which he relied and which have been referred to above can possibly have any application. Those two are cases in which, so far as can be gathered from the reports, the proceedings were originally laid in a Court which had no jurisdiction and in that way the cases are clearly distinguishable from the case now before us. We are of opinion that the matter should be dealt with by Mr. K. K. Sen who, we are told is at present the Subordinate Judge of the first Court of the district of Barisal.

We accordingly set aside the order passed by the District Judge refusing to transfer the case and we direct that the petition under O. 47, R. 1 which forms the subject-matter of these proceedings be now transferred to the file of Mr. K. K. Sen so that he may deal with and dispose of it in accordance with law.

The Opposite Party not having appeared in this rule we make no order as to costs.

**Graham, J.**—I agree.

G.B. *Rule made absolute.*

(3) [1889] 27 Cal. 272.
(4) A. I. R. 1922 Cal. 41.
(5) [1921] 6 Pat L. J. 304=2 Pat. L. T. 374 =(1921) P. H. C. C. 186.

---

## ✲ A. I. R. 1927 Calcutta 313

SUHRAWARDY AND CAMMIADE, JJ.

*Loke Nath Roy* and *others*—1st Party—Petitioners.

v.

*Bazlal Gani Patari* and *others*—Opposite Party.

Criminal Revision Nos. 864, 1010 and 1011 of 1926, Decided on 4th January 1927, against the order of the Dy. Mag. 1st Cl., Chandpur, D/- 28th July 1926.

✲ *Criminal P. C., S. 145 (1) — Possession—On failure of non-landlord parties to prove possession, possession should be presumed to be with landlord—Continuous possession does not mean possession exercised every day of the year.*

The possession claimed by persons other than the landlords having been disbelieved, possession is presumed to be with parties who have title to

the land. This possession may not be actual possession. Possession under S. 145 must be absolute and continuous and not occasional. But it is not intended that possession must be such as should be exercised continuously or every day of the year. By continuous possession is meant such possession which a party in possession may have occasion to exercise and has exercised and exercises whenever he likes. Continuity of possession should be understood with reference to the object over which it is exercised.

Where the land not capable of yielding much profit on the bank of a river and used to get covered with water at certain seasons of the year and it was found that sometimes bricks were stacked on it, sometimes people were allowed to dry jute on the land, and bastu puja was held on it:

*Held*: it cannot be said that the landlords were not in actual possssion.

[P 314 C 2; P 315 C 1]

*Narendra Kumar Basu* and *Bhagirath Chandra Das*—for Petitioners.

*Jagindra Mohun Ghose*, *Asitaranjan Ghose*, *Nagendra Nath Basu*, *Giris Chandra Paul* and *Nalin Chandra Paul*—for Opposite Party.

**Judgment**. — In these proceedings under S. 145, Criminal P. C., there were six parties—the first three being the landlords (the first party holding one anna share, the second party three annas share and the third party a twelve annas share in the land in dispute). The fourth party claims to have executed a kabuliyat in respect of the land in dispute in favour of the second and third parties and is now holding over—the term of the lease having expired in 1330. The fifth party is the Chittagong Company which claims to hold possession of a portion of the land where it repairs its launches, and sometimes cuts earth and erects a bamboo jetty fencing when the river rises. The sixth party does not claim any title but says he took a verbal bandobust from the maliks. The learned Deputy Magistrate went thoroughly into the evidence and found that none of the parties had been able to produce sufficient evidence of possession within the meaning of S. 145, Criminal P. C., and therefore passed an order under S. 146, Criminal P. C., attaching the land in dispute.

This rule was obtained by the first party on the ground that upon the findings arrived at by the Magistrate, he should have been held to be in possession and that the order under S. 146 was without jurisdiction. The second and the third parties, who were the joint landlords with the first party, have not filed any separate application disputing the findings of the Magistrate; but at the hearing of the rule they have expressed their intention not to object to the rule being made absolute if the first party agreed to treat them as co-sharer landlords of the land in dispute. The first party has said that he has no objection if the joint possession of all the landlords is declared in the land. The real dispute, therefore, is between the landlords on one side and the other parties who claims possession of the land either on settlement from the landlords or by adverse possession on the other. Applications objecting to the order passed by the Magistrate have been filed on behalf of the fourth and fifth parties. Rules have not been issued upon those applications but it is ordered that they should be heard along with the present rule.

We have heard all the parties who have appeared before us except the sixth party who is not represented before us by any pleader and we are of opinion that on the findings arrived at by the Deputy Magistrate the order under S. 146, Criminal P. C., must be held to be bad in law. The position is this: The Magistrate has found with reference to the claim of the fourth, fifth and the sixth parties that they were not in possession. His finding is that the land is fallow and lowlying and during the rainy season covered with water. As happens to all fallow lands people who have any occasion to use them and especially the neighbours use them not with an idea of exercising any act of possession but simply for the sake of convenience. Such being the state of the land, the learned Magistrate has found that the acts which the fourth, fifth and the sixth parties have claimed to have done over it are not in assertion of any title or possession and are not therefore sufficient evidence of possession within the meaning of the section. With this finding we do not disagree.

The possession claimed by persons other than the landlords having been disbelieved, possession is presumed to be with parties who have title to the land and admittedly the first three parties have title to the land as claimed by them. This possession may not be actual possession within the meaning of S. 145 (1) but on the finding of the Magistrate there is no reason to doubt that the possession

exercised by the landlords is sufficient to satisfy the requirements of law. Possession under S. 145, Criminal P. C., must be, as has been held in the case of *Nayan Manjuri Dassi* v. *Fazley Huq Sardar* (1) absolute and continuous and not occasional. But it is not intended that possession must be such as should be exercised continuously or every day of the year. By continuous possession is meant such possession which a party in possession may have occasion to exercise and has exercised and exercises whenever he likes Continuity of possession should be understood with reference to the object over which it is exercised. It is a fallow land not capable of yielding much profit on the bank of a river and gets covered with water at certain seasons of the year. It is found by the Magistrate that the first party stacked some bricks on it, that the second party sometimes allowed people to dry jute on this land, and that the third party held bastu puja on the land. These are the proper uses of a land of this description and on this finding it cannot be said that the landlords were not in actual possession.

The fourth party, who claims to hold over, argues that possession should have been found with him of at least a portion of the land in dispute. The finding of the Magistrate is that he held land adjacent to the land in dispute, and in common with other people sometimes uses the land in dispute in storing bamboos, thatching grass, etc. On this finding of fact we do not think that he has been able to prove his possession.

As regards the fifth party (the Chittagong Company), they have claimed to have used a portion of the land when it gets under water for repairing launches and also to have put up a bamboo jetty fencing and have got a drain passing across the land. They do not claim any right to the land; but they claim to have possessed the land in the manner above-described for a long time. The Magistrate was not satisfied as regards the erection of the fencing and in his opinion possession exercised by the Company was not continuous as they used the land only during the season when it goes under water and not to the exclusion of others. The Company have expressed their willingness before us to take settlement of this land from the landlords. We think that the proposal is reasonable. We, however, do not want in this case to decide the legal rights of the parties.

The result is that this rule is made absolute and we direct that possession of the land in dispute be declared in the first, second and the third parties as one body of landlords until evicted therefrom in due course of law and forbid disturbance of such possession until such eviction.

The applications of the fourth and the fifth parties are rejected.

G.B. *Rule made absolute.*

(1) A.I.R. 1922 Cal. 502 = 49 Cal. 871.

---

## A. I. R. 1927 Calcutta 315

SUHRAWARDY AND GRAHAM, JJ.

*Hara Prasad Gain* and *others*—Plaintiffs—Appellants.

v.

*Gopal Chandra Gain* and *others*—Defendants—Respondents.

Appeals Nos. 2222 and 2233 of 1923, Decided on 10th February 1926, from the appellate decrees of the Dist.-J., Midnapur, D/- 13th August 1923.

(a) *Bengal Public Demands Recovery Act*, (1913), *Ss. 4 and 6—Columns in the tabular form properly filled in—Omission to mention names and figures in the blanks in the certificate portion does not invalidate the certificate.*

Where in the certificate the columns in the tabular form are properly filled in, namely, the name and address of the certificate-holder, the name and address of the certificate-debtors and the amount of public demand for which the certificate was signed are mentioned, the omission to mention these names and the figures in the blanks in the certificate portion of the form cannot be taken to be material omission which would go to the length of invalidating the certificates. The idea underlying the filling in of the form is that the debtor should have information of the specific sum claimed from him and the particulars thereof: 19 C. W. N. 1159, *Dist.* [P 317 C 1, 2]

(b) *Bengal Public Demands Recovery Act*, (1913)—*S. 7 and Appx. form 3—Lithographic signature of certificate officer is sufficient.*

It is not incumbent on the certificate officer to sign the notice with his own hand. Lithographic signature is sufficient. [P 317 C 2]

(c) *Bengal Public Demands Recovery Act*, (1913)—*Rules by Local Government, R. 46 (2)—Omission to serve notice does not vitiate sale.*

Omission to serve notice under R. 46 (2), not causing injury to any party does not vitiate sale. [P 318 C 1]

(*d*) *Bengal Public Demands Recovery Act, (1913)—Rules under R. 46 (4)—Omission of statement under—Only purchaser can raise an objection, if any.*

An objection on the ground of omission of the statement required by R. 46 (4) is available to the purchaser ; but it does not lie in the mouth of the debtor or his representative to take exception to the validity of the sale on this ground. [P 318·C 1]

(*e*) *Bengal Public Demands Recovery Act, Rules under R. 47 (3)—Omission to publish proclamation at Thana is not fatal.*

An omission to publish sale proclamation at the local thana is not fatal to the sale if no injury is caused to the debtor. [P 318 C 1]

(*f*) *Bengal Public Demands Recovery Act, Ss. 37 and 23—Sale cannot be set aside by suit unless substantial injury is caused.*

A sale cannot be set aside for material irregularity by a separate suit unless substantial injury is caused. [P 318 C 2]

(*g*) *Execution—Sale—Death of judgment-debtor after attachment but before sale—Sale is not invalidated.*

The death of a judgment-debtor after attachment of the property and before sale does not necessarily invalidate the sale. Such a sale is good unless appropriate steps are taken to have it set aside. [P 318 C 2]

(*h*) *Bengal Public Demands Recovery Act, S. 37—Scope.*

A suit in the civil Court to set aside sale will only lie on the ground of fraud and not on the ground of irregularities in the conduct of the sale. [P 319 C 1]

(*i*) *Bengal Public Demands Recovery Act, (1913), S. 37—Representative.*

Mortgagee from certificate debtors is their representative. [P 319 C 1]

(*j*) *Limitation Act, Art. 12—Time runs from date of final confirmation of sale.*

Time under Art. 12 runs from the date of the final confirmation of the sale. So long as the sale is under consideration of the revenue authorities, it cannot be said to have been confirmed and become final and conclusive. [P 320 C 2]

*Dwarka Nath Mitter, Amarendra Nath Bose, Apurba Charan Mukherjee* and *Pramatha Nath Bandopadhya*—for Appellants.

*Ram Chandra Majumdar, Sisir Kumar Ghosal, Satya Charan Sinha, Surendra Nath Guha* and *Nuruddin Ahmed*—for Respondents.

**Suhrawardy, J.**—These appeals arise out of a suit by the appellants for recovery of possession of one-half share of the plaint lands on declaration of their alleged title therein and setting aside the sales of the properties under the Public Demands Recovery Act (3 of 1913, B. C.). It will be necessary to mention a few dates in order to understand fully the contentions raised by the parties in these cases. The properties are four in number, and are described in Schs. ka, kha, ga and gha of the plaint. The Sch. ka property was sold under a certificate issued by the certificate officer under the Public Demands Recovery Act and purchased by Defendant No. 1 on the 28th October 1918. The sale was confirmed on the 3rd January 1919 and delivery of possession was given to the purchaser on the 23rd August 1919. The sale of "kha" property was held on the 23rd December 1918 and confirmed on the 24th February 1919 and delivery of possession made to the purchasers, Defendants Nos. 2 and 3, on the 1st September 1919. "Ga" property was sold on the 28th October 1918 and the sale was confirmed on the 3rd January 1919 and delivery made to the purchasers, Defendants Nos 2 and 3, on the 1st November 1919. The sale of gha property was held on the 2nd December 1918 and confirmed on the 3rd February 1919 and delivery of possession given to the purchaser, Defendant No. 1, on the 1st September 1919.

The plaintiffs based their title on a mortgage executed by Defendants Nos. 5 to 15 who had an eight-annas share in the properties in favour of the plaintiffs in December 1903. A suit upon the mortgage was brought by the plaintiffs in 1917 and a decree for foreclosure was passed in favour of the plaintiffs on the 8th March 1919. The other eight annas share was also mortgaged by the owners thereof to Defendant No. 1 who obtained a decree on it and in execution thereof purchased the property. It is not necessary to consider it as it is not in controversy in these cases.

The Subordinate Judge in the trial Court held that the sales were not liable to be set aside ; but as he found that they were vitiated by fraud he held that they were not binding on the plaintiffs and did not affect the plaintiff's eight-annas share in the property. The defendants appealed and the learned District Judge was of opinion that the plaintiffs had failed to prove fraud and that the sales were not liable to be set aside on the ground of irregularities mentioned by the plaintiffs. In this view the learned Judge reversed the decision of the trial Court and dismissed the plaintiffs' suits. Against these decrees these appeals have been preferred by the plaintiffs and various

grounds have been urged on their behalf which will be noticed in the course of the judgment.

It is argued, in the first place, that the principle of lis pendens should apply in the present case and it should be held that the purchasers in the certificate sales took the properties subject to plaintiffs' mortgage decrees. This ground was not taken in the plaint or in any of the Courts below nor in the grounds of appeal presented to this Court. It was taken for the first time at the hearing and we have disallowed the plaintiffs' prayer to raise it at this stage of the case. I need not say further upon this matter.

It is next argued that the sales were void and illegal on the grounds : (1) that there was no proper certificate under the Public Demands Recovery Act in virtue of which the sales were held ; and secondly, that notice under S. 7 of the Act was not properly served. As to the first of these grounds the objection is that all the blank spaces in the form appended to the Act and the certificate under it, being Form No. 1 of the appendix to the Act, were not filled up. The columns of the tabular statement in that form were properly filled up but blanks in the certificate portion were not written up. The sentence runs thus :

> I hereby certify that the above-mentioned sum of Rs..... is due to the above..... from the defendants.....I further certify that the above-mentioned sum of Rs. ..... is justly recoverable and that its recovery by suit is not barred by law.

The ellipses in this form were not supplied and it is objected that due to this omission the certificate is not one which can be called a valid certificate under Ss. 4 and 6 of the Public Demands Recovery Act. It appears from a perusal of the certificate filed in this case that the columns in the tabular form were properly filled up, namely, the name and address of the certificate-holder, the name and address of the certificate-debtors and the amount of public demand for which the certificate was signed were mentioned. The omission, therefore, to mention these names and the figures in a portion of the form cannot be taken to be material omission which would go to the length of invalidating the certificates. The idea underlying the filling up of the form is that the debtor should have information of the specific sum claimed from him and the particulars thereof. In the certificate, as it stands, all the necessary informatiou is given. In this connexion reference has been made to the case of *Syed Mohiuddin* v. *Pirthi Chand Lal* (1). There the facts were very different and the learned Judges on those facts were justified in holding that the certificate was not a valid one under the law. In that case, as here, blank spaces under the tabular statement were not filled up and in the columns of the table the amount recoverable from the debtors was not correctly stated. Under column 4, where the amount of public due for which certificate is signed has to be put, the sum mentioned was different from the amount put in column 5 which requires particulars of the public demand to be inserted. The debtors, therefore, it was rightly assumed, were not in a position to ascertain as to what was the actual amount demanded from them. On these facts the learned Judges rightly remarked :

> It is consequently impossible to say to what precise figure in the tabular statement reference was intended to be made by the expression 'the above-mentioned sum of Rs. . . . ' in the certificate.

No such doubt with regard to the precise figure of the amount recoverable from the debtors exists in the present case. The "above-mentioned sum of Rs. . . . " was the sum mentioned in column 4 and there can be no doubt about it. I am accordingly of opinion that the certificate cannot be held to be invalid on the ground that the blank spaces were not filled up before it was signed by the certificate officer.

As to the other ground with regard to the non-service of notice under S. 7 of the Act, it has been found by the Courts below that notice was served. But the objection on behalf of the appellants rests on the informal nature of the notice. The notice bears the lithographic signature of the certificate officer. It is argued that it is not signed by the certificate officer as required by form No. 3 of the Appendix to the Act read with S. 7 of the Act. I have not been able to discover any law under which it is incumbent on the certificate officer to sign the notice with his own hand. In S. 2 (20) of the Civil Procedure Code "signed" is defined "save in case of

(1) [1915] 19 C. W. N. 1159=31 I. C. 664.

a judgment or decree," as including "stamped." A notice is neither a judgment nor a decree. This objection with regard to the facsimile signature of the certificate officer would have been effective in case of a certificate which has the force of a decree. But under the ordinary law of procedure a notice may be and is generally signed with stamped signature. This objection also fails.

Several irregularities have been pointed out in the procedure adopted in connexion with the sale before the certificate officer which it is contended, would make the sale liable to be set aside. It is pointed out that notices were not served under R. 46 (2) of the rules framed by the Local Government under the Act. That sub-rule says that the proclamation of sale shall be drawn up after notice to the certificate-debtor. This notice, it is argued, was not served and therefore the sale should be held to be bad. In my opinion this is a mere irregularity which it is not proved has caused injury to any party. It is also stated that under R. 46 (4), the sale-proclamation should state that the holding should be sold with power to annul all encumbrances, and as this statement is wanting in the sale-proclamation the sale is not one under the law. This objection, if there is any force in it, is available to the purchaser; but it does not lie in the mouth of the debtor or his representative to take exception to the validity of the sale on this ground. It may be mentioned here that the properties are occupancy holdings under the Government khas mehal. Under the tenancy law the purchaser of an occupancy holding sold for arrears of rent takes it with certain defined rights, the omission to mention which cannot invalidate the sale.

Then it is argued that the sale-proclamation was not published at the local thana under R. 47 (3). This omission too is not fatal to the sale. Even if these irregularities are taken to be material irregularities, they must be such as to cause injury to the debtor. The plaintiffs' case is that the properties were sold at an inadequate price. But none of the Courts below has held that this inadequacy of price was due to any of these irregularities or that the inadequacy is such as to raise a presumption to that effect. After the sales the plaintiff applied under S. 23 of the Act to have the sales set aside on the ground of those irregularities and the application was dismissed. That section provides that a sale may be set aside on the application of any person whose interests are affected by the sale on the ground that notice was not served under S. 7 or on the ground of irregularity in the certificate proceedings or in publishing or conducting the sale, provided that no such sale shall be set aside on any such ground, unless the certificate officer is satisfied that the applicant has sustained substantial injury by reason of irregularities. This suit having been brought to set aside a sale, held under the Public Demands Recovery Act, can only succeed and the sale set aside on the ground mentioned in S. 23, namely, that there was a material irregularity which has caused substantial injury. If the sale is not liable to be set aside by the certificate officer without proof of material irregularity and consequent substantial injury, it cannot be set aside in a separate suit without such proof.

An objection is also taken to the validity of the sale on the ground that in S. A. No. 2222 of 1923 one of the judgment-debtors had died after attachment but before the sale. It is contended that at any rate the share of that judgment-debtor is not affected by the sale This objection also should not prevail. It has been held in the cases of *Sheo Pershad* v. *Hiralal* (2) and *Net Lall Sahoo* v. *Sheikh Kareem Bux* (3) that the death of a judgment-debtor after attachment of the property and before sale does not necessarily invalidate the sale; and it has been pointed out in *Bepin Behary* v. *Sasi Bhusan* (4) that such a sale is good unless appropriate steps are taken to have it set aside.

The next question, which is of some importance in this case, is as to the nature of the suit brought by the plaintiffs. The plaint, as it stands, seeks to recover possession of the properties after setting aside the certificate sales. The prayers in the plaint are to the following effect:—(ka.) After setting aside the sales the plaintiffs may be given possession of their eight-annas share after

(2) [1889] 12 All. 440=(1890) A. W. N. 103 (F. B.).
(3) [1896] 23 Cal. 686.
(4) [1913] 18 C. L. J. 628=22 I. C. 95=18 C. W. N. 766.

declaration of their title thereto; (kha) the certificates and the sales held by the certificate officer of Contai in the following cases (Nos . . .) were fraudulent and collusive; and the processes not having been served in the mofussil the sales may be held as not binding on the plaintiffs; (ga) that it may be held that Defendants Nos. 1 to 3 have acquired no right under those sales and a decree may be passed against them. The other two prayers are in respect of costs of the suit and mesne profits. The suit, as made out in the plaint, is one for setting aside the sales on the ground of fraud and also on the ground of irregularities pointed out therein. It therefore comes within the ambit of S. 37 of the Act. That section says that all matters relating to execution, discharge or satisfaction of a certificate should be determined by the certificate officer; and that a suit may be brought in a civil Court in respect of any such question on the ground of fraud. This section is analogous to S. 47, Civil P. C. Matters relating to execution of the certificate must be determined by the certificate officer who answers to the executing Court within the meaning of S. 47, Civil P. C. A suit in the civil Court will only lie on the ground of fraud and not on the ground of irregularities in the conduct of the sale. It having been found by the lower appellate Court, which finding of fact we are unable to disturb, that the plaintiffs failed to prove any fraud, the plaintiffs' suit must necessarily fail, as in the absence of fraud it is taken out of S. 37 of the Act, and the rest of the questions can only be determined by the certificate officer. Reference in this connexion may be made to the case of *Basanta Kumar Pal* v. *Harendra Nath Mukhopadhya* (5).

The next question that arises in this connexion is whether the plaintiffs are representatives of the certificate-debtors within the meaning of S. 37 of the Act. It has been found by the learned District Judge that the certificates were issued against the tenants who were recorded in the settlement record and they were the persons recorded as tenants in the landlord's sherista. On these facts the learned Judge has held that the certificates that were issued against the recorded tenants had the effect of rent decrees and therefore the plaintiffs must be taken to be bound by them as representatives of the debtors. It is further to be noted in this connexion that the defendants became purchasers of the shares of these holdings after the certificate sales and even after the confirmation of the sales. There can, therefore, be no doubt that if the sales were good as against the Defendants Nos. 5 to 15, they were binding upon the plaintiffs also. On the above considerations it is clear that the suit is one by its constitution and scope under S. 37 of the Act, and as the plaintiffs have failed to prove fraud it is liable to be dismissed.

The learned Judge has also taken the view that the suit is barred by limitation. If I could have agreed with the view taken by the learned Judge on the ground of limitation it would not have been necessary to go into the other matters. But it seems to me that the view taken by the learned Judge is not on the authorities correct. The learned Judge holds that the suit is barred under Art. 12 of the Limitation Act. There can be no doubt that that article is applicable. It says that a suit to set aside a sale such as a sale under the Public Demands Recovery Act must be brought within one year from the date when the sale is confirmed or otherwise becomes final and conclusive. The question therefore is, When did the sales become final and conclusive? By the use of the word "otherwise" in the third column it is meant that the time runs from the date when the sale is confirmed and takes effect as conclusive or when it otherwise becomes final and conclusive. The starting date therefore for limitation should be the date on which the sale has become final and conclusive and cannot be disturbed by any of the means provided in the law of procedure except by means of a suit to which the article is held to apply. In the present case we find that the sales were confirmed on the 3rd January, 3rd February and 24th February 1919.

The suit was brought on 3rd June 1921. Apparently it was brought more than one year after the confirmation of the sale. But it appears that an application was made to the certificate officer to set aside the sales and it succeeded. The sales were set aside on the 19th April 1920. An appeal was taken from this order to

(5) A. I. R. 1926 Cal. 107.

the Collector who set it aside and restored the sales on the 18th May 1920. There was a further application for review before the Commissioner but as there are no proper materials on the record to find out the date on which that application was dismissed, it cannot be referred to in this connexion. The fact that appears on the evidence is that the sale was set aside in April 1920 and that no suit to set aside the sale could have been brought till the sale was again confirmed in May 1920.

The present case is governed by the decision of their Lordships of the Judicial Committee in the case of *Baijnath Sahai* v. *Ramgut Singh* (6). In that case similar circumstances existed and the sale which was set aside at one stage of the proceedings in the revenue Courts was finally confirmed by the Board of Revenue. Their Lordships held that time under Art. 12, Limitation Act, should run from the date of the final confirmation of the sale. In fact there is enough indication in the judgment of the Judicial Committee in support of the view that so long as the sale is under consideration of the revenue authorities, it cannot be said to have been confirmed and become final and conclusive. The date from which time is to be counted under Art. 12 must be the date on which the sale is confirmed and has also become final and conclusive. If time is counted from the 18th May 1920 when the order of the certificate officer setting aside the sale was reversed by the Collector and the sale restored, which must be the date on which it can be said that the sale was confirmed and acquired its conclusive character, the plaintiffs' suit is within time, if allowance is made for the period occupied in serving notice on the Secretary of State under S. 80, Civil P. C., as is provided for in S. 15 (2), Limitation Act. In this connexion the principle which should govern the case where such circumstances exist is also indicated in the decision in the case of *Nrityamoni Dassi* v. *Lakhan Chandra Das* (7). It may also be argued with sufficient force that when a sale is once set aside, it ceases to exist and the cause of action which accrued at its confirmation also ceases to exist and if it is again confirmed by the appellate authority it must be taken that confirmation should date from the judgment of such authority. It is also worthy of note that S. 9 of the Limitation Act has not been extended to proceedings under the Public Demands Recovery Act. In this view I hold that the suit is not barred by limitation. But in the view that I have taken on the merits of the case it must fail.

One other submission is made which requires notice. It was suggested that the plaintiffs at any rate are entitled to relief under the Bengal Tenancy Act as their interest in the properties is an encumbrance within the meaning of S. 161, Bengal Tenancy Act and as it has not been avoided, a decree should be made in their favour in respect of their mortgage or purchase of eight annas share in the property. As I have said, the suit is not framed in such a way as to give the plaintiffs any relief under this head. The suit is purely and simply one under the Public Demands Recovery Act and no further relief was prayed for by the plaintiffs in the suit nor can it be given to them in the present state of the pleadings. This question was raised before the Subordinate Judge but as he was of opinion that the sale was liable to be set aside on the ground of fraud, he did not enter any finding upon it. There is no indication that this point was taken before the Court of first appeal. But it may be argued on the other hand that as the plaintiffs were respondents they had no opportunity of taking it before that Court. Be that as it may, this question is foreign to the present suit and cannot be determined in it

The result of the above consideration is that these appeals fail and must be dismissed with costs. The Secretary of State should get separate costs.

**Graham, J.**—(After setting out the facts his Lordship proceeded.) With regard to the first contention, viz., lis pendens it may be observed that this point was never raised in the pleading, no issue was consequently framed thereon ; nor has it been even included in the numerous grounds of appeal taken in this Court. Furthermore we are informed that notice was served upon the respondents shortly before the date fixed for hearing this appeal of a new ground of appeal, and at that late stage the question of lis pen-

(6) [1896] 23 Cal. 775=23 I. A. 45=7 Sar. 1 (P. C.).

(7) [1916] 43 Cal. 660=33 I. C. 452=20 C. W. N. 522 (P. C.).

dens was not raised. In these circumstances I do not think that this ground ought now to be allowed to be entertained.

The second point relates to the alleged irregularities in connexion with the certificate sales. It does not appear to have been made clear at any stage of the case whether the plaintiffs, who sought to set aside the certificate sales, relied upon S. 36 or S. 37 of the Public Demands Recovery Act. S. 36 apparently has no application, as it is confined to a suit to set aside such a sale on the ground of nonservice of notice. That is not the case here and it has been found as a fact that notice was served. The learned advocate for the appellants has conceded that S. 36 does not apply. He has argued that S. 37 is equally inapplicable, and that the plaintiffs base their suit upon their paramount title and come under the general law quite irrespective of the Public Demands Recovery Act. Such a position cannot, in my opinion, be maintained. Where a special procedure is provided by a special Act for setting aside such sales, it seems to me that that procedure must be complied with. S. 37 refers to certificate-debtors, or their representatives, and the plaintiffs must, I think, be held to come within the latter category. The proviso to the section says

> that a suit may be brought in a civil Court in respect of any such question (setting aside a sale being included) upon the ground of fraud.

The plaintiffs alleged fraud in their plaint, but the finding upon this point in the Court of appeal below is against them, and the learned advocate, who appeared on their behalf in this appeal, very properly intimated that he did not challenge that finding. That being so, it appears to me that, the allegation of fraud having been negatived the suit under the provisions of the Public Demands Recovery Act must be held to have failed [*Basanta Kumar Pal* v. *Harendra Nath Mukhopadhya* (5).] I may mention here incidentally that though the plaintiffs-appellants disclaim any reliance upon the above-mentioned Act, and seek to base their claim upon what is termed their paramount right under the general law, they did, at an earlier stage of the proceedings, make an application under S. 23 of the Act, and in so doing may be said to have tacitly recognized that it was incumbent upon them to proceed under the Act. The case of superior right now set up was never made in their plaint, nor indeed can it be said to have been raised in the grounds in this appeal.

The third point is that the Court of appeal below erred in holding that the sales had the effect of a sale under a decree for arrears of rent, and were binding on the plaintiffs. The learned District Judge has found that the certificates were issued against the recorded tenants and had therefore the effect of rent decrees. On behalf of the appellants reliance has been placed, as in the Court below, upon the entries made in previous certificates, but it is difficult to see how those entries can prevail over the settlement record. Those entries may moreover have been wrong, or again different persons may have been tenants at the time when those certificates were issued. In my opinion the decision of the Court below upon this point is right.

With regard to the fourth point the trial Court did not go into the question whether notices were served under S. 167 of the Bengal Tenancy Act, because in the view it took of the case a decision on the point was unnecessary. It has been argued that the Court of appeal below should have gone into this question. The argument, if substantiated, would necessitate a remand, but as the suit has been held to fail in connexion with the second point, no effect can be given to this contention.

Finally, there is the question of limitation with which my learned brother has dealt in his judgment. On the authorities, including the of case *Baijnath Sahai* v. *Ramgut Singh* (6) decided by their Lordships of the Privy Council, it would appear that the suit cannot be held to be barred by limitation.

The suit, however, viewed as a suit under the Public Demands Recovery Act, failed as already held above and the appeals must, therefore, be dismissed with costs.

G.B. *Appeals dismissed.*

## A. I. R. 1927 Calcutta 322

B. B. GHOSE AND CAMMIADE, JJ.

*Abani Nath Mukerji*—Plaintiff—Appellant.

v.

*Secretary of State*—Defendant—Respondent.

Appeal No. 736 of 1924, Decided on 24th June 1926, from the appellate decree of the Dist. J., Hughly, D/- 21st December 1923.

(a) *Bengal Cess Act* (1880), *S.* 40—*S.* 40 *applies only where cess is levied in the district as a whole—S.* 40 *is imperative wherever it applies.*

Section 40 is applicable only where there is any cess to be levied in the district as a whole, that is, if there is a district re-valuation; and where there is a re-valuation only of an estate or a tenure in any district it is not imperative that notice should be served on the holder of that estate or tenure according to the provisions of the last paragraph of S. 40. Where the matter falls within the provisions of S. 40 the procedure laid down in that section is imperative and unless it is followed the taxing authority cannot impose any burden of taxation on any person. [P 322, C 2; P 323, C 1]

(b) *Bengal Cess Act* (1880), *S.* 182 (1)—*R.* 30 *is not ultra vires.*

Rule 30 is not ultra vires as Cl. (1) of S. 182 is quite general. [P 323 C 2]

*Rupendra Kumar Mitter* and *Shyama Das Bhuttacharjya*—for Appellant.

*Surendra Nath Guha*—for Respondent.

**Judgment.**—This appeal by the plaintiff raises a question of some importance with regard to the procedure relating to assessment of cesses on re-valuation of an estate under S. 15 of the Cess Act. We must at the outset say that the facts of this case reveal considerable irregularities in the office which was concerned with the levying of rates under the Cess Act.

In this case it appears that there was a re-valuation of the estate of the plaintiff in the years 1914 and 1915. But cesses were realized at the old rate till March 1919 and although there was a re-valuation of the estate no one discovered that cesses were being realized at the old rate for a period of about three years. It seems that somebody woke up on the 28th March 1919 and found that the rates were being realized at a rate considerably below the re-valuation made in the years 1914 and 1915 and demand was made for the increased rate for three preceding years which the plaintiff refused to pay. There were proceedings before the revenue authorities which were unsuccessful and the plaintiff was compelled to pay a sum of Rs. 1,600 odd which was realized by the certificate procedure.

This suit has been brought for the purpose of a declaration that the plaintiff was not bound to pay the amount assessed on re-valuation by reason of the failure of the reveune authority to serve notice under the last paragraph of S. 40 of the Cess Act and for recovery of the amount which the plaintiff had been compelled to pay in excess of the old rates and also for a declaration that the certificates lodged against him up to to January 1919 are void.

The Subordinate Judge who tried the case in the first instance passed a decree in favour of the plaintiff. On appeal by the Secretary of State for India in Council that judgment has been reversed.

Two questions have been urged against the judgment of the learned District Judge on behalf of the appellant. The first question is that the provisions of S. 40 of the Cess Act are mandatory and imperative and the failure to comply with the provisions of that section renders the levy of the rates void; and secondly, that cesses could not have been realised on re-valuation from after the year of the completion of the re-valuation. In the present case the re-valuation was made of a particular estate belonging to the plaintiff under S. 15 of the Cess Act and we have to construe the Act having regard to that fact in view. As at present advised we are of opinion that in order to levy cesses on any estate where the matter falls within the provisions of S. 40 the procedure laid down in that section is imperative and unless it is followed the taxing authority cannot impose any burden of taxation on any person.

But in the present case the difficulty arises from the fact that there was re-valuation only with regard to this particular estate and we are unable to hold that S. 40 applies when there is re-valuation of only one particular estate. The section commences with these words:

> When the rate of road cess and public works cess to be levied in any district shall have been determined for any year and published in the Calcutta Gazette as provided in S. 155 the Collector of the district.

shall do certain things. If these provisions are scrutinized it would appear that they provide for the procedure to be adopted with reference to the whole district, that is to say, the Collector must cause the rate so determined to be published by affixing a notification in some conspicuous place in his office in every civil Court, in every Police Station and in the office of every Sub-Divisional Officer within the district and he shall cause such rate to be prolcaimed by beat of drum throughout the district and shall also cause to be served a notice on the holder of every estate within the district and so on.

It is argued strenuously on behalf of the appellant that it would not be proper to confine this procedure to a case where cess is to be levied on the entire district, but ought to be made applicable also where there is a re-valuation of a part of a district or of an estate. But it seems that there cannot be the same reason for the publication and service of notice where a particular estate is concerned and not an entire district. Because when only an estate is re-valued it is to be presumed that the owner of the estate, who only is concerned in the matter, will take proper steps in order to acquaint himself as regards the matter of re-valuation. However that may be we cannot make any surmise as to what was the intention of the legislature. We must construe the section as it stands and as the section stands we must hold that S. 40 is applicable only where there is any cess to be levied in the district as a whole, that is, if there is a district re-valuation ; and where there is a re-valuation only on an estate or a tenure in any district it is not imperative that notice should be served on the holder of that estate or tenure according to the provisions of the last paragraph of S. 40. That being so, we are unable to hold that the levy of the rate is unauthorised in this particular case.

Then comes the question whether the revenue authority was justified in levying the cess in 1919 from the year 1916. That matter must be governed according to law or any rule which has the effect of law. Under S. 12 it is the Board of Revenue which has to fix a date from which the re-valuation is to take effect. S. 15 may be taken to be a supplement to that section. But there is no provision in S. 15 as to the period from which the re-valuation is to take effect. That is provided in R. 30 made by the Board of Revenue under the authority given by S. 182 of the Cess Act.

It is contended on behalf of the appellant that R. 30 is ultra vires of the Act. But Cl. (1) of S. 182 is quite general and we cannot say that that rule is ultra vires of the law. Although we feel that it is a hardship on the plaintiff to have to pay back cess for three years on account of some negligence in the office of the taxing authority we cannot say that this realisation of the cess is illegal.

We must therefore dismiss the appeal with costs.

G.B. *Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 323

CUMING AND PAGE, JJ.

*Surja Kumar Roy Choudhry*—Defendant No. 1—Appellant.

v.

*Kamakhya Charan Chatterji* and *others*—Plaintiffs and Pro forma Defendants—Respondents.

Appeal No. 244 of 1924, Decided on 18th March 1926, from the Appellate Decree of the Sub-J., 2nd Court, Faridpur, D/- 27th June 1923.

*Civil P. C., O. 41, R. 31—Appellate Court independently considering material points—Adopting reasons of trial Court is not objectionable.*

Where an appellate Court has independently considered every material point in the case there is no objection to its adopting the reasons of the trial Court without once more writing down the same reasons at length. [P 324, C 1 & 2]

*Asita Ranjan Ghose* and *Mohendra Kumar Ghose*—for Appellant.

*Jogesh Chandra Roy, Sures Chandra Talukdar* and *Kiran Mohan Sarkar*—for Respondents.

**Cuming, J.**—In the suit out of which this appeal has arisen the plaintiffs sued for a declaration that a certain patni tenure had been wrongly split up in the Record of Rights and recorded under a wrong landlord and that two other holdings, of which the plaintiffs are co-sharer landlords, had wrongly been recorded exclusively under the defendants' share. The main contention of the defendants was that the Record of Rights was correct. The first Court dealt with the

case in a lengthly judgment extending over 43 pages, found in the plaintiffs' favour and decreed the suit. The defendants appealed to the District Court. The District Court dismissed the appeal with costs and upheld the finding of the trial Court.

Against this order the Defendant No. 1 has appealed to this Court. He first of all contends that the judgment is not in accordance with law, because it does not fulfil the conditions required by O 41, R. 31. Order 41, R. 31 requires that a judgment of the appellate Court shall be in writing and shall contain the points for determination, the decision thereon and the reasons for the decision. The learned vakil admits that the learned Subordinate Judge has set out the points for determination and the decision thereon and he contends that the learned Subordinate Judge has not stated his own reasons for the decision. What he objects to apparently is that the learned Judge instead of writing a judgment of 43 pages had adopted very largely, as he himself says, the findings and reasons given by the trial Court. No doubt the learned Judge has to some extent adopted the findings and reasons of the first Court; but he has also independently dealt with in his judgment what he described as the salient points. So long as it is clear that the learned Judge in dealing with the appeal has really applied his mind to the case and has come to his judgment independently of the findings and reasonings of the lower Court there is no objection whatever to the Judge's adopting the lower Court's findings and reasonings as his own. As far as I can see that is what he has done here.

The learned vakil has referred us in support of his contention to the case of *Assanullah* v. *Hafiz Mahomed Ali* (1). In that case, however, the only judgment written by the learned Judge consisted of these words: "There is no ground whatever for the appeal." In the present case the judgment of the learned Subordinate Judge extends very nearly to two printed pages and he has dealt independently with the salient points. With regard to the other points he has adopted the findings and reasons of the trial Court. I see no objection to the course followed by the learned Judge. When he has independently considered every material point in the case, there is no objection to the learned Judge's adopting the reasons of the trial Court without once more writing down the same reasons at length. (After dealing with other points the judge dismissed the appeal with which decision Page, J. agreed.)

R.D. *Appeal dismissed.*

(1) [1884] 10 Cal, 952.

---

## * A. I. R. 1927 Calcutta 324

CUMING AND GREGORY, JJ.

*Adam Ali Taluqdar* and *others*—Accused—Appellants.

v.

*King-Emperor*—Opposite Party.

Criminal Appeal No. 427 of 1926, Decided on 20th December 1926, from the decision of the S. J., Barisal, D/- 8th May 1926.

* (a) *Penal Code, S. 34—S. 34 can apply to a case under S. 304, Part 2.*

Although to constitute an offence under S. 304, Part 2, there must be no intention of causing death or such injury as the offender knew was likely to cause death, there must still be a common intention to do an act with the knowledge that it is likely to cause death though without the intention of causing death. Each of the assailants may know that the act, they are jointly doing, is one that is likely to cause death but have no intention of causing death, yet they may certainly have the common intention to do that act and therefore S. 34 can apply to a case under S. 304, Part. 2. [P. 325, C. 2]

(b) *Criminal P. C., S. 297—Questions of law not arising from facts or pleadings need not be explained.*

It is not for the Judge to explain to the jury questions of law which do not arise on the facts or pleadings of the party. [P. 326, C. 1]

(c) *Penal Code, S. 97—Plea of private defence—Accused must prove justifying circumstances.*

Where the accused themselves never pleaded that they acted in the exercise of the right of private defence, but it was presumably argued by their counsel that they were acting in the right of private defence:

*Held*: that there was nothing for the Judge to explain on the point of right of private defence.

If a person raises the defence that he acted in the exercise of the right of private defence he must prove it. He must set forth the exact circumstances in which he acted to show that he was justified in what he did. [P. 326, C. 1]

*Sures Chandra Taluqdar* and *Mohendra Kumar Ghose*—for Appellants.

*Khondkar*—for the Crown.

**Judgment.**—*Appeal No.* 427 *of* 1926. This is an appeal by two persons, Adam Ali Taluqdar and Sher Gazi, who have been sentenced by the Sessions Judge of Barisal, agreeing with the unanimous verdict of the jury, to seven years' rigorous imprisonment under the second part of S. 304, I. P. C.

The facts are as follows: There are two persons, Ekram Ali and Akkel Ali, who own a piece of land each having an eight-annas share in it. By arrangement Ekram Ali possessed the northern half and Akkel Ali the southern half. Akkel Ali is the husband of the sister of Ekram Ali. Ekram Ali mortgaged the land to Adam Ali Taluqdar, one of the appellants now before us, and Adam Ali was in possession. Then Akkel Ali sold the land to Ekram Ali. Ekram Ali wanted to redeem the mortgage and tendered the money to Adam Ali. There were some disputes about the payment of the money, but Ekram Ali cultivated the land. On the 25th December 1925, Adam Ali, Sher Gazi and Abdul Gafur, who is the appellant in a connected appeal, and one Tahir Khan, brought a number of reapers and proceeded to cut the coarse paddy grown on the northern half of the land by Ekram Ali and began to cut the paddy. Ekram Ali and his two brothers Adam Ali, Monta Ali and his cousin Mahammad, came to the spot. The two parties faced each other and Mahammad flung a spear at Tahir Ali which missed him. Abdul Gafur called out to the party to kill someone. Tahir Mahammad then struck Mahammad with his spear in the stomach and Sher Ali and Adam Ali also stabbed him. He fell down and died on the spot.

The defence was that of innocence and enmity. Mr. Taluqdar has argued that S. 34 of the I. P. C. can have no application to the second part of S. 304 under which the appellants have been convicted. His argument is this:

The second part of S. 304 runs as follows:

> or with imprisonment of either description for a term which may extend to ten years or with fine or with both, if the act is done with the knowledge that it is likely to cause death but without any intention to cause death or to cause such bodily injury as is likely to cause death.

Mr. Taluqdar argues that to apply S. 34 there must be a common intention and that as there was no common intention to cause death or such bodily injury as is likely to cause death because the definition of S. 304, Part 2, excludes such intention, S. 34 cannot apply. The simple answer to this contention is this: that although to constitute an offence under S. 304, Part 2, there must be no intention of causing death or such injury as the offender knew was likely to cause death, there must still be a common intention to do an act with the knowledge that it is likely to cause death though without the intention of causing death. Each of the assailants may know that the act they are jointly doing is one that is likely to cause death but have no intention of causing death, yet they may certainly have the common intention to do that act. No one will dispute that such an act is a criminal act. Clearly S. 34 can apply to a case under S. 304, Part 2.

Our attention has been drawn to a decision of Mr. Justice Walmsley and Mr. Justice Mookerjee (Appeal No. 248 of 1924, decided on 19th August 1924). In that case there are the following remarks of Walmsley, J.:

> There is yet another objection to the charges and verdict. It is that S. 34, which is based on a common intention, cannot possibly be used with the second part of S. 304 which expressly excludes intention. Personally I do not think that it could be used with the first part either, except possibly in very rare cases. However, the point is that the jury have found the accused guilty of committing culpable homicide by doing an act with the knowledge that they were likely to cause death, but without any such intention, in furtherance of a common intention. It is badly framed charge and the defective summing up that have led the jury to their illogical verdict.

With great respect to the learned Judge I am not quite able to discover whether he did or did not decide the point. He certainly does not discuss it or give any reason for his decision. But it is clear from a perusal of the judgment that the learned Judge decided the case upon other considerations and that the decision of that case did not depend on the interpretation of S. 34. The learned Judge's remarks therefore on the applicability of 34 to S. 304, Part 2, may therefore be considered as obiter dicta.

Mr. Taluqdar next contends that S. 35 is the section that really applies. S. 35, I. P. C., simply makes it clear that where a number of persons join in an act which is criminal only by reason of its being done with a certain knowledge

or intention, each person is liable for the act to the extent of his knowledge or intention; in other words, that the Court or jury have to consider what is knowledge or intention with which each person joined in the act, i.e., A and B beat C who dies. A intended to murder him and knew that the act would cause death. B only intended to cause grievous hurt and did not know his act would cause death or such bodily injury as was likely to result in death. A is guilty of murder and B of causing grievous hurt. This is no doubt correct, and it was no doubt incumbent on the Judge to charge the jury that they must consider with what knowledge or intention each person joined in the act. The learned Judge's summing up is a long and careful one. The law is dealt with by him carefully and at length. In dealing with S. 34 he points out that the act must be done with the common intention of all which must be gathered from the circumstances of the case. He also explains S. 304 very carefully and points out that to find them guilty under S. 304, Part 2, there must be the knowledge that the injury is likely to cause death, and although it is not put in so many words, I think it is to be inferred from the charge as a whole that it was put to the jury that they had to consider the knowledge with which each person acted.

Mr. Taluqdar next contends that the learned Judge never explained to the jury the law on the subject of the right of private defence. Now it is not for the Judge to explain to the jury questions of law which do not arise on the facts or pleadings of the party. In this case the appellants themselves never pleaded that they acted in the exercise of the right of private defence. Their plea was a simple denial. It was presumably argued by their counsel that they were acting in the right of private defence. They themselves, however, so far as can be seen, never raised it and it cannot therefore be said to have ever been their case. If a person raises the defence that he acted in the exercise of the right of private defence, he must prove it. He must set forth the exact circumstances in which he acted to show that he was justified in what he did. It has no doubt been held that he may plead he was not there and at the same time make out from the evidence of the prosecution witnesses that what he did was in the exercise of the right of private defence. But it seems to me that if there is absolutely nothing in the prosecution evidence to suggest that he was so acting, there is nothing to go to the jury. It is very difficult for the Judge to put to the jury what is really a hypothetical and nobody's substantial case. There are so many factors and circumstances which require to be proved to establish a right of private defence that it is difficult to see how it can be successful unless specifically pleaded. The Judge has always this difficulty that he never knows what in each case he has to put and it is very difficult for an appellate Court to discover what case he was asked to put to the jury on behalf of the accused when they themselves say nothing, or for an appellate Court to say that the accused's case of the right of private defence was or was not properly put for the simple reason that the appellate Court does not know what that case was. In the present case, however, the Judge does seem to have explained the right of private defence to the jury and I am not prepared to find on the facts proved or alleged that their explanation was not sufficient. The result is that this appeal must be dismissed and the accused, if on bail, must surrender to serve out the remainder of their sentence.

*Appeal No.* 442 *of* 1926.

This is the appeal by one Abdul Gaffur Panchayet who has been convicted under S. 304, para. 2 read with S. 109 and sentenced to 2 years' rigorous imprisonment and a fine of Rs. 50, in default to undergo a further term of six months' rigorous imprisonment.

The facts of the case have been fully set forth in the connected Appeal No. 427 of 1926 and it is unnecessary to recapitulate them.

The case against the present appellant is that he instigated the two men Adam Ali and Sher Gazi to kill Mahammad Ali.

The instigation consisted in certain words which he used. Learned counsel, who has appeared for him, has contended that the Judge did not correctly explain to the jury the law of abetment. He contends that Abdul Gaffur has been convicted under S. 304 read with S. 109. S. 109 deals with the case in which the act was committed as a result of the

abetment. Mr. Bose contends that it was Mahammad Ali who by throwing a spear at Taher Ali started the whole trouble and so it was not on account of the words used by Abdul Gaffur that Mahammad Ali was killed.

We have carefully considered the charge of the Judge to the jury and it is quite clear that he did put it to the jury to consider whether it was the appellant Abdul Gaffur who instigated the death of Mahammad and whether the death of Mahammad Ali was the result of the instigation. The concluding words of his charge on this point are:

If the words uttered could not have been the main reason for the assault on the deceased he is entitled to be found not guilty.

The jury were left to put their own interpretation on the words used.

We have next been asked to consider the question of sentence. No doubt the appellant did nothing more than urge on the others, but the man who urges on others is often the real cause of the whole trouble and but for his urging nothing would have happened. We are not prepared to say that his sentence errs on the side of severity. His appeal is dimissed and, if on bail, he must surrender to serve out the remainder of the sentence.

G.B.J. *Appeals dismissed.*

---

## A. I. R. 1927 Calcutta 327

MUKERJI AND ROY, JJ.

*Rani Shashi Mukhi Chaudhurani* and *others*—Petitioners.

v.

*Sarat Chandra Chakravarty* and *others*—Opposite Party.

Criminal Revision No. 495 of 1926, Decided on 24th August 1926, from an order of the Dy. Mag., Faridpur.

*Criminal P. C., S. 145—Report of police and sketch submitted with it showing lands in possession of parties cannot be used to found possession.*

Where the Magistrate based his conclusions about possession on the police report and a sketch submitted with it showing the lands in possession of different parties.

*Held*; that the use made of these documents was not a proper one. The only legitimate use to which the sketch and the report could be put was to treat them as the basis of the proceedings and as affording materials for determining the question of likelihood of a breach of the peace and of the identity of the subject-matter of the dispute and of the disputing parties. [P 239 C 2]

*N. K. Bose* and *Debendra Narain Bhattacharjee*—for Petitioners.

*K. N. Chowdhury*, *Birendra Kumar De*, *Amarendra Nath Bose* and *Dwijendra Krishna Dutt*—for Opposite Party.

**Mukerji, J.**—This Rule relates to an order passed under S. 145, Criminal P. C., by a Deputy Magistrate of Faridpur. The proceedings were in respect of a chur about 2500 bighas in area in the river Padma, near the Goalundo Ghat railway station. There were three parties to the proceedings. The area has been divided into three portions, marked as Blocks A, B and C in the same map. Block A has been declared to be in possession of the first party, Block C of the second party and Block B of the third party. The second party have moved this Court and obtained this Rule.

In order to deal with the contentions urged in support of this Rule it is necessary to state a few facts. The dispute relating to this chur has a long history at its back. For our present purposes it is not necessary to go beyond the 29th January 1925, when the Sub-Inspector of Goalundo Ghat thana visited the chur on information received about an apprehended breach of the peace. On that occasion the said Sub-Inspector prepared a sketch (Ex. 6) dividing the chur into three portions marked thereon as Blocks A, B and C as representing the lands of which he found the three parties, namely, the first, third and second parties respectively, in possession. This sketch (Ex. 6) he submitted along with a report, dated the 8th February 1925. To prevent a breach of the peace he posted constables and also an armed guard on the chur.

On the basis of the aforesaid police report proceedings under S. 145, Criminal P. C., were started on or about the 12th February 1925, but eventually, on the 27th March 1925, the said proceedings were dropped and an order under S. 144, Criminal P. C., was passed, confining the possession of the three parties to the three blocks aforesaid. On the 9th April 1925 the said blocks were demarcated by the posting of pegs. The armed guard was withdrawn and only a few constables were left on the chur. With this relaxation of watch on the part of the police, certain distur-

bances took place on the 13th April 1925. These led to the institution of two criminal cases against the men of the second party. One of these cases ended in the acquittal of the men concerned therein, before the order complained of in the present Rule was passed. It is said that the other case also had the same fate, though at the date of the said order it was yet pending. The Sub-Inspector of Goalundo Ghat thana then submitted a further report in continuation of the report of the 8th February 1925, on the 26th April 1925 and thereupon on the 28th April 1925 the present proceedings under S. 145, Criminal P. C., were started. These proceedings terminated in the order, dated the 16th April 1926, against which this Rule is directed.

The Rule has been issued upon four grounds, being Grounds Nos. 2, 4, 5 and 8 of the petition of motion. The contentions involved in these grounds have to be grouped in a somewhat different way for the sake of convenience.

The first contention relates to the admissibility or rather the evdentiary value of three maps, Exs. L, B and 8. Ex. L is the map of the chur prepared by a pleader Commissioner Babu Hem Chandra Majumdar, under the orders of the Magistrate for use in these proceedings. It was considered necessary to have an accurate map prepared by a trained surveyor showing the whole chur as well as the blocks which appeared in the sketch Ex. 6, and that is why this map was prepared. It does not appear that it has been used in evidence in respect of any matter which it purports to depict and the only use that has been made of it is to refer to it for identifying the blocks in respect of which the final order has been made. Ex. 8 is the map prepared in August 1924 by an amin Gopal Chandra Das in connexion with certain demarcation proceedings under the Survey Act that took place at the time. This map is explanatory of Ex. 9 the order passed in these proceedings and is therefore relevant. As regards Ex. B, which is a map prepared by a kanungoo at the instance of two of the parties, viz., the first and the second parties, it only shows the thak and the survey lines relaid on the Commissioner's map, Ex. L, and it is difficult to imagine how it is irrelevant, and in any case no reliance appears to have been placed on it in the order which is complained against in this Rule. This contention therefore is of no substance.

The next contention is to the effect that certain pieces of documentary evidence which are very material on the question of possession and are in favour of the second party have not been duly considered by the Magistrate. This contention relates to the documents marked Exs. 7, P, Z6, T and X. Ex. 7 is an order in the order sheet of a previous case under S. 144, Criminal P. C., dated 31st April 1924, in which the then Sub-Divisional Magistrate, on a visit to the locality, expressed the opinion that the present second party or rather the principal members of it were in possession of the chur and issued an injunction on the first party in those proceedings restraining them under S. 144, Criminal P. C., from entering on the lands of the chur. Ex. P is the order of the High Court, dated 18th March 1924, refusing to interfere with the injunction, Ex. 7, and the learned Judges who passed that order were of opinion that the view as to possession which the Sub-Divisional Magistrate had taken was right. Ex. Z6 is the order-sheet of certain proceedings under S. 145, Criminal P. C., which were drawn up on the 23rd December 1925, but were dropped on the same day and which on the submission of the police report of the 8th February 1925 were revived but were again dropped on the 27th March 1925, an order under S. 144, Criminal P. C., being passed instead as has been already stated. This last mentioned order under S. 144, Criminal P. C., has been referred to in the Magistrate's judgment. Exs. X and T are judgments, dated 29th June 1925 and 31st August 1925, in certain criminal cases of rioting and mischief (one of these relating to one of the two cases which arose out of the occurrences of the 13th April 1925), which ended in the acquittal of men of the second party and in which there are some observations showing that the accused concerned therein were in possession of the lands involved in those occurrences. Apart from the fact that some of these documents are not inter partes, the evidentiary value of the findings on the question of possession, such as they are contained in these

documents, at the date with which we are concerned, is practically nil.

The orders under S. 144 could only refer to a point of time when they were passed and assuming that what was stated therein on the question of possession was anything more than the opinion of the Courts which passed those orders, these orders cannot show who came to be in possession when the statutory period during which these orders remained operative was at an end. The judgments of the criminal Courts, in which the men of the second party were acquitted and in which it was incidentally found that they were in possession, can only be evidence of the fact that there were those cases and that they ended in such acquittal, but the finding on the question of possession, which is a ground of such acquittal, can hardly be any evidence in the present proceedings.

The third contention urged in support of the rule is to the effect that the police report, dated the 8th February 1925, and the sketch Ex. 6 have been wrongly used as evidence on the question of possession. Along with this contention it will be convenient to deal with the fourth one, namely that as because of the prohibitory order passed on the 27th March 1925, the parties were precluded from giving evidence of their possession in the entire chur, the Magistrate should have directed his enquiry on the question of possession not as at the date of the proceedings but as on 27th March 1925.

The process of reasoning by which the learned Magistrate has arrived at his conclusion is as follows: To quote his own words he was of opinion that

> the oral evidence of the tenants and other witnesses as regards facts of actual possession by the respective parties is not only of a partisan kind but lacks definiteness on most essential points,

He found, however, that there were certain "land-marks" in the evidence which were practically admitted by the parties and on which he could safely rely. He found that the sketch prepared by the Sub-Inspector of Goalundo Ghat Thana showed the possession of three parties in different portions of the chur which he depicted in the Blocks A, B and C. The possession in his opinion remained intact till the 9th April 1925 when pegs were posted demarcating the blocks, as already stated. He was further of opinion that there could not have been any change in the possession of the parties during this period because the armed guard remained on the spot from the beginning of February to the first part of April 1925. Accordingly he held that the possession of the parties at the date of the proceedings—unless there was a forcible and wrongful change on the 13th April 1925 which for the purpose of S. 145 is of no avail as being within two months from the date of the proceedings—was the same as it was on the 29th January 1925 and as shown by the Sub-Inspector in his report, dated 8th February 1925, and the sketch Ex. 6. Despite the very ingenious arguments advanced on behalf of the first and the third parties this is what seems to me to be the substance of the reasoning of the learned Magistrate. This reasoning to my mind is perfectly sound, but for the assumption which it makes, namely that the sketch Ex. 6 and the statement in the police report of the 8th February 1925 correctly represent the state of affairs as they stood at the time. If this assumption is correct then no objection can be taken to the Magistrate having found possession at the date of the proceedings and not on the 27th March 1925, for in that case there was no change of possession from the 29th February 1925 at any time forward. The only legitimate use to which the sketch and the report could be put is to treat them as the basis of the proceedings and as affording materials for determining the question of likelihood of a breach of the peace and of the identity of the subject-matter of the dispute and of the disputing parties. The use that has been made of these documents is to treat the fact, evidenced thereby, of the Sub-Inspector having seen the parties in possession of the respective blocks as a "land-mark"—the word being used figuratively—which serves as a guide leading to the conclusions at which the learned Magistrate has arrived. The other evidence on the record has been only treated as corroborative of this map and Ex. 6 so far as this matter is concerned. I am, therefore, clearly of opinion that the use that has been made of these two documents is not a proper one, and that they should be excluded from consideration as evidence of possession. I am unable to accept as well founded the

arguments of the first and the third parties ; that when these documents were admitted without objection their admissibility cannot be challenged now, because the question here is not a mere question of mode of proof but a question of the evidentiary value of their contents on the question of possession.

The learned Sessions Judge, in his order refusing to make a reference to this Court against the order, appears to have taken the same view of this matter. He has, however, observed in his order that there are other materials on the record sufficient to justify the learned Magistrate in arriving at the conclusion that the three parties are entitled to retain possession of the three blocks shown in the map Ex. 6. This also is the argument that has been addressed to us by the first and the third parties in this rule. We have accordingly examined the evidence that is on the record and we note below our conclusions on that evidence.

The observations of the learned Magistrate as to the character of the oral evidence which have been quoted above are in our opinion too general and while they are correct in so far as the question of possession in respect of particular plots of the different tenants is concerned, there is a body of evidence which is clear, definite and unambiguous. That evidence establishes the following facts : (a) That the blocks lie within certain defined boundaries, (b) that the possession of the different tenants who hold lands on the border between two contiguous blocks does not extend beyond the line separating one block from another. (c) that there is definite evidence showing that the blocks were in the possession of one or other of the parties at the date of the Sub-Inspector's visit to the chur on the 29th January 1925 ; and (d) that it is more than improbable that there could have been any change of possession in respect of these blocks so long as the armed guard remained on the spot, that is to say, until well within two months before the date of the proceedings. It is reasonable to suppose that if after the removal of the armed guard there was any change of possession it must have been by wrongful and forcible dispossession, of which no notice need be taken for our present purposes. The evidence referred to above appears also to have been relied upon by the learned Magistrate and we see no reason why we should not accept it.

We are therefore of opinion that there is no reason to interfere with the order complained of in this rule and the rule must accordingly be discharged.

**Roy, J.**—I agree.

G.B. *Rule discharged.*

---

## A. I. R. 1927 Calcutta 330

CUMING AND GREGORY, JJ.

*Tamezkhan* and *others* — Accused—Petitioners.

v.

*Rajjabali Mir* and *another*—Complainants—Opposite party.

Criminal Revision No. 875 of 1926, Decided on 4th January 1927, against the order of the Dy. Mag., Sadar Mymensingh, D/- 3rd August 1926.

(a) *Criminal P. C., S.* 233—*Joinder of two offences in one charge is merely an irregularity.*

The joinder of two offences in a single charge is an irregularity and not an illegality : 41 *Cal.* 66 and *A. I. R.* 1922 *Cal.* 573, *Rel. on.* [P. 331, C. 2]

(b) *Criminal P. C., S.* 235—*Same transaction—Proximity of time, community of intention and continuity of action is the test.*

What does or does not form part of the same transaction may be considered to be a question of fact in each particular case. Acts may be considered to form part of the same transaction if there are between these acts proximity of time, community of intention and continuity of action. [P 332, C 1]

(c) *Criminal P. C., Ss.* 342 *and* 537—*Omission to comply with S.* 342 *is curable irregularity (Obiter).*

*Cuming, J. (Obiter)*—An omission to examine the accused at the stage indicated by the section is an irregularity curable under S. 537. [P. 331, C. 1]

*K. N. Chowdhury, S. K. Sen, Sures Chandra Taluqdar* and *Probodh Nath Sanyal*—for Petitioners.

*B. C. Chatterjee* and *Panna Lal Chatterjee*—for Opposite Party.

**Cuming, J.**—This rule has been granted on four grounds which I propose to deal with seriatim. The first ground is that the trial is vitiated by the fact that the provisions of S. 342, Criminal P. C., were not complied with in the case of the accused Tamejuddin inasmuch as he was not examined under the mandatory provision of that section at the close of the prosecution evidence. It will appear that

Tamejuddin, who was represented by a pleader, was ill at the time and was not present when this examination at the close of the prosecution evidence should have taken place. The other accused persons were duly examined but Tamejuddin was not then examined not being present. He was examined at a subsequent stage, namely at the conclusion of the defence evidence.

Mr. Chowdhury who appears in support of the Rule contends that this was not a compliance with the terms of S. 342, Criminal P. C. He contends that the provisions of the section are mandatory and that the accused persons must be examined at the conclusion of the evidence for the prosecution and that the subsequent examination at a later stage is no compliance with the terms of the section. There are a number of decisions of this Court which go to support the view which Mr. Chowdury asks us to adopt of the provisions of S. 342, Criminal P. C. They will be found in the case of *Pramatha Nath Mukerjee* v. *Emperor* (1) and in the case of *Surendra Lal Shaha* v. *Isamuddi* (2). In the last case it was held that the examination of the accused under S. 342, Criminial P. C., must take place at the close of the prosecution case and before the accused has entered upon his defence, and his examination at a subsequent stage was no compliance with the section.

Mr. Chatterjee who has appeared for the Opposite Party has contended that the law as laid down in these cases is wrong and he would ask us to refer the question to a Full Bench as to whether a failure to comply with the provisions of S. 342, Criminal P. C., was curable under S. 537, Criminal P. C., or whether it was incurable and an illegality as has been held in the cases I have already referred to. Speaking for myself and with great respect to the learned Judges who have held otherwise, it has always been my view that an omission to examine the accused at the stage indicated by the section is an irregularity and curable under S. 537, Criminal P. C. But Mr. Chatterjee has asked that if we do not agree with the law as laid down in the decisions referred to, we should refer the question to a Full Bench. But as we shall dispose of the case of the petitioners on another point, no reference would seem either possible or desirable.

Mr. Chowdhury has argued that the failure to examine Tamejuddin vitiates the trial not only as regards Tamejuddin but as regards all the accused persons. None of the decisions, to which I have referred, decides this particular point. It is not, however, necessary to decide the point. For other reasons we are obliged to hold that the conviction and sentence must be set asde and the whole case retried. However, it is not necessary to pass any order under this particular branch of the Rule, because for certain reasons which I shall shortly deal with, it would be necessary to hold that the whole trial is bad and that the whole case will have to be re-tried. This depends upon the last two points which have been urged by Mr. Chowdury on behalf of the petitioners.

Mr. Chowdhury first of all contends that the charge as framed is bad in law because two distinct offences have been included within one charge. This no doubt is correct. As far as can be seen there were two distinct offences, namely the occurrence on the 16th March when a number of persons attacked the complainant and his party to deprive them of a large number of logs which they were removing from the forest and also the occurrence on the 17th March when it is alleged the accused took away certain other logs from another part of the forest which also belongs to the complainant. The petitioners are charged both with being members of an unlawful assembly and of committing theft on both these occasions. Clearly these offences were distinct offences there being one unlawful assembly and theft on the 16th March and another unlawful assembly and theft on the 17th March. S. 233, Criminal P. C., requires a separate charge for each distinct offence. In this case clearly the two offences have been dealt with in a single charge. There is one charge of being members of an unlawful assembly and one charge of committing theft. The joinder of two offences in a single charge has been held by this Court to be an irregularity and not an illegality: see the cases of *Moharuddi Malita* v. *Jadu Nath Mandal* (3); *Ram Subheg*

(1) A. I. R. 1923 Cal. 470=50 Cal. 518.
(2) A. I. R. 1925 Cal. 480=51 Cal. 933.
(3) [1906] 11 C. W. N. 54.

*Singh* v. *King-Emperor* (4); *Musai Singh* v. *Emperor* (5); and *Radha Nath Karmakar* v. *Emperor* (6). It has not been suggested by Mr. Chowdhury that his clients have been prejudiced by this joinder of offences in one charge which is by itself not a sufficient reason for setting aside the trial.

Mr. Chowdhury's next contention is that these four offences do not form part of the same transaction and therefore they could not be tried together. Mr. Chatterjee who appears for the Opposite Party has admitted that if these four offences do not form part of the same transaction then clearly their joint trial was illegal. Therefore the question that remains to be decided is whether these four offences can be considered to form part of the same transaction. What does or does not form part of the same transaction may be considered to be a question of fact in each particular case. Certain tests have been laid down in various cases by which it may be determined whether certain acts do or do not form part of the same transaction. In some cases it has been held that acts may be considered to form part of the same transaction if there are between these acts proximity of time, community of intention and continuity of action.

Mr. Chatterjee has argued that the intention of all the four acts was the same, namely, to take possession of the logs which the complainant was endeavouring to take out of the forest and to deprive the complainant of his right to take any of the logs of the forest. Admitting that this is so for the sake of argument, there are still the other two tests.: the proximity of time and the continuity of action. Between these two acts there was an interval of at least 24 hours. The two acts took place in different parts of the forest and they related to different logs. It was not the case of the prosecution that the accused endeavoured on the first day to remove a certain number of logs forming a particular batch and came back next day to remove the remainder of the logs that they had not been able to remove on the previous day. The two transactions or acts took place in different parts of the forest.

After a careful examination of all the facts of the case we do not think that these acts can be considered to form part of the same transaction. The offence on the 16th March seems to us to be a separate transaction to the offence on the 17th March. Clearly therefore the trial of these offences in the same trial is against the provisions of S. 235, Criminal P. C., read with S. 239. We have therefore no alternative in the present case but to set aside the conviction of and the sentence passed on these accused persons and to order that they be re-tried of the offences, if necessary in separate trials. The trial to be held before some Magistrate other than the Magistrate who has already tried the case.

Pending the disposal of the case the accused will remain on the same bail.

**Gregory, J.**—For the reasons stated by my learned brother I agree that there must be a re-trial.

G.B. *Re-trial ordered.*

(4) [1915] 19 C. W. N. 972=30 I. C. 465=16 Cr. L. J. 641.
(5) [1914] 41 Cal. 66=22 I. C, 1003=18 C. W. N. 183.
(6) A. I. R. 1922 Cal. 573=50 Cal. 94.

---

## A. I. R. 1927 Calcutta 332

RANKIN, C. J., AND C. C. GHOSE, J.

*Sir William Henry Turner* and *others* —Plaintiffs—Appellants.

v.

*Kilburn* and *Co.*—Defendants—Respondents.

Appeal No. 12 of 1926, Decided on 20th December 1926, from the original decree of Pearson, J., D/- 22nd December 1925.

*Shipping—Charter Party—Delay in loading—It is the duty of charterer to provide cargo and keep it ready for loading—Time will not begin to run until shipowner has brought the ship to the place named in the charter—Ordinarily procuring allotment of berth is charterer's duty—Source of supply of cargo is not the concern of ship-owner unless specially provided for.*

*Per Rankin, C. J.*—The prima facie right of the ship-owner is to say that the provision of the cargo is no part of his concern and that it is an absolute duty resting by the contract on the charterer. It may be qualified by an exception clause but such a clause (unless on unusual terms) will only take effect if the charterer has really been prevented from providing a cargo of the kind prescribed by one or more of the specified clauses. There may well be cases where apart from any exceptions stipulated in the charter party, and apart from any

**express reference, in the charter party, to the custom of the port, owner and charterer can be treated as contracting with reference to the regulations or natural conditions of a port. Where the cargo stipulated for is to be provided from a particular place circumstances affecting supply from that source may, if known to both parties, be circumstances with reference to which the charterer's promise to have a cargo ready has to be construed. When the parties have agreed on the terms of the exception clause in view of the facts known to them and of the extent of the risk each is prepared to take, to impute to the owner's agent knowledge of the charterer's intention to limit himself to loading one ship at a time, knowledge of his proposed sources of supply and of his general practice in deciding between the claims of one customer as against another, to treat these matters as qualification of his undertaking to have a cargo of coal ready is to have little or nothing of the well recognized principle of commercial law.**

**"Ready" in the case of a cargo means "ready" in a reasonable sense.** [P 334 C 2, P 335 C 1]

***Per C.C.Ghose,J.*—The obligation of the parties must be decided by the terms of the charter party, but there are certain general principles governing cases of this nature. It is the ship-owner's duty to bring the ship to the place named in the charter-party ; and until he has done this, the ship is not an arrived ship and the lay-days do not commence to run. It is the duty of the charterer to have the cargo ready so that it may be put on board as soon as the vessel is brought to the place named in the charter party. The result, therefore, is that the ship-owner cannot claim damages for detention or demurrage until he has performed the obligation incumbent on him. If the shipowner has performed this obligation the charterer is liable if the cargo is not ready to be loaded in proper time unless he is protected by the exceptions in the charter-party.**

**If a ship is prevented from getting into a loading berth owing to an obstacle created by the charterer or owing to a default of the charterer in performing his duty, then it is well established that the ship-owner has done all that is needful to bring the ship to the loading place and that the charterer must pay for the subsequent delay. The people who provide cargo as charterers are the people who are responsible for getting allotment of the berth in the dock.** [P 337 C 1, 2]

*Pugh* and *James Page*—for Appellants.

*N. N. Sircar*, *Ameer Ali* and *Ormond*—for Respondents.

**Rankin, C. J.**—The plaintiffs as owners of the *S. S. Zingara* Sue the defendant firm as charterers under a charter party dated 22nd November 1920, for damages for the detention of the vessel caused by the defendants' failure to provide a cargo at the proper time. The charter party was for two consecutive voyages from Calcutta to a place called Dwarka on the Bombay side. The cargo is described in the charter party as "a full and complete cargo of coal in bulk."

The detention complained of extended as regards the first voyage from 14th December 1920 to 13th January 1921, and as regards the second voyage from 8th March 1921 to 27th March 1921.

The defendants are managing agents of certain collieries and in November 1920, were arranging to supply two cargoes of coal to the Dwarka Cement Co. Ltd., beginning with a shipment early in December. The defendants having arranged to charter a steamer for the purpose it would appear that a Mr. Foster acting for the defendants saw a Mr. Cruickshank of Messrs. Graham & Co., about securing a vessel. It is said by the defendants that these two gentlemen were apprehensive of difficulties arising in the way of effecting shipment in time and that accordingly they arranged between them certain special clauses which are to be found in the charter party. The terms of the eleventh clause and of the exception clause are here indicated particularly.

Now it can be said at once that these special terms are admittedly of no service to the defendants in the present case. They are to the same effect as the clauses numbered 3, 11 and 25 which were canvassed by the Judicial Committee of the Privy Council in the recent case of "*Baron Ardrossan.*" But learned counsel for the defendants on this appeal conceded that the exception clauses were of no use to him on the facts before us.

Now the *Zingara* was ready to commence loading on the 4th December 1920. She was not in the coal dock but in a proper waiting place in the stream. It is clear that had the defendants been minded to load her with coal that was coming by Railway from their collieries, they would have encountered no difficulty from the Port authorities. The Harbour Master upon request from the ship would have deputed his assistant to take the *Zingara* into the dock and to the berth at which the defendants were proposing to load. The trouble was that the defendants were proposing to load four or five ships with coal : that the vessels were all waiting ; that the defendants had coal coming along sufficient to enable them to load one vessel at a time and no more ; and that the defendants took each in turn according to the date at which she had been ready to load.

These facts bring the case clearly within the "*Baron Ardrossan*" case, decided upon the very same facts as are here proved.

The Port authorities did not mind which steamer, out of number of steamers belonging to the same agents, was, loaded first. Their order of loading was entirely under the control of the agents and the dock authorities were entirely indifferent in the matter.

These are the words of Chakravarti, J., quoted with approval by the Judicial Committee and if the word 'Suppliers' be read instead of 'agents' they meet this case exactly. It is not possible to say that it was by reason of any regulation or natural condition of the port that the *Zingara* could not get to a loading berth. It was because the defendants had no cargo ready for her. They had coal—a certain amount of it—but no coal for the *Zingara*.

In these circumstances it would seem difficult for the defendants to avoid the conclusion that they failed in their duty as charterers to have the cargo ready and that by reason of their default the vessel was detained. The main ground upon which learned counsel on their behalf, based his argument was that at the time Mr. Foster and Mr. Cruickshank arranged the charter party it was well known to both that the defendants would only have one loading berth at a time and coal only for one vessel at a time ; that they had sold two cargoes per month to Graham & Co. ; that they were getting this coal from a certain colliery of which they were managing agents, and that their practice was to load the vessels in their order of readiness to load. This line of reasoning has commended itself to the learned Judge who is of opinion that delay of the kind which occurred to the *Zingara* was delay which Graham & Co., ought to have contemplated and did contemplate and that accordingly it cannot be regarded as unreasonable. With great respect to the learned Judge I cannot agree with this view of the principles applicable to the case. I have the greatest difficulties in seeing how the defence upon which the defendants succeeded was open to them in view of their pleadings and in view of the refusal of the Court to grant leave to amend by inserting into the written statement the proposed paragraph (marked 3 B) and set out in the 22nd clause of the defendants' petition of 15th July 1925. The scope and character of Graham & Co.'s agency for the shipowners and the conditions upon which the knowledge of Graham & Co., can be imputed to the owners in view of S. 229 of the Contract Act, are matters which require to be investigated and considered.

But even if these difficulties can be surmounted the defence cannot be sustained in law. The cargo specified in the charter party was coal—not coal from any particular colliery. No one suggests that under this charter party the *Zingara* could have refused on the second voyage to load coal brought from Messrs. Sarcar. The prima facie right of the ship-owner is to say that the provision of the cargo is no part of his concern and that it is an absolute duty resting by the contract on the charterer. It may be qualified by an exception clause but such a clause (unless on unusual terms)will only take effect if the charterer has really been prevented from providing a cargo of the kind prescribed by one or more of the specified clauses. There may well be cases where, apart from any exceptions stipulated in the charter party, and apart from any express reference in the charter party to the custom of the port, owner and charterer can be treated as contracting with reference to the regulations or natural conditions of a port. Where the cargo stipulated for is to be one provided from a particular place (e. g., a certain colliery) circumstances affecting supply from that source may, if known to both parties, be circumstances with reference to which the charterers' promise to have a cargo ready has to be construed. If *Jones* v. *Green* (1) was rightly decided it was on these principles, and it is on these principles that "colliery turn" may become important. But it is another matter altogether to hold the charterer excused for failure to have this cargo ready in a case of the present character and on the grounds relied on by the learned Judge. When the parties have agreed on the terms of the exception clause in view of the facts known to them and of the extent of the risk each is prepared to take, to impute to the owner's agent knowledge of the charterer's intention to limit himself to loading one

(1) [1904] 2 K. B. 275=73 L. J. K. B. 601=9 Asp. M. C. 600=9 Com. Cas. 20=90 L. T. 768.

ship at a time, knowledge of his proposed sources of supply and of his general practice in deciding between the claims of one customer as against another, to treat these matters as qualification of his undertaking to have a cargo of coal ready—this is to have little or nothing of "the well-recognized principle of commercial law" as Lord Halsbury described it: *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.* (2) that the "merchant is under an absolute obligation to supply the cargo." It is a mere infraction of the rule as to the construction of written instruments. There is no analogy between "colliery turn" and "suppliers turn." The matters relied on in this case have been taken to excuse the charterer in spite of the fact that they were not causes which prevented him or rendered it impossible for him to supply a cargo to this ship. They are more formidable to the owners than any ordinary exception clause would make them. They are matters for the charterer's consideration before he makes his bargain and it is open to him after he has made his bargain to change his practice so as to keep his bargain. These circumstances are not notice to the owners, that the charterer is not proposing to have a cargo ready even though he be not hindered by any cause within the specified exception. The concluding words of Lord Sumners' speech in *Bunge Y Born Co.* v. *H. A. Brightman & Co.* (3) apply to any such theory.

As regards the dicta relied on by the learned Judge from *Harrowing* v. *Dupre* (4) and *Carlton Steamship Co.* v. *Castle Mail Packets Co.* (5), I would observe that neither Bigham, J., nor Rigby, L. J., was dealing with a charterer's obligation to provide a cargo. The duty for breach of which the plaintiffs sue is not the mere general duty cast upon all contractors so to act as not to prevent the other party from carrying out the contract—a duty which may easily be overstated. Nor is it a mere duty to exercise reasonable diligence to find a cargo, though it is true enough that "ready" in the case of a cargo means "ready" in a reasonable sense. Nor is this a charter party without specified lay-days.

This suit was instituted on the 24th November 1923 and the written statement was filed on 6th February 1924. Para. 16 of the plaint contained a statement that the plaintiffs

> on and after the said 3rd December 1920 and on and after the 7th March 1921 were at all times ready and willing to perform and kept in readiness the said steamship for the loading of the said cargoes etc.

Para. 11 of the written statement pleads with reference to this "It admits that the plaintiffs were ready and willing." By July 1925 after the *Baron Ardrossan* case had been decided on appeal the defendants were proposing to make a case to the effect that it was for the plaintiffs to apply for the allotment of a loading berth and that they had neglected to do so. They also suggested—without even asking leave to plead—that Graham & Co., informed them that the *Zingara* would have to take her regular turn *cf.* para. 20 (1) of the defendants' petition of 15th July 1925.

Mr. Foster at the trial in November 1925 gave evidence that one or two days before 3rd December 1920 he asked Mr. Cruickshank of Graham & Co., to put the *Zingara* into berth as soon as possible and was told that he could not put her in at once; she would have to take her turn. Mr. Foster seems to have thought that it was not a question of the defendants making up their mind: they would be told by Graham & Co. which steamer would go to a berth next. Graham & Co., were purchasers of the defendants' coal for the other waiting vessels. As agents of the *Zingara* it would certainly be in their power to refuse to let the vessel go to a loading berth in spite of the charterer's desire that she should do so, but more extraordinary conduct could hardly be imputed to respectable agents and it is simply incredible that so conclusive a reply to the plaintiffs' suit should not have been pleaded at once or even remarked upon in the correspondence as the defendants' plain justification.

> Your own agents, to serve their private ends as buyers of coal from us, refused to let your ship be loaded when we wanted to load her and now you want us to pay you damages for the delay in loading.

That there was ever a question of refusing to let the *Zingara* come to a loading berth may I think safely be dis-

(2) [1905] A. C. 501=74 L. J. P. C. 143=11 Com. Cas. 26=93 L. T. 559=21 T. L. R. 723=10 Asp. M. C. 135.
(3) [1925] A. C. 799.
(4) [1902] 7 Com. Cas. 157.
(5) [1897] 2 Q. B. D. 485=66 L. J. Q. B. 819=46 W. R. 68=77 L. T. 332.

believed. The defendants being apparently unable to do their ordinary duty as charterers of the *Zingara* as well as to fulfil their other engagements to Graham & Co., and being under some misapprehension of what their duty was, may have exercised no control over their own business and loaded whatever Graham & Co., put forward, but that is another matter and not matter of excuse to them. They are in no position to say that as against the plaintiffs they were entitled to rely on Graham & Co., sacrificing the plaintiffs' interests to their own desire to be supplied with coal. It makes all the difference whether the real effect and intention of anything said by Mr. Foster to Mr. Cruickshank was "Do you mind my putting another purchaser of coal in front of you?" or "as charterers we order the *Zingara* to a loading berth at once." But in all the circumstances I feel clear that the latter is not proved, and that the plaintiffs were not called upon to deal with such a case.

As regards the first voyage there was no shortage of waggons in December 1920. As regards the second voyage shortage of waggons does not matter since it is clear on the correspondence that the defendants could have brought coal in time from Messrs. Sircar and in any case it is not proved that the shortage was sudden or that in spite of it coal could not have been had at the dock from persons with a wider or a different area of supply.

Learned counsel for the defendants, citing the *Carlton* case (5), threw out a suggestion in the course of his argument that it is not the duty of the charterer to point out a berth which is at the moment vacant but only to point out one that will be ready in a reasonable time and that the defendants cannot be liable to pay for detention of the vessel as from 4th December 1920 or 8th March 1921. In my judgment, however, the facts of this case and the terms in which this charter party makes provision as to lay-days, require that time be computed against the defendants as from the 4th December 1920 and the 8th March 1921 respectively.

In my opinion the appeal should be allowed with costs here and before the learned Judge and the case must be sent back with a declaration of the liability of the defendants in order that the amount to be recovered by the plaintiffs may be assessed.

It being stated that the parties have agreed that the costs before the learned Judge should include the costs of three counsels we make an order accordingly.

As regards the costs of this appeal we understand that there was an agreement contained in the letter of Messrs. Morgan and Co., dated the 18th of November 1926, and our order for costs of this appeal will be in accordance with the agreed terms.

**C. C. Ghose, J.**—(After setting out the facts and evidence his Lordship proceeded.) On behalf of the appellants it has been argued before us that there is an absolute obligation on the charterers, under a charter party as in the present case, to have a cargo ready for being loaded into the vessel on the expiration of 24 hours' notice of her arrival in port at the place of loading and that if there is a failure on the part of the charterers and delay results therefrom, they are liable for damages for detention, the contention being that the case is really covered by the judgment of the Privy Council in the case of *Samuel Crawford Hogarth* v. *Cory Brothers & Co., Ltd.* (6) delivered on the 26th July 1926, and by the judgments in the cases of *Ardan Steamship Co., Ltd.* v. *Andrew Weir & Co.* (2); *Grant* v. *Coverdale* (7) and *Bunge Y Born Co.* v. *H. A. Brightman & Co.* (3). The appellants contend that as the defendant firm had no cargo ready they were not in a position to get the vessel into the coal dock and to get her berthed in proper time. In the second place, it is argued that notwithstanding Messrs. Graham and Company's letters of the 14th January 1921 and 28th March 1921, wherein they said that the lay-days were to commence from the 13th January 1921 as regards the first voyage, and the 27th March 1921 as regards the second voyage, the defendant firm, who had in fact no cargo ready for being loaded into the vessel when she arrived in port and was entered in the Customs House, cannot be heard to say that the lay-days did not run from the expiration of 24 hours after notice of arrival of the vessel

(6) A. I. R. 1926 P. C. 121=54 Cal. 84=53 I. A. 230 (P. C.).
(7) [1884] 9 A. C. 470=53 L. J. Q. B. 462=32 W. R. 831=51 L. T. 472=5 Asp. M. C. 353.

in port. In the third place it is argued that the learned Judge was in error in admitting in evidence Mr. Foster's account of the conversations referred to above and in allowing the defendant firm to contend that in the circumstances appearing on the evidence, the charterers were not liable because the case sought to be raised had been definitely disallowed on the application for amendment of the written statement and also because it was not raised in the issues nor put forward till the plaintiffs' case had been closed. It is also argued that the plaintiffs would not be affected by any knowledge on the part of Messrs. Graham and Company, who were merely the agents of the vessel and not general agents of the plaintiffs, of the matters, assuming that they were true, referred to in the evidence of Mr Foster. It is further argued that, in any event, such evidence was inadmissible under the provisions of S. 92 of the Indian Evidence Act and that as a matter of fact, even if this evidence be received it is inconsistent with the other evidence on record and should not have been relied upon. Lastly, it is argued that the defendant firm's case is not covered by the exceptions in the charter-party and that, in the circumstances, the plaintiffs were entitled to succeed in their suit.

On behalf of the respondents it has been strenuously contended before us that the charterers had in fact and truth a continuous stream of coal at their disposal, but there was failure on the part of Messrs. Graham and Company, the agents of the vessel, in that the vessel was not ready to receive the cargo at the place in which cargoes of the agreed kind are usually loaded until the 13th January 1921 as regards the first voyage and until the 27th March 1921 as regards the second voyage; in other words, the contention is that it being common ground that coal could only have been loaded in the coal dock and nowhere else it was not enough for the plaintiffs to bring the vessel to the port of Calcutta, but that it was their duty to bring the vessel to the place where goods of this description could be shipped, namely, the coal dock. In the second place, it is contended that nothing really turned upon the defendant firm's acceptance of the notices of arrival of the Zingara, because all that it meant was that the ship was in a fit condition to receive the cargo, but it did not and could not possibly mean that the ship had been brought into the place where goods of this description could be shipped. In the third place, it is argued that, on the evidence on record, there could not be any doubt whatsoever that at all material times the defendant firm had a complete cargo ready to be loaded into the Zingara and that if obstacles had not been thrown in the way of the defendant firm in getting the Zingara berthed within a reasonable time of her arrival in port neither the fact of a station not being opened in time nor the coal wagons containing the defendant firm's coal not having been labelled for the Zingara could have prevented the Zingara from being loaded in terms of the charter party. Lastly, it is contended that on the evidence on record it is evident that the parties contemplated that the vessel would be loaded in the shippers' turn i.e., turn of the people who actually loaded, and that if that was so there was no duty on the charterers to be ready with their cargo until the vessel was ready to be berthed.

Now in cases of this description, the principles of law applicable are well settled and it is unnecessary in my opinion to make any detailed reference to the cases. The obligation of the parties must be decided by the terms of the charter-party, but there are certain general principles governing cases of this nature. It is the ship-owner's duty to bring the ship to the place named in the charter-party; and until he has done this the ship is not an arrived ship and the lay-days do not commence to run. It is the duty of the charterer to have the cargo ready so that it may be put on board as soon as the vessel is brought to the place named in the charter-party. The result, therefore, is that the ship owner cannot claim damages for detention or demurrage until he has performed the obligation incumbent on him. If the shipowner has performed this obligation the charterer is liable if the cargo is not ready to be loaded in proper time unless he is protected by the exceptions in the charter-party. My conclusions on the evidence on record are as stated below, that the ship, owners in this case did perform their obligation but that the charterers did not perform

their obligation in that they did not supply the cargo in proper time in terms of the charter-party.

In my view there is absolutely no substance whatsoever in the contention raised on behalf of the respondents that the Zingara could not be treated as an arrived ship because she had not been brought into the place where goods of this description could be shipped. Now in the first place, the charterers did not indicate the dock, place or wharf where the loading was to begin. The Zingara arrived in port on the 3rd December 1920 and was waiting at the mooring buoys in the stream and notice of readiness to load which was given by Messrs. Graham and Co. was accepted by the charterers. That being so and having regard to the Port regulations, the ship-owners had done, in my opinion, all that was needful under the terms of the charter-party.

It appears from the evidence of Mr. Pyster that some time before a steamer actually arrives in port a provisional berthing list with probable dates thereon is made out in the office of the Port Commissioners and that the controlling factor which enables a vessel to come into the coal docks and get into a berth therein is that there must be at least 800 to 1000 tons of coal intended for the vessel either at the coal docks or on wagons and that the rest of the cargo to be loaded is waiting to come down. In the case of the Zingara (first voyage) the first lot of coal intended for her did not arrive at the docks till the 31st December 1920, but it is said that the defendant firm had a continuous stream of coal at their disposal from the 4th December 1920 to the 22nd January 1921. By this is meant that the defendant firm were supplying coal to four vessels of which the agents were Messrs. Graham and Co. and that it would have been quite easy for the defendant firm to commence loading the Zingara from the 4th December 1920 if they had been allowed to do so. The actual dates of loading of the four vessels referred to above appear on page 28 of the paper book. It may be true in one sense that the defendant firm had a certain amount of coal at their disposal on the material dates; but it does not appear to be at all clear on the evidence that if the defendant firm had insisted on the Zingara being loaded in proper time in terms of the charter-party they would not have succeeded in getting her berthed in the coal dock within a reasonable time of her arrival in port. I think if the defendant firm were minded to load the Zingara immediately on her arrival they would have met with no obstruction at the hands of the Port authorities. I am not unmindful of the evidence of Mr. Foster in this connexion. In my view this evidence should not have been received at all by the learned Judge. If it was the defendant firm's contention that they as charterers were not going to be made liable for delay owing to the Zingara being made to take her turn as directed by Messrs. Graham and Co. there was nothing whatsoever to prevent the defendant firm saying so in the charter-party itself. In passing, it must be observed that there was no shortage of wagons in December 1920. The case sought to be set up at the trial was, in my opinion, inconsistent with the correspondence produced at the hearing and with the known and well-understood state of things obtaining at the docks at the material times. The position, therefore, in my opinion is, on the evidence, that if the defendant firm had exerted themselves they could have easily got the Zingara berthed within a reasonable time after her arrival in port. It was the duty of the charterers to approach the dock authorities and get an allotment of a berth. They did not do so in proper time in terms of the contract between the parties.

As their Lordships of the Judicial Committee observed in the *Baron Ardrossan* case,

> If a ship is prevented from getting into a loading berth owing to an obstacle created by the charterer or owing to a default of the charterer in performing his duty, then it is well-established that the ship-owner has done all that is needful to bring the ship to the loading place and that the charterer must pay for the subsequent delay.

I do not read the acceptance by the defendant firm of the notice of arrival in the way in which it was sought to be contended on behalf of the respondents before us, nor can I deduce from the evidence that it was any part of the duty of Messrs. Graham and Co., the agents of the vessel, to get allotment of a berth. In the *Baron Ardrossan* case it is laid down by their Lordships of the Judicial Committee that the people who provide

cargo as charterers are the people who are responsible for getting allotment of the berth in the coal dock. I do not think it is made out on the evidence that the agents of the vessel regulated the turn of the vessel in the berth or that the plaintiffs knew that the Zingara would have to take her turn in the order in which the defendant firm were loading the four vessels referred to on page 28 of the paper-book. In this connexion I may observe I am satisfied on the evidence that there was, in fact, no congestion in the port on the material dates because it is clear that certain other steamers were able to get away after loading within a reasonable time of the dates of their arrival.

As I understood the argument on behalf of the respondents, so far as the first voyage of the Zingara was concerned, no attempt was made to bring the case with in the ambit of the exceptions mentioned in the charter-party. In my opinion, the defendant firm have failed to meet the plaintiffs' case as regards the first voyage of the Zingara ; the case is in my opinion concluded by the judgments in the cases referred to above.

As regards the second voyage of the Zingara, learned counsel on behalf of the respondents definitely stated that he did not rely on the exceptions. As stated above, the Zingara (second voyage) arrived in port on the 7th March 1921 and on that very day notice of readiness to load was given by Messrs. Graham and Co. to the defendant firm. The defendant firm opened a station for her on the 8th March 1921. On the 9th March the defendant firm informed the Collector of Customs that they were unable to secure wagons at their collieries for despatch of coal to the docks on account of the Zingara and they therefore requested that their authorization for coal might be cancelled.

It appears that the defendant firm had entered into an arrangement on the 9th March 1921 with Messrs. N. C. Sircar & Sons for supply of coal to the Zingara. On the 10th March 1921 Messrs. N.C. Sircar & Sons obtained an authorization from the Collector of Customs, Calcutta, for 5000 tons of coal for the S S. "Zingara." Messrs. Sircar & Sons had collieries, near more than one railway and it was thought that they would be in a position to supply the cargo quickly. As a matter of fact, however, the Zingara did not commence loading till the 27th March 1921. It is said that the delay was caused by the railways not supplying wagons to Messrs. Sircar and Sons' collieries. The wagon shortage, if any, was not relied upon at the hearing before us ; the contention was that the Zingara was loaded in her proper turn as regards the second voyage. The considerations which have influenced me in coming to the conclusion that the defendant firm had failed in their duty to provide cargo for the Zingara as regards her first voyage in proper time in terms of the charter-party apply equally to the second voyage.

I do not think that the plaintiffs are estopped from claiming damages for detention of the vessel because of the fact that the agents of the vessel had written on the 14th January and 28th March 1921 the letters referred to above relating to the running of lay-days. I think that the second contention put forward on behalf of the appellants noticedin a previous part of this judgment is sound and that no estoppel really arises.

The result, therefore, is that, in my judgment, the plaintiffs are entitled to claim damages for detention of the vessel from the 4th December 1920 and the 8th March 1920.

For these reasons I agree with the learned Chief Justice in the order which he proposes to make.

G.B. *Appeal allowed.*

---

## A. I. R. 1927 Calcutta 339

MUKERJI, J.

*Munni Lal Kshetry*—Decree-holder—Petitioner.

v.

*Sasi Bhusan Adhikari* and *another*—Judgment-debtors—Opposite Parties.

Civil Rule No. 1409 of 1925, Decided on 5th February 1926, from an order of 1st Court Munsif, Midnapur, D/- 25th August 1925.

*Civil P. C., O.* 21, *Rr.* 100, 58 *and* 63—*Claim under R.* 58 *dismissed—Suit under R.* 63 *not filed—Application by transferee of claimant under R.* 100 *was held competent.*

If the claimant under R. 100 was in possession though without a good title or even as a trespasser but on his own account or on account

of some person other than the judgment-debtor he is entitled to succeed under R. 101.

[P 340, C 2]

*Satindra Nath Roy Choudhury*—for Petitioner.

*S. C. Maity* and *Apurba Charan Mukerji*—for Opposite Party.

**Judgment.**—The petitioner had a decree for money against one Rajendra Nath Adhikari and in execution thereof attached certain properties. Upon that one Nani Bala Debya, widow of a deceased brother of the judgment-debtor, filed an application under O. 21, R. 58, claiming a 1/5th share in the attached properties, and it is said that the application was dismissed for default on the 25th April 1922. The properties were put up to sale and were purchased by the petitioner. The sale was confirmed on the 25th April 1922, and possession was delivered to the petitioner on the 28th April 1925. On the 21st May 1925, the opposite party Sashi Bhusan Adhikari alleged to be the son-in-law of Nani Bala applied under O. 21, R. 100, Civil P. C., alleging that he had purchased Nani Bala's 1/5th share in execution of a decree against Nani Bala and was in possession of that share.

The claim preferred by Sashi Bhusan Adhikari has been allowed by the learned Munsif. Against this order the present Rule has been issued at the instance of the decree-holder auction-purchaser. The petitioner contends that Nani Bala not having instituted a suit under O. 21, R. 63, after the dismissal of her claim, the order passed against her is conclusive, that it is equally conclusive against Sashi Bhusan who has purchased her interest and that Sashi Bhusan therefore acquired nothing by his purchase and if he is in possession, he is in possession as a trespasser and is not entitled to succeed in an application under O. 21, R. 100, Civil P. C:

The learned Munsif has found that the purchase by Sashi Bhusan was bona fide. That being so, Sashi Bhusan was in possession on his own account, and if he had been dispossessed, as it has been found by the learned Munsif that he has been, he clearly comes under O. 21, R. 101, Civil P, C. The order of dismissal is, no doubt, conclusive against Nani Bala but whether for that reason Sashi Bhusan has acquired a good title or not is not a question which need be gone into in these proceedings. If the claimant was in possession though without a good title or even as a trespasser but on his own account or on account of some person other than the judgment-debtor he is entitled to succeed under O. 21, R. 101, Civil P. C.: [*Sharoda Moyee Chowdhrani* v. *Nabin Chunder Choudhry* (1) and *Kedar Nath Bag* v. *Saday Chandra Nandi* (2).]

In my opinion the order passed by the learned Munsif is right and the Rule should accordingly be discharged with costs. Hearing-fee two gold mohurs.

R.D. *Rule discharged.*

(1) 11 W. R. 255=2 B. L. R. A. C. 333.
(2) [1914] 19 C. L. J. 13=22 I. C. 707.

---

## A. I. R. 1927 Calcutta 340

M. N. MUKERJI AND GRAHAM, JJ.

*Pravat Chandra Giri*—Petitioner.

v.

*Amulya Chandra Bahaduri* and *others*—Opposite Party.

Civil Revision Application No 991 of 1926, Decided on 20th December 1926, from the order of the 1st Munsif, Chinsurah, D/- 4th March 1926.

(a) *Civil P. C., O. 1, R. 10 (1)—To apply sub-R. (1) it must be shown that there was mistake and that addition or substitution of new plaintiffs is necessary—Addition or substitution of plaintiff should not be made without consent of existing plaintiffs.*

To bring a case within sub-R. (1) of R. 10 it must be shown first that the action was commenced in the name of the original plaintiff by mistake and, second that the substitution or addition is necessary for the determination of the real matter in dispute.

Further, as a general rule a plaintiff cannot be added without the consent of the existing plaintiffs and such consent would be all the more necessary in the case of a substitution.

[P 342, C 1, 2]

(b) *Civil P. C., O. 1, R. 10 (2)—Rent suit—Addition should not be made so as to convert the suit into one of title.*

A third party ought not to be made a party to a suit for rent so as to convert a simple suit for arrears of rent into one for the determination of the title to the property in respect of which the rent is claimed: 8 *Cal.* 238, *Foll.* [P 342, C 2]

*Brojolal Chakravarty, Asita Ranjan Ghosh* and *Lalit Mohan Sanyal*—for Petitioner.

*Dwarka Nath Chakravarti, Girija Prasanna Sanyal* and *Jatindra Nath Sanyal*—for Opposite Party.

**Mukerji, J.**—The petitioner in this Rule instituted a suit for rent in the first Court of the Munsif at Hooghly. The suit was for recovery of the rent for the years 1329 to 1332. It was alleged on behalf of the petitioner that he had a Patni Taluq in Mouza Jagannathpur and that defendants in the suit were tenants under him. The tenants appeared and filed a written statement alleging amongst other things that the plaintiff was not entitled to a decree for rent as Mouza Jagannathpur was in the possession of the Receiver who had been appointed in respect of what is known as the Tarakeswar estate and that they had already paid the rents which were due from them to the said Receiver. These allegations of the defendants were supported by the Receiver who made an application to the Munsif on the 14th August 1926 praying to be added as a party to the suit. The Munsif rejected this application by an order dated the 16th August 1926, and in the said order it appears to have suggested that the Receiver might, if so advised, come in and prosecute the suit as the sole plaintiff therein. Thereafter on the 22nd Augnst 1926 the Receiver apparently acting on the suggestion aforesaid made an application to the Court and the same was granted by an order passed on the 13th September 1926. By this order the Munsif directed that the Receiver should be made the sole plaintiff in the suit in the place of the original plaintiff, namely, the petitioner and that the Receiver should be allowed to prosecute the same. It is the validity of the order which has been questioned before us in this Rule which the petitioner has obtained.

An objection in the nature of a preliminary objection has been taken before us though at the conclusion of the hearing of this Rule, on behalf of the tenants opposite party. It is substantially to the effect that the order that has been passed by the Munsif is one which comes within the purview of O. 1, R 10 of the Code of Civil Procedure and it has the effect of finally adjudicating upon the rights of the plaintiff and that, therefore, it should be treated as a decree within the meaning of S. 2 of the Code of Civil Procedure and consequently an appeal would lie from this order. In support of this position reliance has been placed upon a decision of the Patna High Court in the case of *Ramji Pandey* v. *Alaf Khan* (1) and the case of *Rama Rao* v *The Raja of Pittapur* (2). In the former of these two cases in a suit for partition, on the application of the plaintiff in that suit, certain defendants were dismissed from the suit and the suit as against these defendants was dismissed and it was held that the order dismissing the said defendants from the suit amounted to an adjudication of their rights in that suit against them and, therefore, it amounted to a decree. In the second of the aforesaid cases an order striking out a defendant from the array of the parties therein as an unnecessary party and dismissing the suit as against him was held to amount in effect to a decree.

The reports of these two cases show that there was an adjudication on the question of the rights of the persons who were struck out from the suit and in that respect there is some distinction as between those cases on the one hand and the case before us on the other but I am not of opinion that, even if the two cases to which I have referred be considered as not being distinguishable from the present one and even if it be conceded that the plaintiff could have waited till a proper decree was passed in the suit as against him and could then have preferred an appeal that the present application before us in so far as it purports to be under S. 115 of the Code of Civil Procedure is not maintainable. The position seems to be that no appeal in point of fact has been preferred to any Court against the decision passed by the learned Munsif, assuming for a moment that that decision may be regarded as amounting to a decree as against the plaintiff and that the appeal lay from it. I am clearly of opinion that this Court has jurisdiction in the present case by reason of the provision of S. 115 of the Code to deal with the matter and now that the records are before us, there is no reason why we should not deal with it. The preliminary objection, therefore, in my opinion, must be overruled.

Turning now to the merits of the case, two contentions have been urged before us in support of this Rule. The first one is to the effect that the learned Munsif

(1) A. I. R. 1925 Pat. 121=3 Pat. 859.
(2) [1918] 42 Mad. 219=36 M. L. J. 169=49 I. C. 835=9 L. W. 329.

has no jurisdiction to pass the order that is complained of in this Rule and the second one is to the effect that in point of fact the Receiver was not appointed in respect of the petitioner's interest in the Mouza Jagannathpur. As regards the second contention reference has been made to the schedule appended to the plaint in the suit in which the Receiver was appointed and from which it appears that the rent free debuttur lands in Mouza Jagannathpur were the properties, amongst others, that formed the subject matter of that suit. As against that, reliance has been placed on behalf of the opposite party upon the order appointing the Receiver. It is not possible upon the materials that are before us to pronounce a definite opinion on the question as to whether the Receiver was or was not appointed in respect of the putni interest in Mouza Jagannathpur which the plaintiff claims to be entitled to and on the strength of which interest he has instituted the present suit. But it does not appear to me to be necessary for the purposes of the present Rule to go into this question further and to attempt to arrive at a decision on it because I am of opinion that the order that has been passed by the Munsif in this case and which is now complained of in the present Rule is one which cannot be supported upon any ground and is one of which the learned Munsif had no jurisdiction whatsoever to pass. As I have already stated the tenants opposite parties relied upon the provisions of O. 1 R. 10 of the Code for justifying the said order.

I may mention here that the learned vakil who has appeared on behalf of the Receiver has frankly conceded that the order cannot be justified by reference to any provision of the law. O. 1, R. 10 corresponds to O. 16, Rr. 2, 11 and 39 of the English Rules of the Supreme Court of 1883. To bring a case within sub-R. 1 of R. 10 it must be shown first that the action was commenced in the name of the original plaintiff by mistake and, second, that the substitution or addition is necessary for the determination of the real matter in dispute. This clearly is not a case in which it can be said that there was a bona fide mistake on the part of the original plaintiff in having instituted a suit on his own behalf. The sub-rule, therefore, clearly has no application to the present case. It is also clear upon the authorities that as a general rule a plaintiff cannot be added without the consent of the existing plaintiffs: *Emden* v. *Carte* (3), *Pennington* v. *Cayley* (4). It is only reasonable to hold that such consent would be all the more necessary in the case of a substitution. The order, therefore, cannot be justified by reference to the provisions of O. 1, R. 10 of the Code of Civil Procedure and must accordingly be set aside. The question then arises as to whether we should now pass an order upon the application of the Receiver that was filed on the 14th August 1926 praying to be added as a party to the suit and allow him to be added as a co-defendant. The propriety of passing an order to that effect has been pressed before us very forcibly by the learned vakil appearing on behalf of the Receiver and our attention has been drawn to an order which appears to have been passed by the District Judge upon the application of some persons, whether the present defendants were amongst them or not does not very clearly appear, by which order the learned District Judge directed the rents in respect of Mouza Jagannathpur to be paid to the Receiver. We have carefully considered the circumstances but we are clearly of the opinion that it would not be right to allow the Receiver to come in and be adduced as a party defendant in the suit and then raise questions of title which ordinarily should be considered as foreign to a simple suit for rent. As has been laid down by this Court in the well known case of *Lodai Mollah* v. *Kally Dass Roy* (5) a third party ought not to be made a party to a suit for rent so as to convert a simple suit for arrears of rent into one for the determination of the title to the property in respect of which the rent is claimed. It is clear to us that any defence which the Receiver would have been competent to take if he were made a co-defendant in the suit would be open to the tenant-defendants to take and it goes without saying that it will be for the plaintiff to prove his title to recover the rent which was claimed in the suit, before he can get a decree therefor.

(3) [1881] 17 Ch. D. 768=51 L. J. Ch. 41=44 L. T. 636.
(4) [1912] 2 Ch. 236=106 L. T. 591.
(5) [1881] 8 Cal. 238=10 C. L. R. 581.

For these reasons we are of opinion that there are no grounds whatsoever which would justify us in allowing the Receiver to come in as a co-defendant in the present suit and we, therefore, refuse to pass any further order on the Receiver's application of the 4th of August 1926 which was rejected by the Munsif on the 10th August 1926. For the foregoing reasons we are of opinion that the Rule should be made absolute and we order accordingly. We direct that the name of the Receiver Amulya Chandra Bhaduri which has been inserted in the plaint as the sole plaintiff should be struck out and the name of the original plaintiff Pravat Chandra Giri should be restored as such.

We decline to make any order as to costs in this Rule.

**Graham, J.**—I agree.

G.B. *Rule made absolute.*

---

## A. I. R. 1927 Calcutta 343

SUHRAWARDY AND CAMMIADE, JJ.

*Asrafali Saiyal*—Complainant.

v.

*Nasur Sarkar* and *others*—Accused.

Criminal Reference No. 225 of 1926, Decided on 21st December 1926, made by the S. J., Faridpur.

*(a) Criminal P. C., Ss. 247 and 117 (2)—Applicability.*

Section 247 is not applicable to proceedings under S. 117 (2). [P 343, C 2]

*(b) Criminal P. C., Ss. 107, 117 (1) and 119—Magistrate proceeding under S. 117 (1)—Complainant and witnesses absent—Discharge under S. 119 is proper—Criminal P. C., S. 119.*

Where in proceedings under S. 107 the Magistrate proceeds to enquire into the truth of the information under S. 117 (1) but the complainant and prosecution witnesses are found absent, it is proper for the Magistrate to pass an order under S. 119 discharging the person proceeded against. [P 343, C 2]

*S. C. Talukdar*—for Opposite Party.

**Judgment.**—This is a reference under S. 438, Criminal P. C., by the Sessions Judge of Faridpore recommending that the order of the Deputy Magistrate of Madaripur, discharging the accused under S. 119, Criminal P. C., in proceedings under S. 107, Criminal P. C., may be set aside. It appears that on the report of one Asrafali Saiyal, Chowkidar of Tarabunia, proceedings were started against the Opposite Party uuder S. 107 Criminal P. C., for obstructing a halot. The case was adjourned from time to time till the 10th July 1926 when the following order was recorded by the Magistrate:

> The petitioner is absent and no P. Ws. are present. There is also no petition on behalf of the prosecution. Accused persons are therefore discharged under S. 119, Criminal P. C.

Against this order the Sessions Judge of Faridpore was moved and the learned Judge has made the present reference on the ground that S. 119 has no application to the facts of this case and that the order passed by the Magistrate was without jurisdiction and should therefore be set aside. In the explanation the trying Magistrate stated that he acted according to the procedure laid down in summons cases as provided for by S. 117, Criminal P. C., and he discharged or acquitted the accused under S. 247, Criminal P. C. We think that the view of law taken by the trying Magistrate is not correct, for, under S. 117 (2) the mode of trial is mentioned as that to be followed in summons cases. S. 247 is not applicable to a case like the present inasmuch as no summons was issued in the case and there is no accused in the case, as has been held in several decisions of this Court: see the case of *Queen-Empress* v. *Imam Mondul* (1). What the Magistrate is required to do under S. 117 (1) Criminal P. C., is to proceed to enquire into the truth of the information upon which action has been taken. In the present case we may suppose that the Magistrate proceeds to enquire into the truth of the information and no evidence having been produced before him he holds under S. 119, Criminal P. C., that it is not proved that the person in respect of whom enquiry is made should execute a bond. This is a procedure which the Magistrate is entitled to follow in the absence of any evidence on behalf of the complainant or the petitioner in the case.

According to the view taken by the Sessions Judge the accused has no remedy if the complainant does not choose to appear before the Court to substantiate his allegation nor has the Magistrate any power to discharge the accused under these circumstances. We are therefore of opinion that the order

(1) [1900] 27 Cal. 662.

passed by the trying Magistrate discharging the accused was an order which could be properly passed under S. 119, Criminal P. C. Accordingly we reject the Reference.

G.B. *Reference rejected.*

---

## A. I. R. 1927 Calcutta 344

DUVAL AND MITTER, JJ.

*Pramatha Nath Mallia*—Defendant No. 1—Appellant.

v.

*Radha Kishore Mukherjee* and *others*—Plaintiffs—Respondents.

Appeal No. 1633 of 1924, Decided on 24th November 1926, from the decree of the Dist. J., Bankura, D/- 22nd March 1924.

*Possession—Suit for—Title found with plaintiff—Possession follows title.*

Where title is found with the plaintiff in a suit for possession and the evidence of possession is equally balanced, possession must be presumed to follow the title. [P. 344, C. 2]

*Radha Binode Pal, Amullya Charan Sen* and *Syamadas Bhattacharjee*—for Appellant.

*Mrityunjoy Chatterjee* and *Nirmal Chandra Chakravarti*—for Respondents.

**Mitter, J.**—This appeal is on behalf of the defendant and arises out of a suit commenced by the plaintiffs for declaration of title and confirmation of possession in 15 bighas 8 kattas 9 chataks of land. There is also an alternative prayer for recovery of possession. There was also an allegation in the plaint that the plaintiffs had acquired title by adverse possession. But the defence of the defendant was that the plaintiffs had no title to the property as it did not form part of village Luchibad but it formed part of his mouza village Mukundapore,

The Court of first instance decreed against the defendant on the question of title and dismissed the plaintiffs' suit holding that the plaintiffs were not in possession of the disputed parcels within 12 years before the suit.

On appeal by the plaintiffs to the lower appellate Court it came to the conclusion that 10 bighas 12 kattas 15 chataks of the disputed land appertained to Luchibad and the remaining 4 bighas appertained to Khiraijuri which belonged neither to the plaintiffs nor to the defendant. On the question of possession the Court held that the evidence of possession was equally strong on both sides and as plaintiffs had made out their title to 10 bighas 8 kattas 12 chataks out of the disputed land the plaintiffs must be deemed to be in possession of the same. It is well-established that where title is found with the plaintiff and the evidence of possession is equally balanced, possesssion must be presumed to follow; that is what the Subordinate Judge really means although his finding on this point is not quite happily expressed.

It has been contended before us that a presumption on the question of possession should be raised in favour of the defendants on account of the entry in the Record of Rights as also by reason of an order made under the Survey Act of 1875 and the case of *Bisseswari Koer* v. *Ram Protab Singh* (1) has been cited in support of that contention. The case is obviously distinguishable for in the case of *Bisseswari Koer* v. *Ram Protab Singh* (1) there was no prayer in the alternative for recovery of possession.

In these circumstances we think that the findings of fact arrived at by the lower Court conclude this second appeal and this appeal is dismissed with costs.

There is a cross-objection which is not pressed. It is also dismissed.

**Duval, J.**—I agree.

R.D. *Appeal dismissed.*

---

(1) [1909] 14 C.W.N. 366=4 I.C. 547.

## A. I. R. 1927 Calcutta 345

RANKIN, C. J., AND C. C. GHOSE, J.

*Debendra Nath Bagchi* and *others*—Plaintiffs—Appellants.

v.

*Surendra Nath Sur*—Defendant—Respondent.

Appeal No. 36 of 1926, Decided on 19th January 1927, from the judgment of Chotzner, J., D/- 21st December 1925.

(a) *Evidence Act, S. 36—Survey maps prepared under Calcutta Survey Act are admissible as evidence of possession (C. C. Ghose, J.)—Survey maps admissible evidence of state of things at the time it was made.*

Maps prepared under the Calcutta Survey Act are admissible as evidence of possession. [P 346 C 2]

*C. C. Ghose, J.*—A survey map is not direct evidence of title, but a survey map is direct evidence of possession at a particular time, namely, the time at which the survey was made. In each case the Court has got to decide whether the evidence of possession is sufficient to raise a reasonable presumption of title. A survey map is an official document prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they were made. [P 349 C 2; P 350 C 1]

(b) *Easement—Interference with ancient lights—Interference with convenience and comfort of dominant premises must be proved—Limitation Act, S. 26.*

*Rankin, C. J.*—Where there has been an interference with ancient lights, the law refuses an action unless there has been a real interference with convenience or comfort of the dominant premises as regards their nature and situation: *Colls* v. *Home and Colonial Stores Ltd*, (1904) *A. C.* 179, *Foll.*; *Kine* v. *Jolly*, (1907) 1 *Ch.* 480, *Expl.* [P 348 C 1]

*P. C. Mitter*, *C. C. Biswas* and *J. N. Sen*—for Appellants.

*S. C. Bose* and *Hazra*—for Respondents.

**Rankin, C. J.**—In this case the plaintiffs are the owners of certain premises known as No. 43, Bagh Bazar Street in the town of Calcutta and the defendant is the owner of the neighbouring premises on the west which is No. 42 of the same street. The street is on the north of both the premises, and No. 42 is on the west of No. 43. Between the two premises is a wall, a more particular description of which will become necessary in connexion with certain points in the case. The plaintiffs sue for a declaration that that wall is a boundary wall belonging to them. They complain that on the 17th of October 1921 the defendant raised this wall flush against the western wall of the plaintiffs' premises to a height which may be roughly described as the top of the second storey. They say, first, that the wall belongs to the plaintiffs, and, secondly, that if that be not so, the windows and openings to the west of the plaintiffs' building are windows and openings to which the plaintiffs have prescriptive rights of light and air, and they ask for a mandatory injunction to compel the defendant to pull down this wall on the ground that it interferes with their ancient light. They ask also by their plaint for damages in respect of the interference with their rights to light and air, and in the plaint there is mention of an interference by the defendant with a certain brick-seat at the northernmost end of the wall where it adjoins the street. They make complaint also that in raising the wall the defendant has interfered with and committed trespass upon certain cornices which are on the western wall of their house.

The first question is, whether or not this wall belongs to the plaintiffs; and the learned Judge after a careful examination of the documents and on the evidence has come to the conclusion that the plaintiffs' case on that question must fail. I agree entirely with the conclusion at which the learned Judge has arrived. The documents of title which bear upon the matter seem to be these: There is a document, dated the 15th of November 1878, which has not been produced, but it is really the root of the plaintiffs title. It is a conveyance from one Iswar Chandra Sadhukhan to Hari Narayan Mandal.

The first document produced by the plaintiffs is a document, dated the 30th of September 1880, whereby Mandal sold to the plaintiffs' mother. In that Bengali conveyance the premises are described as "land and brick-built wall thereon," and again as "the said land and tiled hut inclusive of brick-built wall, etc.;" and the plaintiffs' case is that the wall now in dispute is an old wall and is the wall that is referred to in that conveyance. There is in the conveyance itself nothing to show whereabouts that wall is on the plaintiffs' property. It may be on the western side, on the southern side, or anywhere else. It is true that the property which bounds the plaintiffs'

property on the west is described as "vacant land of late Ishwar Chandra Sadhukhan."

The defendant's title is made out in this way: at some date before 1879 there was a conveyance by Srimati Nitya Kali Debi to Iswar Chandra Sadhukhan. On the 2nd of September 1879 Sadhukhan appears to have made a deed-of-gift of this property to his wife. At those dates there was a one-storeyed building upon what is now the defendant's property. On the 18th of November 1880 Sadhukhan's widow after his death sold to one Indra; and that conveyance is before the Court. It recites that the lady has "broken down the brick-built structure that was over the land and sold away the same separately," and it purports to sell

> two cottahs more or less of vacant land with the foundation on three sides consisting of two bricks;

and it gives as the boundary on the east "the purchased land of Hari Narayan Mandal." On the 9th of September 1918 Indra sold to the defendant, and very soon after the defendant's purchase trouble began. Until that time the land was really a vacant building site on the side of Bagh Bazar Street. The defendant doubtless purchased in order to utilize the site by building houses on it and after his purchase very quickly the present dispute may be said to have begun.

In these circumstances it is for the plaintiffs to show as they claim the property that their document or their evidence on the matter proves that the wall is theirs, and the learned Judge has very carefully examined the evidence with respect to this matter. Sir Provash Mitter on behalf of the appellants has subjected the learned Judge's judgment to a very careful criticizm There is, I think, a good deal of force in the fact to which the learned Judge has pointed that nowhere in the documents do we find the boundary of the plaintiff's premises described in any way by a reference to this wall. It may not be true to say if the wall belonged to the plaintiffs, that the wall in the Bengali custom would be given as a boundary, but one would certainly expect that the boundary with this clear method of defining it would be defined by a reference to the wall in some way or another.

Two plans, Wilkin's plan of 1887 and Smart's plan of 1909-1910, were produced in evidence. These undoubtedly show that the wall was not in the plaintiffs' possession, and Sir Provash Mitter attacked the admissibility of these plans for the purpose of proving what the boundary was. In my judgment, both of them, having been made as we know, under the Calcutta Survey Act, were admissible in evidence for the present purpose. Technically they are admissible as evidence of possession; but, in a matter of this sort, evidence of possession has a great value as regards the question of title. There is to my mind no validity in the contention that all the trouble taken to have these surveys made of Calcutta ends in the lame conclusion that the surveys are no evidence on the question of boundary.

The case of *Jagadindra Nath Roy* v. *Secretary of State* (1) shows the contrary. The Act under which the maps were made shows that it was the business of the persons conducting these surveys to demarcate the boundaries. It was not the object of the survey to set all the owners of properties in Calcutta by the ears. It is to be hoped that only in a tiny minority of cases would it become necessary for the purpose of a survey to have an arbitration or other proceedings to settle the boundaries. A great majority of boundaries would be settled in the ordinary way without such contention. To my mind it would be reducing the Acts and the proceedings under them to nothing, if it was to be held that after all that was done to get a carefully prepared plan brought into existence by this survey it would not be evidence on a question like the one in the present suit. I think, therefore, that the learned Judge was well entitled to rely upon the evidence of those maps.

There is nowhere, that I can see, in any of the other maps in the case any evidence that assists the plaintiffs. There are other maps as to which the utmost that can be said is that they are not conclusive or strong against the plaintiffs. There is, for example, a map of 1881 which refers really to the southern portion of the building as it at present stands. It is noticeable that to the west there is no sign on the Municipal sanc-

(1) [1902] 30 Cal. 291=30 I. A. 44=7 C. W. N. 193 (P. C.).

tioned plan of 1881 of any openings. In view of the fact that on other directions there are signs of openings, this seems to be a matter which raises some little inference against the plaintiffs, even if it be true that the only compulsory requirement under the existing Municipal law of the town was to provide a plan that would show the foundation and the levels of the building.

There is a sanctioned plan of 1894—a plan which came into existence for the purpose of the newer or northernmost part of the building. As to that the learned Judge points out that at all events no openings are shown on the west, but towards the south there are two openings which as a matter of fact were not constructed. Sir Provash says quite correctly that the purpose of that plan had reference merely to the new construction, and that it did not very much matter as to what the representation was as regards the older wall. It is difficult to see, in these circumstances, that that sanctioned plan can be taken in any way as supporting the plaintiffs' case. There may be all sorts of reasons which may prevent it being conclusive against the plaintiffs' case, but there is no benefit in that plan to be drawn by the plaintiffs.

The learned Judge has commented upon the fact that on the western side of the disputed wall there are arches which appear to have been used at one time when the land was covered with temporary erections as a place where syces or other people might conveniently cook their food. It is quite clear that at one time that wall was serving some purpose in connexion with the defendant's land. Sir Provash Mitter points out that according to his case both the plaintiffs and the defendant had a common predecessor-in-title in Iswar Chandra Sadhukhan and that it might therefore have been when both the properties were in one ownership that this condition of affairs came about. Then, again, it may be that the existence of these arches is not conclusive against the plaintiffs, but it does not help them.

For all these reasons, I am of opinion that the finding of fact by the learned Judge that this particular wall was not shown to be a part of the plaintiffs' property is right and must be affirmed.

I now turn to deal with the case as one of light and air through the various openings on the plaintiffs' western wall. A consideration of the evidence leads one somewhat clearly to the conclusion that the only openings which for this purpose need be elaborately considered are the openings on the western side of the western room in front of the plaintiffs' premises, that is to say, in the northern or the new portion of the plaintiffs' premises. There are other openings to the south including a window in the middle room, that is to say, in what was the most northern room before the new portion was erected. But with regard to those openings it is not proved that they enjoyed a passage of light and air from the defendant's property. There is definite evidence as regards the middle room window by the defendant who says that the wall was straight in front of it at the time he bought, and so far as the middle room window and anything to the south of that are concerned, it is not established to my satisfaction that rights of light and air were enjoyed in respect of them because it is not established to my satisfaction that the wall was not covering them up till recent times. It is necessary therefore, to concentrate attention on the western openings of the new portion of the building and with regard to them it is not proved that the plaintiffs had the two ground-floor openings for any substantial length of time.

The defendant's case is that plaintiffs made these openings in 1919 and the balance of probability on the evidence to my mind is that the defendant is correct as regards that matter. The learned Judge has dealt with the question of the four openings on the western side of the westernmost room of the first-floor of the new building by taking as his *terminus ad quam* the year of 1919. It appears that in 1919 this portion of the wall broke down and there were certain cases in the police Court and after that date, therefore, the plaintiffs' enjoyment of light and air was not peaceable in the learned Judge's view within the meaning of that word in S. 26 of the Indian Limitation Act. An examination of the evidence with regard to that matter leads me to think that in this respect the learned Judge did not correctly appreciate the evidence. (After examining evidence on this point his Lordship held

that the question of prescription has to be considered with reference to the 17th October 1921 and that that the correct inference in this case is that these openings were receiving light and air by the 17th of October 1901 and proceeded.) There remains, therefore, the question whether the interference caused by the defendant in raising this wall ,has been such as to ground an action for nuisance. The law, as declared in the well-known case of *Colls* v. *Home and Colonial Stores Ltd.* (2), refuses an action unless there has been a real interference with convenience or comfort of the dominant premises. The only room which need be considered is the westernmost room upon the first-floor of the new building. The learned Judge, in view of the very candid evidence of the plaintiff's engineer that that room can have been affected very little has held that the diminution of light and air caused by the obstruction on the west is not an interference with the comfort or convenience of this room. In view of the plaintiff's engineer's own evidence, he had very solid materials for coming to this finding; but as the photograph, which is Ex. No. 11 in this case, does not show the complete facts with regard to this matter we thought it well, in order that we might appreciate the evidence given on this subject, to see the premises for ourselves, and we have seen the premises for ourselves.

After doing that, and after carefully considering the evidence, now that I have a better mental picture of the place, I have come to the conclusion that the learned Judge's finding on this point is perfectly correct. To my mind there is no way of making out that the comfort or convenience in respect of light and air of this room has been interfered with. It is quite right to bear in mind the case which Sir Provash Mitter has quoted—the case of *Kine* v. *Jolly* (3). It is a difficult case to interpret, and probably Lord Loreburn's interpretation of it is the most intelligible, because in that case he held that what really was meant by the learned trial Judge was this that the room in question had enough light and air for ordinary purposes—say in a crowded city,—but it had not that amount of light and air that a person might reasonably expect to enjoy in a country villa. Whatever is the true construction of that case, I am quite satisfied that no question of charm or character of this room arises so as to give the plaintiffs any ground of action. For that reason it seem to me that the only part of the plaintiffs' case which has any foundation at all must fail by reason of the circumstances that they are not really affected.

I will now refer in conclusion to two matters. One is the question of the seat in front of the building and the other is the question of the interference with the plaintiffs' cornices. These matters have some importance when considering the question whether the wall has been shown to belong to the plaintiff.

It appears that the seat was put up and it is said that for a number of years this seat projected a few inches beyond the westernmost limit of the wall of the plaintiff's house and into the part which was at one time occupied by the wall in dispute. How long this tiny projection can be proved to have existed is a matter upon which I am in no way satisfied. The defendant has raised the wall and the plaintiff complains that he has interfered with this seat. In my judgment that seat is more an argument against the plaintiff on the question of the proprietorship of the wall than in his favour, because I have very little doubt that if he had thought he had a right to the wall or, any part of the ground on which the wall had stood he would not in building the seat have built in the way he has done but would have taken full advantage of the space which was at his disposal However, it is not proved to my satis for tion that this projection has been in existence for any definite length of time.

With regard to the cornices and the interference with them, it seems clear that there has been some little interference; but it is quite clear to me that the interference has been entirely trumpery and I find, when I look at the issues settled by the learned Judge in the presence of a very experienced counsel who appeared for the plaintiff that there is no issue which can in any way—however indirect or ambiguous—be taken as referring to the interference with the cornices as a substantive claim. In these circum-

(2) (1904) A. C. 179=73 L. J. Ch. 484=53 W. R. 30=20 T. L. R. 475=19 L. T. 687.
(3) (1905) 1 Ch. 480=74 L. J. Ch. 174=92 L. T. 209=53 W. R. 462=21 T.L. R. 128.

stances I have no doubt at all that this is a matter of a very trumpery character and that it would not be proper for this Court in a matter of this sort to go back upon the very sensible exercise of discretion by the learned counsel who was in charge. I entirely decline to reconsider the learned Judge's judgment.

In these circumstances I am of opinion that this appeal should be dismissed with costs.

**C. C. Ghose, J.**—This is an appeal against a judgment of my learned brother Mr. Justice Chotzner delivered on the 21st December 1925, by which he dismissed the plaintiffs' suit with costs. (After stating facts as in the first judgment his Lordship proceeded.) In March 1881, an application was sent in by the plaintiffs' mother to the Corporation of Calcutta for sanction to erect a two storeyed house on the southern portion of the premises according to a plan submitted (Ex. I).

It is stated that the house in question was erected some time in 1882 and that on the first-floor, there were a window 5′ × 2′-6″ and some appertures on the western wall giving light and air to the plaintiffs' premises. It is further stated that some time about 1894 the tiled hut on the north was pulled down, and after sanction had been obtained from the Corporation of Calcutta for the erection of a two-storeyed building on the northern portion (see Ex. B.) the same was erected some time in 1895. On the western wall of the said newly erected two-storeyed building on the northern portion, there are on the ground-floor two windows each measuring 2′-9″ × 1′-10″, they being situated on the passage from the entrance to Premises No. 43, Bagh Bazar Street. Immediately above the passage on the first-floor, there is a verandah from north to south in which there are two openings through arches measuring 9″ × 5″. There is a verandah on the first-floor on the road side, and on the westernmost corner of the last-mentioned verandah there is an opening looking out on Premises No. 42.

At the south end of the verandah there is an open space measuring 3′-6″ × 5′-6″. On the west of this open space is an opening similarly looking out on Premises No. 42, Bagh Bazar Street. At the roof level of the ground-floor there is a string of bricks projecting along its western edge. This has been described as a cornice.

The first contention that has been advanced on behalf of the appellants is that the learned Judge was in error holding that the brick-built wall, immediately on the west of the plaintiffs' premises lies outside the ambit of the premises covered by the plaintiffs' conveyance. Now, on this point, the material documeuts are those which are referred to in the judgment of the learned Judge on pages 210 to 212 of the paper-book and as will be seen from what is stated below, in my opinion, no case has been made out for coming to a conclusion different from what has been arrived at by the learned Judge.

To start with, no real assistance can be derived by the plaintiffs from the two survey maps produced in this case, nor can the plaintiffs, in my opinion, invoke in aid anything from the plans which were submitted to the Corporation of Calcutta in 1881 and 1894 for sanction to the construction of masonry structures. It has been argued that the two survey maps being Exs. 12 and 19, although they were made by the anthority of Government, are not in any way conclusive on the question of the ownership of the wall in dispute and that the word "accurate" in S. 83 of the Indian Evidence Act refers only to the accuracy of the drawing and correctness of the measurements and to nothing else. In other words, it is contended that the correctness of boundaries, according to the rights of the parties, is not to be presumed from the maps. It is also urged that there was no contested proceeding within the meaning of the Calcutta Survey Act, when the properties were surveyed and that therefore there was no judicial adjudication of the rights of the owners of the two parcels, namely, Nos. 42 and 43, Bagh Bazar Street.

Now, it is perfectly true that a survey map is not direct evidence of title, but a survey map is direct evidence of possession at a particular time, namely, the time at which the survey was made. In each case the Court has got to decide whether the evidence of possession is sufficient to raise a reasonable presumption of title. A survey map is an official document prepared by competent persons and with such publicity and notice to persons interested as to be admissible

and valuable and evidence of the state of things at the time they were made see: in this connexion *Nobocoomar* v. *Gobind Chunder* (4) and *Jagadindra Nath* v. *Secretary of State* (1). This being the state of the authorities (see in this connexion S. 36 of the Indian Evidence Act) the survey maps when looked at do not show that the wall in question is within the boundary lines of Premises No. 43, Bagh Bazar Street. Further, having regard to the procedure which is usually followed by the officers who make these surveys under the Calcutta Survey Act, it cannot be doubted for one moment that if the wall in dispute had really belonged to the owners of No. 43, Bagh Bazar Street, they would have taken the necessary steps under the law to obtain an adjudication of their rights before the proper authorities. That the owners of No. 43 did not raise any question is, to my mind, sufficient evidence of the fact that they were satisfied with the result of the survey. it being always borne in mind that the proceedings of the survey authorities were conducted openly.

There is also, in my opinion, not the slightest pretence for the suggestion that if the wall be not held to be included within the boundaries of No. 43, Bagh Bazar Street, it should, at any rate, be held to be a party-wall. Now, the expression "party-wall" may be used in four different senses: (1) A wall of which the two adjoining owners are tenants in common. (2) A wall divided longitudinally into two strips one belonging to each of the two adjoining owners, (3) A wall which belongs naturally to one of the adjoining owners subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements (4). A wall divided longitudinally into two moieties each moiety being subject to easement in favour of the other moiety. I have examined the evidence, such as it is, for the purpose of finding out whether the plaintiffs have satisfied any one of the four conditions noted above, and I have come to the conclusion that there is nothing in the evidence to support the plaintiffs' claim to the effect that the wall in question is a party-wall between the two premises. The survey maps definitely and conclusively negative any such contention.

(1) [1881] 9 C. L. R. 305.

No side space on the west was left by the plaintiffs when they proceeded to erect masonry structures in pursuance of the sanctions granted by the Corporation of Calcutta in 1881 and 1894, and it seems to me that if as a matter of fact the land on which the brick-built wall now in question stands had really belonged to the plaintiffs, there was no conceivable reason whatsoever why the western wall of the masonry structures erected by the plaintiffs should not have proceeded towards the west up to the very edge of the land on which the brick-built wall now in question stands. Further, as the learned Judge points out the nature of the brick-built wall in question is such that the wall itself bears evidence to the fact that it must have belonged to some one other than the plaintiffs. There are two recesses or arches on what has been described the wrong side of the wall, indicating that the same had formed part of some sort of structure on land which admittedly did not form part of Premises No. 43, Bagh Bazar Street, but which did form part of Premises No. 42, Bagh Bazar Street. It is said, however, that the wall with the recesses or arches on the wrong side, of it passed to the plaintiff by the conveyance of 1880, and therefore no point can be made from the existence of these recesses or arches in Ex. 2. To that the answer is that it is impossible to say with any degree of certainty that a wall situated as the wall now in question is situate, did pass to the plaintiffs by the conveyance of 1880. Nor is there any foundation in the evidence on record for the contention indicated in Ground No. 10 in the Memorandum of Appeal.

The plaintiffs have not produced their root of title, being the conveyance in favour of Hari Narayan Mandal and no explanation has been given as to why that conveyance has been withheld. If a wall on the site of the present wall had passed to Hari Narayan Mandal by the conveyance in his favour from Iswar Chandra Sadhukhan, one would have expected that the plaintiffs would have taken care to produce the said conveyance in this case. Further, as has been pointed by the learned Judge, if the wall had been the property of the plaintiffs, no reason whatsoever has been shown why the two openings provided for in the sanctioned plan of 1894 on the west

should not have been there. This is a very strong argument in favour of the contention that the plaintiffs knew full well at the time when they showed the two openings on the west in the plan of 1894, that they could not possibly keep any opening on the west, because they had no right whatsoever in and to the wall which is now the subject-matter of dispute.

As regards the alleged encroachment on the seat at the entrance to Premises No. 43, Bagh Bazar Street, it appears that only the portion of the seat erected on the road side at the extreme north of the wall in dispute and in a straight line with it has been built upon. If it be the case, as in my opinion it is, that the plaintiffs have not made out any case that the wall in dispute or the site belonged to them, their case with reference to the portion of the seat referred to above must fail.

The next question to which our attention has been drawn is whether or not the windows, apertures, openings and arches on the western wall of the plaintiffs' building are ancient lights. (After considering evidence his Lordship held that the nothern portion of the plaintiffs' building was constructed 20 years prior to the 17th October 1921 and proceeded.) It would seem therefore from what has been stated above that the plaintiffs have made out a right to access and use of lignt and air through the four openings on the western side of their wall on the first-floor of the northern portion of their building.

It is said, however, by the defendant that the 20 years should be calculated not from the 17th October 1921, but from September 1919, or, at any rate, from December 1919, when the defendant was preparing to raise the wall in question to a height more than that at which it stood. What really happened in 1919 is to be found in the evidence of the defendant on pages 171 to 173 of the paper-book and in Ex. 13, being a copy of a petition of the plaintiff Debendra Nath Bagchi filed in this Court in February 1920. It does not appear therefrom that on any date prior to the 17th October 1921, the enjoyment of light and air through the said four openings on the western wall of the first-floor of the northern portion of the plaintiffs' building had ceased to be peaceable and as of right and without interruption. It may be that the access of light and air through the two windows on the passage on the ground-floor had become contentious, but we are not concerned, as has been indicated above, with these two windows on the ground-floor because in my opinion the plaintiffs have not made out any case in respect thereof. In my opinion the terminal date for the calculation of the period of 20 years referred to in S. 26 of the Indian Limitation Act, in respect of the said arches on the first-floor must be taken to be the 17th October 1921.

I now proceed to consider issue No. 5 with reference to the obstructions against the four openings on the western wall on the first-floor of the northern portion of the plaintiffs' building. The learned Judge has come to the conclusion that it is difficult to say that the obstructions complained of are of such a character as to constitute an actionable nuisance. For the purpose of fully appreciating the evidence on this point the learned Chief Justice and myself went down at the conclusion of the hearing of this appeal to have a view of the plaintiffs' building. On the evidence on this point and having regard to the locality in which the building is situate and the nature and construction thereof and in particular the place where these four openings are, it being a verandah or passage from north to south, and the amount of light and air still left in the room immediately on the west of the verandah or passage referred to above, I am not prepared to say that the obstructions complained of are of such a character as to constitute an actionable nuisance. The result, therefore, is—so far as Issue No. 5 is concerned—the answer is in the negative.

There now remains for consideration the question of the encroachment on the cornice. So far as the cornice at the roof-level of the first-floor is concerned, it has not been encroached upon, and the encroachment, if any, is on the cornice at the roof-level of the ground-floor. The question of the encroachment on the cornice, although referred to in the plaint, was not raised in the issues as it must have been given up. Therefore nothing further need be said about it. I, therefore, agree with the learned Chief Justice in holding that this appeal fails and that it should be dismissed with costs.

R.D. *Appeal dismissed.*

## * A. I. R. 1927 Calcutta 352

PANTON AND MULLIK, JJ.

*Hashim Ibrahim Saleji* and *others*—Petitioners.

v.

*Secretary of State* and *others*—Opposite Party.

Civil Revision No. 1284 of 1926, Decided on 17th January 1927, from an order of the Addl. Dist. J., Howrah.

* *Land Acquisition Act* (1894), *Ss.* 18 *and* 54 *—Subject of acquisition—Wakf property—Reference under S.* 18 *for determining valuation of property—Trustees can be added as parties—Civil P. C., O.* 1, *R.* 10 (2).

Although the principle is that the Court in hearing a reference under the Land Acquisition Act can only deal with an objection which has been referred to it and it cannot go into any question raised for the first time by a party who had not referred any question or any objection to it under S. 18, yet where the question referred to the Judge is the question of the market-value of the property acquired, addition of parties to the proceeding will in no manner violate the principle and enlarge the scope of his enquiry. [P 353, C 1,2]

In reference under the Land Acquisition Act the addition of parties is under certain circumstances permissible and it does not matter whether the subject of reference is one of valuation or of apportionment. [P 353, C 2]

Where the property acquired is wakf property, although the subject of reference is valuation of the property, it is open to any one of the body of trustees to come forward and ask that he should be allowed to appear in the Court of the Judge and be permitted to place before the Court such material as he may have in his power to enable the Court to arrive at a proper decision as to the value of the trust property. [P 353, C 2]

*B. C. Mitter, Sarat Chandra Basak* and *Bhupendra Kumar Ghose*—for Petitioners.

*Dwarkanath Chakravarti, Surendra Nath Guha, Amarendra Nath Bose, Satindra Nath Mukherjee* and *Probodh Kumar Das*—for Opposite Party.

**Panton, J.**—The question in this Rule is whether the learned Additional District Judge of Howrah should have joined the present petitioners as parties in the proceeding resulting from a reference under S. 18 of the Land Acquisition Act. The case related to the acquisition of a certain land which it is now admitted formed part of a wakf estate. The declaration for its acquisition was made in the year 1918, and the second opposite party Ismail Ibrahim Saleji preferred a claim to the compensation money alleging that it was his "ancestral purchased niskar land." He appears to have been an undischarged insolvent, and in consequence of this the Official Assignee was joined with him in the proceeding in the Court of the Collector; and on the 24th January 1924 the award was made by the Collector in the joint names of the Opposite Party No. 2 and the Official Assignee. On the 22nd February 1924 the Official Assignee affirmed to a petition to the effect that he had on investigation discovered that the property was in fact a wakf estate and that the present Opposite Party No. 2 was not personally interested in it; he represented that he, as Official Assignee, had therefore no interest in the matter and that he desired to withdraw from the proceeding.

It so happened that this petition was not presented to the Collector until the 23rd December 1924. In the meanwhile the present Opposite Party No. 2 had presented a petition to the Collector in which he also stated that the property in question was owned and possessed by two wakf estates, namely, "Ibrahim Soloman and Company Wakf Estate" and "Ibrahim Saleji Wakf Estate," and that he managed the property as one of the matwallis of the two wakf estates, and asked that the Official Assignee's name should be removed from the list of claimants. In the same petition the Opposite Party No. 2 asked the Collector to make a reference to the civil Court under S. 18 of the Act. That is the reference with which we are at present concerned.

On the 27th July 1925 other persons alleging themselves to be other matwallis of the estate made a petition to the Additional District Judge of Hooghly asking that they should be joined as parties to the reference. It was then stated that as the result of limitation on the Original Side of this Court, a scheme had been settled under which this wakf estate was placed under the management of seven matwallis. The present petitioners are four of the persons so appointed. The Opposite Party No. 2 is another. One is said to have retired from his mutwalliship, and the remaining one has appeared at the hearing of this Rule and has stated that he also has resigned his office and that he wishes to be discharged from these proceedings. He is Opposite Party No. 3.

On the 10th September 1925 the Opposite Party No. 2 made a petition to the Additional District Judge in which he objected to the addition of these parties to the proceeding and on the 16th December 1926 the learned Judge decided that he had no jurisdiction to make any addition of parties. This is the order against which this Rule is directed.

The first opposite party is the Secretary of State. On his behalf the learned senior Government Pleader states that he does not desire to take any part in these proceedings which relate only to the question as to who is to prosecute the claim to additional compensation.

The learned counsel for the petitioners contends that under S. 53 of the Land Acquisition Act read along with O. 1, R. 10 (2), Civil P. C., this Court, and indeed the Court of the District Judge, has jurisdiction to add parties, and he supports his argument by reference to certain cases of this Court, namely, *Golap Khan* v. *Bhola Nath Marick* (1) and *Dwarka Nath Sen* v. *Kishori Lal Gossain* (2). He has referred also to a decision of the Allahabad Court in *Kishan Chand* v. *Jagannath Prasad* (3). On behalf of the Opposite Party No. 2 the learned advocate contends that these cases have no application in the present instance because they are all cases in which the proceedings in which parties were added were proceedings in the matter of apportionment and not, as in the present case, in a matter of valuation. He has further relied upon the principle enunciated in *Mahammad Safi* v. *Haran Chandra Mukherjee* (4) and *Promotha Nath Mitter* v. *Rakhal Das Addy* (5). Now, the principle adopted in the last two cases I have mentioned is quite plain, and it is that the Court in hearing a reference under the Land Acquisition Act can only deal with an objection which has been referred to it and it cannot go into any question raised for the first time by a party who had not referred any question or any objection to it under S. 18 of the Act. In the present instance what has been referred to the learned Judge is the question of the market-value of the property acquired. That is all that the learned Judge is called upon to decide and the addition of parties to the proceeding will in no manner enlarge the scope of his enquiry. The addition therefore of parties will not violate the principle to which I have referred. It is true, as the learned advocate for the Opposite Party No. 2 points out, that the decisions relied upon by the learned counsel for the petitioners are cases in which matters of apportionment were the subject of the reference. But that is not to my mind a material consideration. The cases cited for the petitioners are authority that in references under the Land Acquisition Act the addition of parties is under certain circumstances permissible. It does not seem to matter that the subject of reference should be one of valuation rather than of apportionment. The real point is that the principle of O. 1, R. 10 (2), Civil P. C., has been held to apply, and the question for decision is whether under the present circumstances these persons are necessary or proper parties.

It has been urged on behalf of the Opposite Party No. 2 that since these petitioners and himself do not make up the whole body of mutwallis as appointed by the scheme of this Court, the addition of the former will not be effective fully to represent the wakf estate in the Court of the Additional District Judge. That is so, but it must be borne in mind, as I have just now remarked, that the question which will be agitated in the Court of the learned Judge is not the title of these or any other persons to the compensation money, but solely the question of what the market-value of the property is. It seems to me, looking at it in this way, that it is open to any one of the body of trustees to come forward and ask that he should be allowed to appear in the Court of the Judge and be permitted to place before the Court such material as he may have in his power to enable the Court to arrive at a proper decision as to the value of the trust property. That indeed is his clear duty and it is proper that he should be put in a position to perform this duty. In this view of the case these mutwallis although they do not fully represent the wakf estate are proper persons to be added as parties.

(1) [1910] 12 C. L. J. 545=7 I. C. 481.
(2) [1910] 11 C. L. J. 426 = 6 I. C. 549 = 14 C. W. N. 703.
(3) [1902] 25 All. 133=(1902) A. W. N. 215.
(4) [1908] 12 C. W. N. 985.
(5) [1910] 11 C. L. J. 420=6 I. C. 546.

For these reasons I would make this Rule absolute and direct the addition of the names of the petitioners Ahmed Musaji Saleji, Hashim Ibrahim Saleji, Soloman Musaji Saleji and Kashim Ibrahim Saleji in the proceedings before the Additional District Judge of Howrah.

The Opposite Parties Nos. 1 and 3 are discharged from the Rule. The Rule so far as it relates to the Petitioner No. 5 Rasul Bibi is discharged.

The Opposite Party No. 2 will pay the costs of this Rule to the four petitioners who have succeeded in this Rule. The hearing-fee is assessed at ten gold mohurs.

**Mullik, J.**—I agree.

G.B.

---

## ✻ A. I. R. 1927 Calcutta 354

MUKERJI AND GRAHAM, JJ.

*Sourendra Nath Mitra* and *another*—Defendants—Appellants.

v.

*Sreemati Tarubala Dasi* — Plaintiff—Respondent.

Appeal No. 318 of 1926, Decided on 7th January 1927, from the original order of the 2nd Sub-J., Zillah Hughli, D/- 28th July 1926.

✻ (*a*) *Civil P. C., O.* 38, *R.* 6—*Order for furnishing security or showing cause against it passed—Failure to furnish security — Before ordering attachment, Court must determine that there had been failure.*

Where an order is passed to furnish security or to show cause why security should not be furnished within a date fixed and no security is furnished, the Court would have first to determine judicially that there had been a failure before drawing up a writ of attachment. [P 355, C 2]

(*b*) *Civil P. C., O.* 38, *R.* 6—*Order for security and order for attachment combined—Combined order is not always proper—If combined order leads to doubt as to competency of appeal, benefit of doubt goes to appellant—Practice—Appeal.*

It is not altogether uncommon for Courts to pass one order, in anticipation as it were, combining together what really should be two separate and successive orders, namely, one for security and the other for attachment. By thus combining two orders in one, the procedure is sometimes shortened but only for the time being, for, this shortening leads, more often than not, to endless complications. If on a question which relates to the competency of an appeal on a ground, such as that the order appealed against is not one under R. 6, a reasonable doubt arises, the benefit of that doubt should go to the appellant : *A. I. R.* 1923 *Cal.* 639, *Ref.* [P 356, C 1]

✻ (*c*) *Civil P. C., O.* 38, *R.* 5—*Attempt to secure debts already incurred—Defendants running into debts—Value of properties far exceeding amount of debts including amount of claim in suit—Facts do not necessarily indicate intention to delay execution.*

The fact that the defendant is running into debts or an attempt to secure debts already incurred by executing a mortgage in respect of them does not necessarily indicate an intention to obstruct or delay the execution of a decree to be passed when the value of the properties far exceeds the amount of such debts as well as the claim in the suit. [P 357, C 2]

*H. D. Bose, Ajit Ghose* and *Sukumar Dey*—for Appellants.

*B. L. Mitter, C. C. Biswas, Hemendra Chandra Sen, Surendra Nath Bose* (*Sr.*) and *Satyendra Ch. Sen*—for Respondent.

**Mukerji, J.**—Miscellaneous Appeal No. 318 of 1926 has been preferred from an order passed by the Subordinate Judge, Second Court, Hughli, on the 28th July 1926, and Rule No. 851(*m*) has been issued by this Court in connexion with the said appeal. The petition upon which the said rule has been issued only prayed for stay of execution of the aforesaid order pending the hearing of the appeal, but the rule purports to call in question the validity of the order and directs a stay of its execution, pending the disposal of the rule, on certain terms as to furnishing of security. Evidently the rule is misconceived, or at any rate its terms are inapposite, but the matter is of no importance now as, in point of fact, the execution of the order was stayed on the requisite security being furnished, and the appeal and the rule are both pending and have come up for hearing together.

The facts which led up to these proceedings are these: The plaintiff-respondent Tarubala Dasi instituted a suit for recovery of Rs. 15,000 together with Rs. 1,000 more as damages against the two appellants Sourendra Nath Mitra and Khoka Lal Mitra and one Parul Sundari Dasi in the Court of the Subordinate Judge, Hughli, on the 23rd March 1926. On the 30th June 1926 she applied for attachment of certain immovable properties of the appellants mentioned in the schedule to the application. The Subordinate Judge on the same day ordered the appellants to furnish security to the extent of the amount claimed in the suit or to show cause why the same should not be furnished on or before the 17th July 1926, and also passed an interim order for conditional attachment

in respect of the said properties. The matter eventually came on for hearing on the 28th July 1926 when on hearing both the parties, the Subordinate Judge passed the order which is complained of in this appeal.

The Subordinate Judge appears to have been of opinion that the exigencies of the case demanded an order for security and on failure to furnish the same an order for attachment before judgment, and as the appellants' attorney suggested that if there was to be any attachment at all a certain property, which for the sake of brevity he called the Kalachera property, might be attached, the learned Judge discharged the order by which the properties named by the plaintiff in the schedule to her application had been attached on the 30th June 1926 as stated above, and passed an order, the operative portion of which ran in these words :

> The mehal mentioned above, namely, Kalachera, shall be attached until further orders unless the defendants shall furnish security, i. e., Sourendra Nath Mitra shall furnish security to the extent of Rs. 10.000 and Khoka Lal Mitra to the extent of Rs. 500 within a week from to-day. The plaintiff shall take necessary steps for attachment of the mehal in the meanwhile.

Before dealing with the appellants' contention in the appeal it is necessary to refer to a preliminary objection that has been taken as to its competency. The objection is twofold. It is contended in the first place that the order in question is not one made either under R. 2 or R. 3 or R. 6 of O. 38 which are the only orders in that Order from which appeals lie under O. 43, R. 1, cl. (*q*) of the Code. It is also contended that the appellants have already furnished security to the extent of Rs. 16,000 in pursuance of the direction which was laid down as the condition precedent to the interim stay that was ordered by the rule. As regards the first branch of this preliminary objection I may say at once that it has a good deal of substance in it. It is not pretended that O. 38, Rr. 2 and 3 have any application here. The only rule that we need consider is R. 6. A plain reading of this rule shows that the order contemplated therein is one that can be passed only in the event of the defendant's failure to show cause why he should not furnish security or on his failure to furnish the security required. No such thing had happened on the 28th July 1926 on which date the order in question was passed. The proper order to pass on that date would have been one calling for security, and fixing a time for furnishing the same, and on the failure of the defendant to comply with that order, a further order of the Court would have been necessary for attachment of any property before judgment. I am unable to agree in the view which the appellants have contended for, namely that having regard to the terms of the order, as they are, no further order of the Court would be necessary in the present case in order to issue a writ of attachment.

The form of the writ is to be found in specimen form No. 7 of Appendix T to the Code. It shows that the writ is to issue on proof of failure on the part of the defendant to furnish the security. This failure then has to be proved before the writ can issue, and if that be the position, as I find it is, then, in my opinion, it is only the Court that can determine whether there has been failure or not. It was urged on behalf of the appellants that on the strength of the order, such as was passed in the present case, the ministerial officers of the Court, on finding that no security was furnished, could, on the expiry of the seven days, proceed to draw up a writ, and therefore the order should be treated as one contemplated by R. 6. But could they ? It is true that in the present case no security was furnished, but to test the correctness of the proposition we may think of other cases, e. g., cases in which an extension of time is asked for by the defendant, or some security is furnished which may not be sufficient, or, again, security is furnished but the sufficiency of it may have to be determined. In all such cases the Court will have to determine, and that judicially, as to whether there has been failure or not. A further order by the Court therefore would be necessary before the ministerial part of the work, namely, the drawing up of the writ may be taken in hand. I am therefore of opinion that the order that was passed on the 28th July 1926 is not the final and operative order of attachment that is contemplated by R. 6.

On the other hand, I am not so sure that the learned Subordinate Judge did not intend that it was to be regarded as such an order. The grounds which weigh

with me in entertaining this suspicion are the following: In the first place we have been credibly informed that a writ of attachment was in fact drawn up on the basis of this order, and it was cancelled only at the request of the appellants' attorney. Nextly, it appears that there is no direction given in the order to the effect that the records should be put up before the learned Judge on any subsequent date for another order being passed. Then again we have the fact that, as a matter of fact, no further orders were passed on the expiry of the period mentioned in the order. Added to these is the fact that it is not altogether uncommon for Courts to pass one order, in anticipation as it were, combining together what really should be two separate and successive orders, namely, one for security and the other for attachment.

An order on very similar lines appears to have been passed in the case which came up on appeal before the appellate Bench dealing with appeals from the Original Side of this Court: vide *Haji Mahammaddin & Co.* v. *The Eastern Japan Trading & Co.* (1). By thus combining two orders in one, the procedure is sometimes shortened but only for the time being, for this shortening leads, more often than not, to endless complications. If on a question which relates to the competency of an appeal on a ground such as this a reasonable doubt arises, the benefit of that doubt should go to the appellant. I am accordingly of opinion that this branch of the preliminary objection should be overruled. I take this view the more readily because if we dismiss the appeal as being premature the only result would be that a further order will be passed by the Subordinate Judge and the appellants will have to undergo the trouble and expense of a fresh appeal to this Court, and that appeal, it may also be mentioned, will have to be dealt with on the very materials that are now before us. In a case in which the Court, and not the appellants, is to blame for what has happened, that would hardly be the right course to adopt. As regards the other branch of the preliminary objection the position appears to be this: The appellants have furnished security to the extent of Rs. 16,000 in order to avail of the interim order of stay provided for in the rule issued by this Court. They do not mean to allow that security to continue for the purpose of the order from which this appeal has arisen, and accordingly it cannot be said that the order for security as made by the Subordinate Judge has been complied with. There is therefore no force in this objection.

To turn now to the merits. The findings of the Subordinate Judge upon which the order is based are, to quote his own words, these:

> Therefore the defendants have got vast properties no doubt. As they have run and are running into debts (this is apparent from the affidavits filed on either side), and without prejudicing the merits of the case I am of opinion that some sort of restriction shall be imposed upon some of the defendants' properties.

That these findings are wholly inadequate to form the basis of an order under O. 38, R. 6 cannot possibly be, and indeed has not been, controverted. R. 5 lays down that the Court has to be satisfied that the defendant has acted as mentioned in Cl. (a) or Cl. (b) of that rule with intent to obstruct or delay the execution of any decree that may be passed against him. There is no question of Cl. (b) in this case, and what we have to see is whether Cl. (a) has been satisfied and the requisite intent made out. We have then to examine the materials on the record, and this I propose to do now.

The relevant facts disclosed in the affidavit that was filed in support of the plaintiff's application upon which the order has been passed are that there are several claims against the appellants in respect of which suits are pending, a claim of the plaintiff herself to the extent of Rs. 50,000, another by one Siris Kumar Ghose for Rs. 40,000, that the Receivers appointed in connexion with the partition suit that is pendiug between the parties have borrowed on mortgage a sum of Rs. 40,000 and a sum of Rs. 10,000 on promissory notes, that one of the Calcutta properties has been attached for Rs. 50,000, that the defendants have refused to consolidate the debts due by the estate, meaning thereby to join with the plaintiff in acknowledging the debts now standing against her alone as the debts due by the estate, that they have borrowed Rs. 1,10,000 on promissory notes on which interest to the amount of Rs. 40,000 has accumulated and they are about to execute a mortgage in respect of

(1) A. I. R. 1923 Cal 639=50 Cal. 215.

this total amount of Rs. 1,50,000 and of a further loan of Rs. 2,50,000.

In the affidavits that were filed on behalf of the appellants before the learned Judge an explanation was given as to why Rs. 2,50,000 was required and in the petition upon which the rule was issued by this Court verified by the appellants there is a statement that the proposal for the loan of Rs. 2,50,000 has fallen through. The net result of all these then is that there are the aforesaid claims on the appellant's estate, an attachment in respect of Rs. 50,000 on one of the Calcutta properties, and that the appellants are about to mortgage their properties for Rs. 1,50,000 which, it is said, is due to one of the creditors.

These facts taken together and in view of the value of the appellants' properties, in my opinion, fall far short of establishing that the defendants are about to dispose of their properties with intent to obstruct or delay the execution of any decree that the plaintiff may obtain. An attempt to secure debts already incurred by executing a mortgage in respect of them does not necessarily indicate an intention to obstruct or delay the execution of a decree which has not yet been passed and such a mortgage will not, in a case when the value of the properties far exceeds the amount of said debts as well as the claim in the suit, necessarily obstruct or delay the execution, for the plaintiff will be able to put up the properties to sale subject to the mortgage that may be executed and realize her decretal dues.

I am accordingly of opinion that the order passed by Sub. Judge cannot be supported. The appeal therefore succeeds and the order of Sub. Judge is set aside.

As regards costs I am not disposed to make any order in favour of the appellants in these proceedings either in this Court or in the Court below as in my opinion having regard to the relation between them and the plaintiff a more reasonable attitude for them to take up would have been to offer the security and thus allay any apprehension which she may entertain as regards difficulties in reaping the fruits of the decree that she is expecting in her favour. Each party will therefore bear his or her own costs in these proceedings.

**Graham, J.**—I agree.

R.D. *Appeal allowed.*

## A. I. R. 1927 Calcutta 357

B. B. GHOSE AND PANTON, JJ.

*Suresh Chandra Banerji*—Claimant No. 2—Appellant.

v.

*Secretary of State* and *another*—Opposite Party—Respondents.

Appeal No. 93 of 1924, Decided on 9th November 1926, from the original decree of the Addl. Dist. J., Howrah, D/- 11th January 1924.

*Land Acquisition Act, S. 23—Market value assessed—Damages for prospective profits cannot be asked in addition.*

The market value of the land is assessed by taking every circumstance into consideration. A person is entitled to claim damages for loss of earnings if he carries on some business in the acquired premises and by virtue of the acquisition he is deprived of his profits by reason of the fact that he cannot find any other place where he can carry on the business to which he was engaged on the acquired premises. He however cannot again ask for damages on the ground that he might have made profits by engaging in a certain trade or business on the land in question : *Ripley* v. *Great Northern Railway Company*, (1875) 10 *Ch. A.* 435, *Dist.* [P 859, C 1]

*Dwarka Nath Mitter, Bejoy Kumar Bhattacharjee, Shyama Prosad Mukherjee (Sr.)* and *Benoyendra Nath Palit*—for Appellant.

*Langford James, Surendra Nath Guha, M. Nuruddin Ahmed* and *Ambicapada Chowdhury*—for Respondents.

**B. B. Ghose, J.**—This is an appeal from the decision of the Special Land Acquisition Judge on a reference made at the instance of the present appellant and another who was described as Claimant No. 1, named Mohini Mohan Banerji, against an award made by the Collector. The land acquired was 21 bighas odd and was used as a brick-field. It was let out to two brothers named Bull from October 1910 for ten years. The land was acquired under the Land Acquisition Act in 1914 when five years of the lease still remained to run. The rent payable by the Bull brothers to the two claimants was Rs. 1,800 per year. The interest of the claimants was that of dar-mokarraridars. The Collector awarded compensation on the basis of the rent reserved by the lease and allowed 20 years' purchase-money to the claimants. The total amount was Rs. 30,836. In their application for reference to the Judge the two claimants

wanted compensation to the extent of Rs. 1,18,000 odd. The learned Judge upheld the Collector's award on certain grounds which it is not necessary now to deal with. Of the two claimants only the Claimant No. 2 has appealed before us and he has valued his appeal at Rs. 15,000 in his one-half share, that is, he alleges that the compensation to be awarded to the two claimants ought to have been Rs. 60,000 odd.

It has been contended before us that the Special Judge ought to have allowed compensation to the claimants with reference to one calculation something above Rs. 88,000 and according to a different calculation Rs. 77,000 odd. The contention with regard to the valuation according to the first method is that the rent ought to have been taken at the rate of Rs. 110 per bigha and the Collector ought to have awarded 20 years' purchase value of that rent the amount being something over Rs. 46,000. To this it is contended that the value of the structures on the land should be added. The structures were a kiln and a building in which the office of the brick-makers was held. Rs. 3,000 is claimed for the kiln and Rs. 2,500 for the office building. The contention of the appellant further is that to this amount should be added damages for loss of earnings of the claimants as brick-makers and that is estimated at Rs. 37,000. This gives a total of Rs. 88,700 and if this calculation had any basis to support it the claimants might have claimed a sum of about Rs. 58,000 in addition to what has been awarded by the Collector. The appellant's share on this calculation would have been namely Rs. 29,000. But he has abandoned about one-half of his legitimate claim on that basis according to the contention of his learned vakil.

The second method in which compensation is claimed is that the valuation should have been made on the basis of the profits made by the business of brick-making. It is said that the profits according to the evidence would have been Rs. 3 per thousand bricks and as 15 lakhs of bricks would have been made every year the profits would have been Rs. 4,500. From this a deduction was made of 25 per cent. for risk in the manufacture and so forth. The actual profit is claimed at Rs. 3,385. To this is added the rent of Rs. 1,800 which the proprietor would not have to pay if he had himself prepared bricks on his own land. This gives a sum of Rs. 5,185. At 15 years' purchase on this basis the valuation is said to be something over Rs. 77,000.

We have to examine whether the appellant is entitled to a higher amount as compensation than what has been awarded by the Collector. The learned Judge below was of opinion that the Collector has actually awarded more than what the claimants were legitimately entitled to get as the market value of the property. It is not necessary for us as the appeal has been argued here to examine the evidence from that point of view of the learned Judge below. The only thing that I think we ought to see is whether the appellant before us has been able to prove by evidence that he is entitled to a higher sum than what has baen awarded to him. In this case there is no evidence as to the selling value of lands in the vicinity for ascertaining the market value. The Collector took as the basis of his valuation the rent which was payable under the ten years' lease to the Bull brothers. That lease was only for ten years as I have already stated. The Collector apparently took that amount to be the rent realizable if a permanent lease were granted by the claimants. There is no evidence on the record as to what rent this land would fetch after the expiry of the lease to the Bull brothers. (After dealing with evidence his Lordship proceeded.) It is contended that the building must have some value. It is, however, possible that the building was a thatched bungalow of no value to speak of. The argument, therefore, asking for adding the value of the structures to the value of the land must fail.

The next question put forward on behalf of the appellant is that of damage by reason of the acquisition injuriously affecting the earnings of the claimants. It is contended that in addition to the market value of the land as ascertained the claimants were entitled to damages for loss of any profits they might have made if they had engaged in the business of brick-making after the expiry of the lease in favour of the Bulls. In support of that contention the learned

vakil cites the case of *Ripley* v. *Great Northern Railway Company* (1). It seems to me that the principle laid down in that case has no application to the circumstances of the present case. It is no doubt, well settled that in ascertaining the market value of the land the Court has to ascertain what is the market value of the property not according to its present disposition, but laid out in the most lucrative and advantageous manner in which the owner can dispose of it. A familiar example is that of lands in or near a town which are agricultural, but capable of being used as building sites. But when once you assess the market value of the land by taking every circumstance into consideration, I do not think that the person interested may again ask for damages on the ground that he might have made profits by engaging in a certain trade or business on the land in question.

It seems to me that a person is entitled to claim damages for loss of earnings if he carries on some business in the acquired premises and by virtue of the acquisition he is deprived of his profits by reason of the fact that he cannot find any other place where he can carry on the business in which he was engaged on the acquired premises; for example, in this case if the claimant had carried on the trade of brick-making and had proved that after the acquisition he was unable to find a suitable field for carrying on his business of brick-making and by that reason would lose his customers or suffer damage in any other way, he might have made a claim for such damage. In this case there is ample evidence that if the claimants had wished to carry on their trade of brick-making there were sufficient lands where they might have carried on the business if they chose to do so immediately after the acquisition or five years after the acquisition, that is after the lapse of the period when the lease granted by them was to expire. Moreover, as I shall state later on, there is no sufficient evidence to establish the amount of profits of the business. On these grounds I do not think that the appellant can claim anything as compensation for loss of his earnings.

With regard to the valuation that was suggested by the learned vakil for the appellant on the basis of profits, I do not think that there is any sufficient evidence on which the profits with regard to the business can at all be calculated. (After considering evidence on the point thej udgment proceeded.) I do not think I should add anything further in order to dispose of the arguments advanced in the appeal. As a matter of fact, the appellant has not been able to satisfy us that the compensation that has been awarded was inadequate. The appeal must, therefore, be dismissed with costs.

The application was not pressed at the hearing. It is, therefore, rejected.

**Panton, J.**—I agree.

R.D. *Application rejected*

(1) [1875] 10 Ch. A. 435=23 W. R. 685=31 T. L. R. 869.

---

## A. I. R. 1927 Calcutta 359

B. B. GHOSE AND PANTON, JJ.

*Rajah Janaki Nath Roy* and *others*—Plaintiffs—Appellants.

v.

*Nawab Khawaja Habibulla Saheb*—Defendant—Respondent.

Appeals Nos. 289 and 290 of 1924, Decided on 30th November 1926, from the original decrees of the 4th Offg. Sub-J., Dacca, D/- 12th September 1924.

(a) *Deed—Construction— Document construed by Privy Council in a certain way—It is not open to further consideration by High Court.*

Where a document was construed by the Privy Council in a certain way in a previous litigation.

*Held*: that the effect of the document is a matter of construction and is a question of law and that question of law having been decided in a certain way by the highest tribunal is not open to further consideration by the High Court in subsequent litigation. [P 363, C 1]

(b) *Civil P. C., S. 65—Mortgagor having only charge on property mortgaged, mortgaging as owner—Purchaser in execution of mortgage decree against him was disallowed to recover possession—Purchaser can claim a right to the charge in favour of the mortgagor.*

Where a mortgagor claiming only a charge on the properties mortgaged, professed to mortgage them as owner and if the claim for possession of the purchaser in execution of a mortgage decree against him was disallowed.

*Held*: that the claim to enforce a charge on the property does not rest upon any new facts but upon consideration of what the purchaser got by the purchase of the right, title and interest of the mortgagor, and that the charge being an

interest in immovable property and transferable as such, the purchaser can therefore claim a right in the charge created on the properties in favour of the mortgagor if the greater claim is not allowed. [P 364, C 1]

*Dwarka Nath Chakrabarti*, *Sarat Chandra Basak*, *Promode Kumar Ghose*, *Indu Prokas Chatterjee*, *Surendra Nath Bose II* and *Jatin Mohan Bose*—for Appellants.

*Pugh*, *Surendra Nath Guha*, *Myer* and *Sisir Kumar Ghoshal*—for Respondent.

**B. B. Ghose, J.**—These two appeals arise out of two suits which were dismissed by the Subordinate Judge of Dacca on the 12th of September 1924. The plaintiffs sued for possession of 17 gandas 6 dantis 4 jobs and 34½ renus share of four zamindaries on the allegation that they had purchased that share on July 9, 1913, in execution of mortgage decree obtained by them against their mortgagors. Two suits were brought in two districts as the properties were situated in different districts and one of the suits was transferred to Dacca under the orders of this Court. The questions involved in the two suits being the same they were tried together and were governed by the same judgment. The two appeals have also been heard together and will be disposed of by one judgment.

The mortgage in favour of the plaintiffs was executed in May 1906 and the suit out of which these appeals arise were brought in May 1916. There were four mortgagors but the mortgage suit against one of the legal representatives of one of them named Abdul Majid alias Hala Mia had abated and the decree was with regard to the shares which the three other mortgagors and the shares of the other legal representatives of Hala Mia purported to have in the mortgaged properties. There is no question before us as to the validity of the mortgage decree or the sale thereunder. Those persons who purported to mortgage their shares in the properties in suit to the plaintiffs will henceforth be described as the mortgagors. After the execution purchase the plaintiffs endeavoured to take possession of the share sold but they were resisted by the defendant. There were certain intermediate proceedings, which it is unnecessary now to state, in which the defendant was successful. Ultimately the plaintiffs brought the present suits.

The Subordinate Judge has given an elaborate statement of the facts which give rise to the controversy in the suits in question. The material facts as to the dealings with the property before the mortgage would also appear in the judgment of the Judicial Committee in the case of *Khajeh Solehman* v. *Salimullah* (1) to which it will be necessary for me to refer fully hereafter. I need only give a brief summary of the facts.

On May 8, 1846, corresponding to the 27th Baisakh 1253 B. S. certain person belonging to the same family, among whom were the ancestors of the mortgagors, executed a deed by which they purported to create a wakf of certain properties including the properties now in dispute for the benefit of themselves and their descendants generation after generation and ultimately for the poor and destitute. They appointed Abdul Gani to be mutwalli of the properties and directed him to pay certain allowance to the grantors who were members of the family. On September 11, 1868, Abdul Gani appointed his son Ashanullah to be mutwalli in his place and on the same date Abdul Gani executed another deed also purporting to make wakf of certain other properties of which he claimed to be the sole owner and appointed his son mutwalli of those properties also and directed him to pay certain allowances to members of the family described in that deed. The mortgagors did not get any interest under the provisions of this deed of 1868.

In the year 1880, some members of the family brought a suit for accounts against Sir Abdul Gani and his son Nawab Ashanullah. The relevant portions of the plaint are as follows :

The said Alimullah (father of Sir Abdul Gani) prevailed upon the Plaintiffs Nos. 20 and 21 and the ancestors of the remaining plaintiffs and of the co-sharer defendants and with their consent placed on the 27th Baishakh 1253 B. S. the said management in the hands of the Defendant No. 1 and entrusted him with the management and preservation of all descriptions of properties of the plaintiffs and the co-sharer defendants; and thus the Defendant No. 1 continued to do the management. The document of 27th Baisakh, 1253 B. S. propounded by the Defendants Nos. 1 and 2, is as a matter of fact not a towliatnamah. It is only an instrument by which the management of the estate was made over. At that time most of the members of the plaintiffs' family were

(1) A. I. R, 1922 P. C. 107=49 Cal. 820=49 I. A. 153.

minors and females; and even if he (Defendant No. 1) fraudulently inserted into it the terms "mutwalli" "wakf" (endowment) etc. without the knowledgde of the parties concerned, the said instrument cannot be regarded as a towliatnamah nor are the plaintiffs bound by it. Besides it was not executed according to the regulations and the Mahomedan Law. . . . .

In the schedules to the plaint the properties comprised in the deed of 1868 were also included as having been acquired with the income of the properties in the deed of 1846. The Defendant No. 1 was Abdul Gani and Defendant No. 2 was Ashanullah. The question as to the validity of the wakf of 1846 was thus distinctly raised in the suit. Three of the mortgagors and the father of the fourth were plaintiffs in that suit.

The case was heard by the Subordinate Judge but before judgment was pronounced some friends of the family, including men in very high position, intervened and brought about a compromise. Two documents were executed, one dated August 26, 1881, signed by all the members of the family except Sir Abdul Gani and Nawab Ashanullah and the other dated September 17, 1881, signed by Ashanullah alone. The main controversy in these appeals is with regard to the effect of the document of August 26, 1881. By reason of the agreement made by the document of August 26, 1881, all the defendants in the suit other than Sir Abdul Gani and Nawab Ashanullah were transferred to the category of plaintiffs and they made an application to the Court for withdrawing the suit on the same day reciting some of the provisions of the agreement and admitting the validity of the wakfnamah of the 27th Baisakh 1253. The prayer in the application runs thus:

On these terms we beg to file this petition and pray that this suit be allowed to be withdrawn without any right of instituting a fresh suit on any causes of action which form the subject-matter of this suit.

The suit was thus withdrawn.

By a series of decisions from the year 1889 the Privy Council held that a wakf such as was sought to be made under the deeds of 1846 and 1868 was void under the Mahomedan law: *Mahomad Ashanullah* v. *Amar Chand* (2); *Abdul Gafur* v. *Nizamuddin* (3); *Abdul Fata* v. *Rasamaya* (4); *Muhammad Munawar Ali* v. *Razia Bibi* (5). In January 1895 Sir Abdul Gani executed a heba-bil-ewaz in favour of his son Ashanullah and his heirs, of the properties included in the wakfnamah of 1868, as he was advised that the wakf was invalid by reason of the decision of the Privy Council. In that deed he stated that he was bound by the provisions of the agreement of August 26, 1881 and that the donees would hold the properties subject to the legal effect of that agreement.

Shortly afterwards Ashanullah stopped payment of the allowance to some of the members of the family on which they brought a suit against heirs for their allowances in 1914, which was carried up to the Privy Council, and the argument before us has been mainly with regard to the effect of that decision.

One other fact need be mentioned subsequent to the decision of the Privy Council as to the invalidity of such wakfs. Ashanullah or his successor began to purchase or take leases of what was described as maliki interest from various members of the family in the properties comprised in the deed of 1846. They thus acquired about 11 annas share of those properties. The shares of the mortgagors were not included in those transactions.

I shall now quote some of the principal terms of the agreement of August 26, 1881, which have been recited fully in the judgment of the Subordinate Judge.

Cl. 3. The persons signing this memorandum admit that save and except as hereinafter provided neither they nor any of them have or has any claim to or interest in any of the properties in the possession of Nawab Abdul Gani and Ashanullah or either of them, or belonging to them or either of them, and registered whether in their or either of their names or in the names of others. 4. The persons signing this memorandum of agreement admit that the two deeds of 1253 and 1275 (1846 and 1868) are valid and binding deeds of wakf.

Under Cl. 5 it was admitted that properties constituted wakf by the deed of 1846 consisted of those described in Schedule A and those so constituted by the deed of 1868 consisted of the properties in Schedule B and no other properties were to be held as wakf. By this clause of the agreement 161 items of

(2) [1889] 17 Cal. 498 = 17 I. A. 28 = 5 Sar. 476 (P. C.).
(3) [1892] 17 Bom. 1 = 19 I. A. 170 = 6 Sar. 288 (P. C.).
(4) [1894] 22 Cal. 619 = 22 I. A. 76 = 6 Sar. 572 (P. C.).
(5) [1905] 27 All. 320 = 32 I. A. 86 = 8 Sar. 788 (P. C.).

property were released from all claims of the plaintiffs in the suit of 1880. Cl. 6 recited that Nawab Ashanullah consented to pay certain allowances to members of the family who were placed in two groups in Schedules C and D of the memorandum. Those who were included in Schedule C were to get their allowances out of the properties in Schedule A which were included in the deed of 1846 and those placed in Schedule D were to get their allowances out of the income of the properties in Schedule B which comprised the properties in the deed of 1868. For the purpose of the present appeals it is not necessary to recite any other terms of the agreement. The memorandum was registered and was signed amongst others by three of the mortgagors and the father of the fourth. Nawab Ashanullah alone signed the agreement of September 17, 1881 by which he agreed to pay the allowances.

The defendant in this case is the successor-in-interest of Nawab Sir Ashanullah. His main defence was that the wakf of 1846 was valid and the allowances mentioned in the memorandum of agreement of 1881 were purely compassionate allowances and were not payable to the descendants of the signatories or their transferees. It was also urged that the suits were barred by limitation. Various other questions were raised in the Court below, many of which were not urged before us. The Subordinate Judge dismissed the suits on the ground that by the two deeds of 1881, the title of the mortgagors to the disputed properties ceased save for the annuities referred to, and that the mortgagors had no title which they could mortgage or which could pass to the purchasers. He purported to base this decision on the judgment of the Privy Council in the case of *Solehman Quadir* v. *Salimullah* (1), already referred to.

There is no question before us that the wakfs purported to have been created by the deeds of 1846 and 1868 are invalid. It has been so held by the Privy Council in the case already referred to. The main argument of the appellants is that the wakf having been declared invalid no title to the property was conveyed to Ashanullah by the document of August 26, 1881. The ultimate gift for wakf (or as it was put, the gift to God) having failed the title remained in the grantors and the effect of the document is that it merely gave authority to Ashanullah for the management of the properties for and on behalf of the grantors. This being a deed of management could not operate as an assignment of the right of the grantors in perpetuity but it was a personal agreement which is not binding on their assignees. The plaintiffs therefore are entitled to recover possession of the shares of the mortgagors by virtue of their execution purchase.

Even if I were inclined to accept that argument as sound, which I am not, I do not think I would be free to give effect to it, having regard to the decision of the Privy Council. What their Lordships say with regard to the agreement is this :

> The principal purpose of those agreements was to secure to living and named persons certain fixed allowances which were to become payable immediately and were to be continued to their heirs. It is true that the agreements purported to confirm the wakfnamas, and that the allowances were made payable by the hand of the mutwalli of the wakfnames out of the income accruing to him from the properties thereby settled ; but allowances were intended to take effect as immediate and heritable charges on such incomes taking priority of all the limitations contained in the settlement, and they may, therefore, be supported; although those limitations fail. The direction to pay the allowances 'out of income' of the settled properties, which appears in both agreements, shows an intention to create a charge, and this intention was not frustrated by the ineffectual attempt to keep alive the subsequent and invalid limitations of the settlements.
>
> By those agreements the members of the family other than Sir Abdul Gani and his son Ashanullah surrendered their claims to property of considerable value and stated their suit in consideration of a firm contract securing to them annuities to an amount exceeding Rs. 1,30,000 and continuing such annuities to their heirs.

It is, however, contended on behalf of the appellants that although the language used by their Lordships is wide enough it was used with reference to the facts of the case. It is urged that in that case the plaintiffs did not seek for possession of the property but only to recover their allowances, the right to which was denied by Ashanullah. The plaintiffs there were included among the co-sharers placed in Schedule D and the properties out of the income of which they had to get their allowances were comprised in the deed of 1868 and their right to such allowances was recognized in the heba-bill-ewaz of Sir Abdul Gani

of 1895. When they claimed their allowances the right to which was denied, their Lordships had only to consider the question whether they were entitled to recover their allowances. The decision of their Lordships should not be extended so as to construe it to have laid down that the title to the properties passed to the grantee by those agreements. Reliance is placed in support of this argument to the observation of Lord Halsbury L. C., in *Quinn* v. *Leathem* (6) that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. Bearing this in mind, as also the observations of Jessel, M. R., in *In re Hallett's Estate* (7) that the only use of authorities or decided cases is the establishment of some principle which the Judge can follow out in deciding the case before him, can it be said that we can disregard the observation of the Judicial Committee above ited in deciding this case? The point rgued is with regard to the effect of the agreement of 1881.

The effect of the deed was decided to be settlement of properties on the grantee reserving a charge for allowances for the grantors and their heirs on the properties in question. I think that this question as to the effect of the agreement having been determined by the Judicial Committee it is not open to further consideration by this Court. The construction of the documents did not depend upon the facts of the case. The effect of the document is a matter of construction and is a question of law and this question of law having been decided in a certain way by the highest tribunal is, as much binding on us as other decision in that case that the wakfs of 1846 and 1868 are invalid.

Further, even if the question were open to us I do not think that the language could be plainer than what was used in Clause 3 of the agreement, to extinguish the title to the properties of the persons who signed the document of August 26, 1881, subject to the reservation for allowances in Clause 6. If those persons executed the documents under any mistake or misapprehension they might possibly ask for its cancellation, but that step was never taken. There is no reason to suppose that the relinquishment of the title on certain considerations should be invalid because of "the ineffectual attempt to keep alive the subsequent and invalid limitations of the settlement." In my opinion therefore the claim of the appellants for possession of the properties must fail. It was also urged that the defendant's predecessors themselves acknowledged that the co-sharers had subsisting title to the properties and they acquired the interests of other co-sharers to the extent of 11 annas as we should also put the same construction on the documents. But it is not urged that there is any estoppel, and I think we should give effect to the true construction of the documents

In my judgment there is another ground on which the plaintiffs' claim for possession should fail. I have pointed out that the validity of the wakf of 1846 was directly questioned by the mortgagors in the suit of 1880 and they withdrew their suit without any permission to bring a fresh suit. They are precluded from bringing a fresh suit in respect of the same subject matter under O. 23, R. 1 (3) of the Civil Procedure Code which is practically the same in this respect as S. 97 of Act 8 of 1859, the Code then in force. The plaintiffs as their assignees are under the same disability. The fact that the wakfs have been decided to be invalid by the Judicial Committee does not help the plaintiffs. The result of the decision is that the defendant will not be able to set up the validity of the wakf as against third persons and the property in his hands will be considered as his personal property and liable to attachment and sale in execution of decree against the defendant subject to the charges. But so far as the mortgagors are concerned and their assignees they are bound by the effect of the withdrawal of their suit of 1880, without permission to bring a fresh suit on the same matter.

On behalf of the respondent it was urged that the suits were barred by limitation. The Subordinate Judge

(6) [1901] A. C. 495 = 70 L. J. P. C. 76 = 85 L. T. 289 = 50 W. R. 139 = 65 J. P. 708=17 T. L. R. 749.

(7) [1879] 13 Ch. D. 696=49 L. J. Ch. 415= 42 L. T. 421=28 W. R. 732.

decided that question against the defendant. If there had been no suit in 1880 and the agreement of 1881 I should have held that the right of the mortgagors to the properties was not barred on the authority of *Mahamad Ali* v. *Razia Bibi* (5) which affirmed this decision of the Allahabad High Court as the Subordinate Judge has held. Bnt as I hold that the plaintiffs have no right to recovery of the possession, the question of limitation becomes immaterial.

The next question that is urged for the appellants is that if the plaintiffs are not entitled to recover possession of the properties they are at any rate entitled to enforce the charge for the allowances payable to the mortgagors as they are purchasers of the right, title and interest of the mortgagors at the execution sale. The respondent meets the contention on the grounds : (1) that no charge was claimed in the plaint and no issue was raised on the question ; (2) the allowances are not permanently fixed but liable to fluctuations and may even be discontinued under certain circumstances. With regard to the first objection it seems to me that because the plaintiffs asked for too much we cannot refuse to grant them a decree for less if they are found to be entitled to it. The claim to enforce a charge on the property does not rest upon any new facts but upon consideration of what the plaintiffs got by the purchase of the right, title and interest of the mortgagors. The mortgagors professed to mortgage their interest as owners of the property. It is found that they had merely a charge on the property for allowances and that they were not full owners. The charge is an interest in immovable property and transferable as such. The plaintiffs by their purchase stepped into the shoes of the mortgagors with regard to the property. They can therefore claim a right in the charge created on the properties in favour of their mortgagors if the greater claim is not allowed. The fact of their not placing this question before the Court below may be a matter of costs. With regard to the second objection I need only point out from the judgment of the Privy Council that the provisions contained in the agreements with regard to the distribution of the annuity and proportions to be determined by the punchayat it may be disregarded. See *Khajeh Solehman* v. *Salimullah Bahadur* (1).

It seems to me that there is no valid answer to the claim of the plaintiffs to the annuities which are payable to their mortgagors and charged on the properties in question.

No other point was argued on behalf of the appellants before us. But the respondent urged that the suits were defective for want of parties. I do not think it is so. It was also urged on behalf of the respondent that the shares of the mortgagors were not as found by the Subordinate Judge, but nothing has been said which shows that that finding is erroneous. The respondent also relied on the case of *Mahamed Musa* v. *Aghore Kumar* (8) and certain other cases. I do not see what application the case of *Musa* (8) has to this case. There is no formal defect in the agreement which was a registered instrument.

I am of opinion that the dismissal of the suits would defeat the justice of the case. I would therefore modify the decree of the Subordinate Judge thus : The plaintiffs' claim for possession of the property is dismissed. It is declared that the plaintiffs are entitled to the allowances charged on 17 gundas 6 dantis 4 jobs and 34½ renus share of the properties described in the plaint which were payable to Syad Karimulla, Khaje Abdul Rashid and Khaje Abdul Khalek alias Bachu Mia and their heirs and legal representatives and the legal representatives of Hala Mia except the person named Hafez Bibi against whom the mortgage suit had abated under the agreements dated August 26, 1881 and September 17, 1881, the amount of such allowances being left undetermined in these suits.

As to costs I think the order of the Subordinate Judge should be left undisturbed, but in this Court as both the parties placed their case too high there should be no order as to costs to either party.

**Panton, J.**—I agree.

R.D. *Decree modified.*

---

(8) [1914] 42 Cal. 801=289 I. C. 930=42 I. A. 1 (P. C.).

## * A. I. R. 1927 Calcutta 365

GREAVES AND MUKERJI, JJ.

*Kalipada Basu* and *others*—Plaintiffs—Appellants.

v.

*Fort Gloster Jute Manufacturing Co., Ltd.*—Defendants—Respondents.

Appeal No. 11 of 1925, Decided on 15th July 1926, from the original decree of the Sub-J., Howrah, D/- 24th September 1924.

* *Part performance — Contract to transfer immovable property partly performed — Party delivering possession is estopped from setting up his own title — Doctrine will not apply where remedy for specific performance of contract is barred — Plaintiff recovering possession on strength of title cannot succeed when the transfer was not by a registered deed.*

Where a contract for the transfer of immovable property is partly performed, the rightful owner is estopped in a suit for recovery of possession from setting up his own title by reason of the contract which had been performed in part. But the doctrine of part performance will not apply where the right to claim specific performance of the contract is barred. *Case law discussed.* [P 369 C 2]

However, the estoppel arising out of the equitable doctrine of part performance will not create title in the plaintiffs if otherwise they had none, and where the plaintiff seeks to recover possession on the strength of his title, he cannot succeed when there has been no transfer by a registered deed such as is necessary under S. 54, T. P. Act. [P 370 C 1, 2]

*D. N. Mitter, Promotho Nath Bandopadhya* and *Surja Kumar Aich*—for Appellants.

*P. C. Mitter, Sisir Kumar Ghosal* and *Krishna Lal Banerjee*—for Respondents.

**Mukerji, J.**—The plaintiffs are the five sons of one Tarak Nath Bose, deceased. Tarak Nath Bose and Hare Krishna Bose were two brothers. The latter died in 1881 leaving a widow who also died on the 7th November 1921. The former died on the 9th September 1921.

The plaintiffs' case appears to be as follows: The properties described in Sch. *ka* to the plaint belonged to the joint family of the said two brothers. They consist of two items, Plot No. 1 being 4 bighas 10 cottahs of land held in mokurrari right under a deity Sree Sree Iswar Dakshina Ray; and Plot No. 2 being 3 bighas of land held in lakheraj right. The plaintiffs are now the owners of the said properties. In 1916 the defendant Company took forcible possession of a bigha of land out of Plot No. 1 of Sch. *ka* and erected cooly huts thereon, and upon that Tarak Nath Bose, who was then an employee under the said Company, instituted a suit, being Suit No. 364 of 1916, for declaration of title, recovery of possession and mesne profits and for a permanent injunction restraining the defendant Company from erecting any structures thereon and for other reliefs. Tarak Nath Bose also instituted criminal proceedings in connexion with this forcible dispossession. The Company then prevailed upon Tarak Nath Bose to withdraw from the suit agreeing to give Tarak Nath Bose a plot of jote land 6 bighas in area and described in Sch. *kha* to the plaint and to excavate for him a tank 100 ft. square and also to erect a boundary wall round his homestead. On this agreement being reached Tarak Nath Bose withdrew from the suit which was eventually dismissed on the 8th April 1916. The execution of a formal deed of exchange which was agreed upon at the time was, however, put off. The Company gave Tarak Nath Bose the land aforesaid which the latter continued to be in possession of by cultivation thereof. In 1917 the Company wanted to have some more lands and there were negotiations between them and Tarak Nath Bose for the purchase of plot No. 2 of Sch. *ka*, as the result of which Tarak Nath Bose made over possession thereof to the Company, it being arranged that the Company would pay its proper price. The Company thus took possession of this plot as well and erected structures thereon. Subsequently the Company asked for and obtained the documents relating to the two Plots, Nos. 1 and 2 in order to execute the deed of exchange and the kobala, but thereafter did nothing in that direction. Thereafter in 1918 the Company dispossessed Tarak Nath Bose from the land of Sch. *kha*. This led to open rupture between the parties and in order to put Tarak Nath Bose into further trouble the Company instituted a suit against him for ejecting him from his homestead. Tarak Nath Bose filed a written statement denying the Company's right to eject him and characterizing the suit as malicious and as being the outcome of the grudge which the Company bore against him for his refusal to part with the homestead for which, he alleged, the Company had offered a price of Rs. 6,000 which was inadequate. In the

said written statement Tarak Nath Bose also set out what the Company had done in respect of Plots Nos. 1 and 2 of Sch. *ka*. The suit ended in a compromise, dated the 16th April 1919, under which the Company purchased the homestead for Rs. 6,000, and there was a condition in the compromise, that both parties would amicably settle between them the dispute relating to the said two plots. This dispute, however, was not settled as agreed upon and Tarak Nath Bose eventually died.

After the death of Tarak Nath Bose on the 14th December 1921 the plaintiffs instituted the present suit. The main prayers in the plaint were as follows :

(*ka*).—That possession of the whole of the land described in Sch. *ka* below may be given to the plaintiffs upon a declaration of their title thereto.

(*kha*) If for any reason the Court holds the above-mentioned contract to be enforcible regarding the 4½ bighas of land described in Plot No. 1 of Sch. *ka*, then possession may be given to the plaintiffs of the property of Sch. *kha*, upon a declaration that they are entitled to get possession of the same and a decree may be passed for execution of a proper deed of exchange in respect of the same and for payment of the sum of Rs. 1,800 for digging a tank and for erecting the compound wall.

(*ga*) That the defendant Company may be ordered to return to the plaintiffs all the documents, etc., regarding the lakheraj (rent-free) property mentioned in plot No. 2 of Sch. *ka*.

(*gha*).—That the defendant Company may be ordered to remove all the structures and other things that they have on the same land.

On the plaint being filed the Company filed a written statement on the 20th February 1922 traversing almost every allegation made in the plaint. This statement consists of thirty paragraphs verified by one Bepin Behari Ganguli who described himself as the gumastha of the Company for the mehal in suit. The statement, however, was afterwards found to be defective as some necessary matter was omitted from it on account of inadvertence and this necessitated the filing of a further statement on behalf of the Company which they filed, verified again by the said gumastha on the 17th March 1922.

These pleadings gave rise to fourteen issues, most of which were found in favour of the plaintiffs by the Subordinate Judge. The learned Judge found in favour of the plaintiffs' title to the lands of Sch. *ka* and gave them relief in the shape of a declaration to that effect. The other prayers of the plaintiffs were rejected. The plaintiffs have accordingly appealed to this Court.

It is somewhat difficult to follow the learned Judge's reasoning which led him to refuse the other prayers in the plaint ; because he has not dealt with those prayers separately. Nor has the learned Judge kept in view the distinction between the plaintiff's case as regards the two plots of Sch. *ka*. On the whole the reasons which weighed with the learned Judge, as far as I am able to gather from his judgment, are these : As regards prayer *kha* of the plaint, he seems to have held that the prayer was one for specific performance of a contract, the cause of action for which accrued in June 1918, and the suit having been filed more than three years after such accrual, the relief was barred ; he has said nothing about prayer *ga* ; as regards the prayer for recovery of possession of the lands of Sch. *ka*, it is not at all clear whether he considers the same barred by limitation ; but in any event he is clearly of opinion that "law and equity will stand in the way of plaintiffs' getting *khas* possession ;" and as regards prayer *gha*, though he says nothing about it specifically, it fails as a corollary to the plaintiffs failure to recover *khas* possession of the lands of Sch. *ka*.

I shall presently deal with the grounds urged on behalf of the appellants in support of the appeal, but before I do so I desire to deal with some of the contentions urged on behalf of the respondent Company, because if these contentions succeed, the judgment of the learned Judge must stand.

The first contention which the respondent Company attempted to urge is to the effect that they are entitled to the lands of Sch. *ka*, as being the present zemindars of the mehal, as these lands were chakran lands which had been given to the pujari of the deity Siva and as they have been surrendered in their favour by the son of the late pujari. Apart from the merits of this contention

which I find wholly unsupported by any evidence except the evidence of one Basanta Choudhury who says he is the son of the late pujari and who professes to have made the surrender, and whose evidence on the face of it is absurd and untrustworthy, the respondent Company are, in my opinion, not competent to challenge the plaintiffs' title for which a declaration has been made by the learned Judge in plaintiffs' favour, they not having preferred any appeal from that decree. The next contention of the respondent is to the effect that there was no such agreement between the parties under which according to the plaintiffs' case there was exchange of Plot No. 1 of Sch. *ka* with the lands of Sch. *kha* in 1916, that there was no such exchange as was alleged on the plaintiffs' behalf, that there were no negotiations relating to Plot No. 2 of Sch. *ka* and no making over of possession in respect of that plot nor any delivery of title-deeds, and that generally speaking the plaintiffs' story is a myth. The plaintiffs have sought to prove the agreement relating to the exchange by direct evidence as well as by evidence showing that in point of fact they were in possession of the Sch. *kha* lands for some time, that is to say, from the latter part of 1916 to some time in 1918 when they were dispossessed. (His Lordship then examined the evidence and proceeded). On consideration of the facts and circumstances of the case I agree with the learned Judge in holding that the agreement upon which the plantiffs rely has been proved. I also hold in agreement with him that the plaintiffs' case as to the circumstances under which Plot No. 2 of Sch. *ka* was made over to the defendant Company as alleged on behalf of the plantiffs, is substantially true.

It is impossible to account for the transfer of possession of this plot on any other hypothesis and indeed no alternative case, beyond a bare denial of plaintiffs' right and possession in this plot at any time, has not been put forward on behalf of the defendant Company. Moreover. Babu Tincouri Ghosh, a very respectable pleader who is said to have taken a very important part in these transactions on behalf of the defendant Company, has not stepped into the witness-box, although it is evident that he was looking after the defendant Company's case. The only suspicion that I feel is as regards the delivery of the title-deeds; for while it is said in the plaint that the title-deeds of both the plots of Sch. *ka* were made over for the purpose of execution of necessary documents and the evidence indicates that all of them were made over at one and the same time, the prayer in the plaint is confined to recovery of the title deeds of only Plot No. 2 of that schedule. I am not satisfied that the title-deeds were really made over and at any rate no details are forthcoming as to the nature and number of the title-deeds, if any, that were so made over. This being my view of the facts, I now proceed to deal with the grounds urged on behalf of the appellants in support of their appeal.

The appellants' first argument relates to their prayer *kha*. As regards this prayer it consists—(a) of recovery of possession of Sch. *kha* land, on declaration of plaintiffs' title thereto; (b) of directions for the execution of a proper deed of exchange in respect of that plot and for payment of Rs. 1,800 for digging a tank and for erecting a compound wall. Portion (b) of this prayer in its essence involves reliefs for specific performance of a contract entered into so far back as 1916, and must I think be held to be barred by the three years' rule of limitation. As regards portion (a) of this prayer the learned Judge in my opinion has erred in holding that it is governed by the same rule. The cause of action was the dispossession in respect of this plot in 1918 and upon the allegation upon which the plaintiffs have come to Court, Art. 142 is clearly the article which should be held to apply. The question then is whether the plaintiffs are entitled to succeed on the facts which have been established. It is clear that in order to succeed as regards this part of the case the appellants must establish their title to the Sch. *kha* plot. It has been urged on behalf of the appellants that in view of the part performance of the contract under which they were put in possession of this plot in exchange for Plot No. 1 of Sch. *ka*, the omission to execute a formal deed of exchange was immaterial and equity will step in and complete any defect in the plaintiffs' title and will assist them in having their title declared and in recovering possession.

In this behalf reliance has been placed upon the decisions of the Judicial Committee in the cases of *Imambandi Begum* v. *Kamaleswari Pershad* (1) and *Mahomed Musa* v. *Aghore Kumar Ganguli* (2). On behalf of the respondents it has been argued that both these cases deal with transactions which took place before the Transfer of Property Act came into existence, under S. 54 of which a registered intrument is essential to the validity of a transfer and that the principle laid down in these cases cannot assist the plaintiffs. This argument has some force and weight of authority in its support. To deal with the question as to how far the doctrine of part performance may assist the plaintiffs in the present case it is necessary to examine the state of the authorities bearing upon the point.

In *Immudipattam Thirugnana Kondama Naik* v. *Periya Dorasami* (3) the transaction by which a mortgage was sought to be effected was of 1882 and the suit was instituted in 1895 and the argument before the Judicial Committee was that though the mortgage fell short of an actual transfer it showed a good contract for one, and the defendant might call upon the heir of the contractor to implement the contract. Their Lordships held that at the date of the deed a transfer such as that alleged could not be effected except by a registered deed as required by the Transfer of Property Act of 1882 and observed thus:

> Certainly if such a right exists it would be an answer to the plaintiffs' claim and the exact form in which it could be enforced need not be considered.

A Full Bench of the Madras High Court in *Kurri Verrareddi* v. *Kurri Bapireddi* (4) had occasion to consider this last-mentioned decision of the Judicial Committee and in that case they treated the observation quoted above as obiter dictum. The next decision to which reference need be made is that of the Judicial Committee in the case of *Mahomed Musa* v. *Aghore Kumar Ganguli* (2). In that case there was a compromise in a suit between the parties in 1873 under which certain conveyances were to be executed, but the agreement of compromise was not registered nor embodied in the decree and no conveyances were executed, but the compromise was acted upon and carried out by all the parties to it and their successors-in-title for 30 or 40 years. Their Lordships held that even though the compromise and the decree taken together was considered defective or inchoate the acts of the parties had supplied all defects. Their Lordships observed:

> When the actings and conduct of the parties are founded upon, as in the performance or part performance of an agreement, the *locus poenitentiae* which exists in a situation where the parties stand upon nothing but an engagement which is not final or complete, is excluded. For equity will support a transaction clothed imperfectly in these legal forms to which finality attaches after the bargain has been acted upon.

Shortly after another pronouncement was made by the Judicial Committee in the case of *Venkayyamma Rao* v. *Appa Rao* (5). In this case their Lordships allowed specific performance of a conditional promise, which otherwise would have been but inchoate, but which by reason of the acceptance and performance of the condition, was held to have amounted to a complete contract. The suit in this case, however, had been filed within three years from the accrual of the cause of action. The learned Judges of the Madras High Court appear to have felt considerable difficulty in interpreting the aforesaid decisions of the Judicial Committee to which I have just referred and a Bench of that Court by a majority held that in the absence of a registered deed of exchange as required by Ss. 54 and 118 of the Transfer of Property Act a defendant in a suit in ejectment could not rely upon the possession which the plaintiff had given him in part performance of a contract and that the plaintiff in the suit was not estopped by his conduct from recovering possession. *K. S. R. Ramanathan Chetty* v. *Ranganathan Chetty* (6). The learned Judges in that case followed the Full Beuch decision of that Court in the case of *Kurri Veerareddi* v. *Kurri Bapireddi* (4).

(1) [1887] 14 Cal. 169=13 I. A. 160=4 Sar. 732 (P. C.).
(2) [1914] 42 Cal. 801=28 I. C. 930=42 I. A. 1 (P. C.).
(3) [1900] 24 Mad. 377=28 I. A. 46=7 Sar. 811 (P. C.).
(4) [1906] 29 Mad. 336=16 M. L. J. 395 (F. B.).
(5) [1916] 39 Mad. 509=34 I. C. 921=43 I. A. 138 (P. C.).
(6) [1907] 40 Mad. 1134=33 M. L. J. 252=6 L. W. 300=43 I. C. 138=(1917) M. W. N. 757.

In a recent Full Bench decision of that Court in the case of *Vizagapatam Sugar Development Co.* v. *Muthuramareddi* (7), in which A agreeing to sell his lands worth more than Rs. 100 to B received the consideration and put B in possession, but did not execute a conveyance and then sued to eject B from the land, it was held that performance by way of delivery of possession and an enforceable right on B's part to specific performance are good defences to the action, and the learned Judges in this decision purported to follow the decision of the Judicial Committee in the cases of *Venkayyamma Rao* v. *Appa Rao* (5) and *Mahomed Musa* v. *Aghore Kumar Ganguli* (2) and to overrule the decisions in *Kurri Veerareddi* v. *Kurri Bapireddi* (4), and *Ramanathan* v. *Ranganathan* (6). In the same case the Division Bench after the expression of opinion of the Full Bench overruled the contention that the doctrine of part performance is limited to cases when the right to sue for specific performance is not barred on the date of the subsequent suit.

The Allahabad High Court in the case of *Salamatuzzamin* v. *Masha Allah Khan* (8), appears to have held the parties down, under somewhat similar circumstances, to the contract which in that case was a contract for exchange and was partly executed by mutual delivery of possession and dismissed the plaintiff's claim to recover possession from the defendant, though on account of want of a proper deed of exchange the title still remained in the plaintiff, and the time for specific performance of the contract had expired. The principle of this decision appears to have been approved of in a more recent decision of that Court in the case of *Ram Sewak Rai* v. *Sheonrik Rai* (9). The Bombay High Court has also applied this principle in the case of *Sandu Valji* v. *Bhikchand Suraj Mull* (10) in which other cases of that Court have also been referred to as having adopted it. In this last-mentioned case there was an agreement arrived at between the parties which had been acted upon for eleven years prior to the suit, and it was held that though the defendants' right to specific performance was barred, the plaintiff according to the equitable principle of part performance which makes the contract binding between the parties was not entitled to succeed.

So far as the Calcutta High Court is concerned the position seems to be that while there is no doubt that the rightful owner is estopped in a suit for recovery of possession from setting up his own title by reason of the contract which had been performed in part there is some, though very slight, conflict of judicial opinion on the point as to whether this doctrine may be applied without reference to the question whether the right to claim specific performance of the contract is or is not still subsisting. The English authorities indicate that the doctrine is applicable only in those cases where specific performance can be obtained between the same parties in the same Court and at the same time as the subsequent legal question falls to be determined : *Manchester Brewery Co.* v. *Coombs* (11), and *Potter* v. *Potter* (12), which was relied upon by the Judicial Committee in *Mahomed Musa* v. *Aghore Kumar Ganguli* (2). This limitation as to the applicability of the doctrine has been recognized in *Bibi Jawahir Kumari* v. *Chatterput Singh* (13), *Singheeram Poddar* v. *Bhaghat Chandra Nandi* (14), *Secretary of State* v. *Forbes* (15), *Bepin Behari Mitra* v. *Tincouri Pathak* (16), *Khagendra Nath Chatterjee* v. *Sonatan Guha* (17), *Shyam Kishore Dey* v. *Umesh Ch. Bhattacharjee* (18), *Gajendra Nath Dey* v. *Moulvi Ashraf Hossain* (19), *Pitambar Gain* v. *Ram Charan Moral* (20), and was implicitly recognized by Jenkins, C. J., in *Puchha Lal* v. *Kunj Behari Lal* (21).

On the other hand, the doctrine has been applied without reference to the question whether the right to claim specific performance was or was not subsisting in the cases of *Meher Ali Khan* v. *Ara-*

(7) A. I. R. 1924 Mad. 271=46 Mad. 919 (F. B.).
(8) [1918] 40 All. 187=43 I. C. 645=16 A.L.J. 98.
(9) A. I. R. 1923 All. 433=45 All. 388.
(10) A. I. R. 1923 Bom. 478=47 Bom. 621.
(11) [1901] 2 Ch. 608=70 L. J. Ch. 814.
(12) [1750] 1 Ves. Son. 437=3 Atk. 719=Ambl. 98.
(13) [1905] 2 C. L. J. 343.
(14) [1910] 11 C. L. J. 543=6 I. C. 632.
(15) [1912] 16 C. L. J. 217=17 I. C. 180.
(16) [1911] 15 C. W. N. 976=9 I. C. 374=13 C. L. J. 271.
(17) [1915] 20 C. W. N. 149=31 I. C. 987.
(18) [1919] 24 C. W. N. 463=55 I. C. 154=31 C. L. J. 75.
(19) A. I. R. 1923 Cal. 130.
(20) A. I. R. 1924 Cal. 483.
(21) [1913] 18 C. W. N. 445=20 I. C. 803=19 C. L. J. 213.

*tunnessa Bibi* (22), and *Shafikul Huq Chowdhry* v. *Krishna Gobinda Dutt* (23). The former of these two decisions is that of a learned Judge sitting singly and the exceptional circumstances of the latter case have been pointed out in the case of *Pitambar Gain* v. *Ram Charan Moral* (20), and it has been explained in this case how that decision does not lay down any exception to the limitation as regards the applicability of the doctrine in cases only where specific performance can be obtained. The preponderance of authority therefore is in favour of the limited applicability of the doctrine.

It is clear, however, that estoppel arising out of the equitable doctrine of part performance will not create title in the plaintiffs if otherwise they had none. The Judicial Committee in the case of *Maung Shwe Goh* v. *Maung Inn* (24) referred to S. 54 of the Transfer of Property Act and it would seem that their Lordships were of opinion in considering whether a contract creates a charge upon or interest in land one has to go by the statute and not upon any principle of English equity. It is true, as has been pointed out in this Court in the case of *Jnan Chandra Das* v. *Rajani Kanta Pal* (25), and in decisions of other High Courts as well, that the Judicial Committee did not consider in that case whether the equitable doctrine of part performance was inapplicable in this country by reason of S. 54 of the Transfer of Property Act; still in a case where, as here, the plaintiffs seek to recover possession on the strength of their title, they cannot succeed when there has been no transfer by a registered deed such as is necessary under that section. [See *Jagadbandhu Saha* v. *Radha Krishna Pal* (26)].

The appellants no doubt came upon the land quite lawfully and were in peaceful possession thereof, having been put in possession by the rightful owners, the defendant Company. It is conceivable, if the defendant Company are estopped by reason of the contract which was partly performed fully on the part of the Appellants' predecessor and in part on behalf of the defendant Company or by reason of some other equitable principle based on their conduct in relation to the land, to take the view that the defendant Company are no better than trespassers. Under such circumstances a question may arise whether prior peaceful and lawful possession may not furnish good title as against a trespasser. Even if those circumstances, however, in view of the decision of this Court in the case of *Nisa Chand Gaita* v. *Kanchiram Bagani* (27), which notwithstanding several dissentient views, is now held to have laid down a principle which is well settled, so far as this Court is concerned [see *Nabakishore* v. *Pora Bewa* (28)], the plaintiff cannot succeed. The result then is that the plaintiffs' prayer *kha* must fail in its entirety.

I now come to deal with prayer *ka* which involves a consideration of the two plots of Sch. *ka*. As regards Plot No. 1 the plaintiffs were dispossessed by the defendant Company at first in respect of one bigha out of it and thereafter the plaintiffs' father put the defendant Company in possession in respect of the rest. The defendant Company have no title to this plot. They had promised to have deed of exchange made in order to effect a transfer which would create their title. There was part performance of the contract on their behalf by reason of the plaintiffs' father being put in possession of the *kha* Schedule lands. From this land the defendant Company subsequently dispossessed the plaintiffs, thereby undoing what they had done in the shape of part performance. I fail to understand how any question of three years' limitation can arise upon the facts or how any questiou of limitation at all can possibly arise. I do not agree with the appellants' contention that Art. 143 of the Limitation Act applies, for in that case some contract which would entitle the plaintiffs to this plot by reason of a forfeiture or breach of condition thereof or some facts which would invoke the operation of S. 119 of the Transfer of Property Act will have to be proved.

At the same time I fail to see why the plaintiffs' suit for recovery of possession should be held to be barred taking the cause of action as having accrued in 1916. The dispossession was

(22) [1919] 25 C. W. N. 905.
(23) [1919] 23 C. W. N. 284=47 I. C. 428=28 C. L. J. 77.
(24) [1917] 44 Cal. 542=38 I. C. 938=44 I. A. 15 (P.C.).
(25) [1918] 22 C. W. N. 522=41 I. C. 850.
(26) [1909] 36 Cal. 920=4 I. C. 414.
(27) [1899] 26 Cal. 579=3 C. W. N. 568.
(28) A. I. R. 1922 Cal. 198=50 Cal. 23.

partly in 1915 and partly subsequent thereto when the defendant Company made up their minds to retain possession of it to the exclusion of the plaintiffs. So far as the one bigha of land which formed the subject-matter of Suit No. 364 of 1916 is concerned, the plaintiffs' claim must be held to be barred by reason of O. 23, R. 1 (3), Civil P. C., no leave having been obtained for the institution of a fresh suit based on the same cause of action; but I am not prepared to accept the respondents' contention that the order of dismissal passed in that suit affects the remaining portion of Plot No. 1. The authority upon which the respondents have relied in this connexion, namely, the decision in the case of *Achuta Menon* v. *Achutan Nayar* (29), if it purported to lay down a general rule, is one from which I would respectfully dissent, and indeed that decision has since been overruled by a Full Bench in the case of *Singa Reddi* v. *P. Y. Subba Reddi* (30).

Then I pass on to Plot No. 2 of Sch. *ka*. The case as regards this plot seems to be still more clear. The plaintiffs must be taken to have been dispossessed in respect of this plot in 1917 or thereafter when the defendant Company began to possess it as being their own property. It is urged on behalf of the respondents that as the Plaintiff No. 3 has stated in his evidence that the price had been settled at Rs. 1,000 per bigha and the Company had been put in possession, the plaintiffs only remedy is to sue for the consideration. I have read the evidence of Plaintiff No. 3 with some degree of care and I am not at all sure that the statement that he made was one about which he had any personal or definite knowledge. He followed it up by saying: "My eldest brother knew that the price was fixed at Rs. 1,000 a bigha." In any case it is only a piece of evidence and not an admission by which the other plaintiffs are bound. On a consideration of the whole of the evidence I am not prepared to hold that there was any completed contract as a result of which the defendant Company was put in possession and I am, therefore, of opinion that a claim for the consideration is not the plaintiff's only remedy.

As regards these two plots the learned Judge, as I have already stated, has given another reason for refusing the plaintiffs' claim, namely, that a decree for possession in respect of these plots would offend against law and equity. This has been sought to be supported on behalf of the respondents on the ground that they have built structures on the land. It will be seen, however, that as soon as there was dispossession of 1 bigha out of Plot No. 1, Tarak Nath Bose sought the assistance of the Court and the Company took possession of the rest of that plot on a promise from which they eventually resiled. As regards Plot No. 2 they obtained possession promising to pay for it which they never did. If they built any structure on the plots as they appear to have done, at considerable cost, the difficulty is entirely their own creation and they can hardly look to the plaintiffs to be reimbursed. It is sufficient to say that there is not a word in the evidence suggesting that the plaintiffs induced any belief in the mind of the defendants that the latter had a title to either of the plots. Indeed this position is directly antagonistic to the Company's case as set forth in their elaborate pleadings.

I turn now to prayer *ga* of the plaint. This prayer must be rejected in view of my finding relating to plaintiffs' story as to the delivery of the documents.

The only other prayer that need be considered is prayer *gha*. In my opinion the plaintiffs are entitled to have the directions which they ask for under this head.

An elaborate argument was advanced on behalf of the respondents on the ground of limitation, it being urged that the plaintiffs cannot recover possession as the defendant Company are their landlords and the suit has been instituted more than two years after dispossession. This argument need not be considered as it relates, if at all, to Sch. kha land the claim as regards which must for the reasons already stated fail.

The result then is that in my opinion the decree passed by the learned Subordinate Judge in so far as it dismisses the plaintiffs' claim for khas possession of the lands of Sch. *ka* is set aside, and in lieu of it they will get a decree in

(29) [1898] 21 Mad. 85.
(30) [1916] 39 Mad. 987=31 M. L. J. 48= 4 L. W. 1=35 I. C. 185= (1916) 2 M. W. N. 1 (F. B.).

addition to the declaration already made by the learned Subordinate Judge, for khas possession of the lands of that schedule with the exception of the one bigha of land covered by the Suit No. 354 of 1916, and also a declaration in terms of prayer *gha* of the plaint. The decree of the Court below as to costs will stand and the plaintiffs will also get their costs in this appeal.

**Greaves, J.**—I agree.

G.B. *Appeal partly allowed.*

---

## A. I. R. 1927 Calcutta 372

RANKIN, C. J., AND C. C. GHOSE, J.

*Sajjad Mirza* and *another* — Applicants.

v.

*Emperor*—Opposite Party.

Criminal Revision No. 1012 of 1926, Decided on 25th November 1926, against the order of the S. J., Malda, D/- 13th September 1926.

*Criminal P. C., S.* 162—*Breach of section not prejudicing accused is not illegality.*

Breach of S. 162 not not prejudicing the accused does not vitiate trial. The purpose of S. 162 is to amend for the purpose of criminal trials certain sections in the Evidence Act which states what evidence is admissible and inadmissible in certain circumstances. [P 372 C 2]

*B. C. Chatterjee* and *Narendra Nath Chatterjee*—for Petitioners.

**Rankin, C. J.**—This Rule was obtained on the single ground that in the course of the trial contrary to S. 162 of the Criminal Procedure Code certain witnesses namely Prosecution Witnesses Nos. 2, 7 and 10 and Court Witnesses Nos. 2 and 3 had been cross-examined with reference to statements made by them to the police in the course of the investigation under S. 161 of the Criminal Procedure Code,

It turns out that as regards the Court Witnesses Nos. 2 and 3 they were not cross-examined contrary to S. 162 so far as can be ascertained at all. With reference to the Prosecution Witness No. 2 he was disbelieved altogether, and the learned Judge has in no way relied upon him nor is it suggested that there was anything in the evidence of the prosecution Witness No. 2 on which the defence could rely as proving this defence story. With regard to the Witnesses No. 7 and 10 it appears that these witnesses were treated as hostile witnesses. They came into the witness box and said that they were not present at the scene of the occurrence at all, which was the case for the defence. The defence did not suggest that they were present at the scene of the occurrence or that they could have given positive evidence. The evidence of these witnesses has been rejected in toto. In these circumstances it is reasonably clear that there has been no prejudice whatever to the defence even if one takes it that one or more of the questions put to the witnesses contravenes S. 162.

I cannot say too emphatically that if there is to be any notion that the smallest breach of S. 162 is to be regarded as entirely vitiating any trial I dissent from the notion altogether. In my judgment there is nothing at all in the section or in the nature of the subject-matter dealt with by the section to warrant that belief. The purpose of S. 162 is to amend for the purpose of criminal trials certain sections in the Evidence Act which states what evidence is admissible and inadmissible in certain circumstances. It is quite true that apart from S. 167 of the Evidence Act it would be open to a person accused to complain for the purpose of S. 537 of the Criminal Procedure Code that he has been prejudiced, e. g., before the jury by certain questions contrary to S. 162 being admitted and allowed to be answered. Apart from question of real prejudice it does not seem to me that it is of any avail in revision for a petitioner merely to show that out of the numerous questions and answers put in the course of the trial one or more of them is contrary to S. 162. That section is very difficult to apply and it will constantly happen, I am afraid, that breaches of section may take place sometimes harmful, sometimes harmless, but always objectionable. But the question in revision is one of such technicality as to enable the trial to be upset when it is clear that there has been no prejudice to the accused.

For these reasons I think this rule must be discharged.

**C. C. Ghose, J.**—I agree.

G.B. *Rule discharged.*

## A. I. R. 1927 Calcutta 373

DUVAL AND MITTER, JJ.

*Adhar Chandra Dey*—Defendant No. 3—Appellant.

v.

*Bipin Chandra Dey* and *another*—Plaintiffs—Respondents.

Appeal No. 1560 of 1924, Decided on 22nd November 1926, from the decree of the 3rd Sub-J., Tipperah, D/- 20th March 1924.

*Landlord and tenant—Tenancies of homestead land and of the nature of village service tenure are not governed by Bengal Tenency or Transfer of Property Act and are not transferable—Surrender by tenant—Former tenant absconding—Landlord can take direct possession.*

Tenancies of homestead land created for the purpose of habitation and purely of the nature of village service-tenure are not governed by the Bengal Tenancy Act or by the Transfer of Property Act and are not transferable except by custom or usage and where there has been an implied surrender of the land and the former tenants have abandoned the land the landlord is entitled to take direct possession of it : 7 *C. L. J.* 309 and 20 *C. W. N.* 322, *Foll.*

[P. 373, C. 2]

*Priya Nath Dutta* for *Birendra Kumar Dey*—for Appellant.

*S. B. Dutta* and *Sourindra Mohan Sen* for Respondents.

**Duval, J.**—In this case the plaintiffs sued to recover possession of a certain piece of bhiti land. Their case was that they had purchased the nishkar right in the same and that one Behari and his father before him held the bhiti land in suit as a tenant-at-will under them. In 1918 Behari left the place and transferred his so-called interest in the land to the other defendants. The defendants at first denied the plaintiffs' title but that denial was subsequently given up. But his main case was that Behari never abandoned the tenancy but had only given it to the present appellants in usufructuary mortgage and so plaintiffs cannot get khas possession. The Munsif found that the so-called usufructuary mortgage was an out-and-out sale and that though, no doubt, Behari was not an agriculturist he held the land with no power of transfer and so decreed the suit. This judgment was confirmed by the learned Subordinate Judge.

Three points have been taken before us. Firstly, it is urged that as both the Courts have found that the land was not agricultural but homestead land the Bengal Tenancy Act cannot apply and no relief can be obtained on abandonment. Secondly, it is urged that if the Transfer of Property Act applies the plaintiff cannot challenge the transfer. Thirdly, it is urged that the deed is not a kobala or an out-and-out sale but only a usufructuary mortgage. As to the third point we may say at once that we have read the deed and considered the evidence of facts which have arisen and it is clear that Behari had abandoned the land and made it over to the present appellants. There is therefore, in our opinion, no point in this contention.

The other two questions may be taken together. It is admitted that the land is homestead land only. Behari was a mason and there is nothing to show that his predecessors were agriculturists either. He was certainly not an agriculturist and he had gone to live elsewhere. The tenancy had been in existence, it would appear, long before the passing of the Transfer of Property Act or the Bengal Tenancy Act. There is no evidence to show that such holdings as these which were purely of the nature of village service tenures are transferable by custom. As to the application of the Bengal Tenancy Act it may be that it does not by itself apply. But as to the Transfer of Property Act it appears to us clear that it also does not apply. The proviso to S. 108 (j) expressly excludes non-transferable homestead and further this tenancy with its incidents came into existence before the passing of that Act. Reference must, therefore, be made to the authorities and in this connexion, I will refer, first to the case of *Hanuman Prasad Singh* v. *Deo Charan Singh* (1) where it was held that previous to the passing of the Transfer of Property Act tenancies of homestead land created for the purpose of habitation were not transferable except by custom or usage and that case further laid down that where there had been an implied surrender of the land and the former tenant had abandoned the land the landlord was entitled to take direct possession of it, The other case to which I am referred is the case of *Ananda Mohan Sah* v. *Gobinda Chandra Ray* (2) which

(1) [1908] 7 C. L. J. 309.
(2) [1916] 20 C. W. N. 322=33 I. C. 565.

are not transferable either absolutely or by way of sub-lease (and so by a usufructuary mortgage).

In this view I must hold that the appellant has no title to remain on the land and that the appeal must stand dismissed with costs.

**Mitter, J.**—I agree.

R.D. *Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 374

CAMMIADE, J.

*Hari Charan Sil* and *another*—Defendants—Appellants.

v.

*Bipin Behari Mukhopadhya* and *others*—Plaintiffs—Respondents.

Appeal No. 745 of 1924, Decided on 17th November 1926, from the decree of the 1st Sub-J., Bakarganji, D/- 4th January 1924.

*Bengal Tenancy Act* (8 *of* 1885), *S.* 40—*Proceedings are miscellaneous proceedings—No procedure is laid down in the Act—Civil P. C., O.* 32, *R.* 3 *does not apply—Civil Court cannot interfere with revenue officer except for illegality.*

Proceedings under S. 40 of the Bengal Tenancy Act are miscellaneous proceedings by a revenue officer in regard to which there are no provisions as to procedure either in the Act itself or in the rules framed under the Act. The provisions of R. 3, O. 32, Civil P. C., have also no application.

Except on the ground of illegality there can be no interference by a civil Court with the orders passed by a revenue officer.

The only matter for a Court to consider in regard to the legality or otherwise of proceedings where a minor has been represented by a guardian who had not appeared is whether the minor was prejudiced by the non-appearance of his guardian. [P. 374, C. 2]

*Asita Ranjan Chatterjee* and *Bhupendra Nath Das*—for Appellants.

*Gunada Charan Sen, Suresh Chandra Talukdar* and *Kiron Mohan Sarkar*—for Respondents.

**Judgment.**—This is an appeal by the defendants in a suit for rent. These defendants had originally held the land on condition of paying half the crop as rent. The rent in kind was commuted as a result of proceedings under S. 40 of the Bengal Tenancy Act. The plaintiffs who are the landlords, sued for arrears of rent in kind. The defendants pleaded commutation and offered to pay rent according to the order of the revenue officer. The plaintiffs took three objections to the order of the revenue officer to the commutation. All the three objections were overruled by the first Court which gave a decree for rent in accordance with the revenue officer's order. In appeal two of the objections taken before the lower Court were given up and the only objection that was pressed was that one of the plaintiffs was a minor whose natural guardian had been served with notice in the proceedings for commutation, and that that natural guardian had not appeared and contested the proceedings before the revenue officer. The learned Subordinate Judge who heard the appeal gave effect to this objection and held that the minor plaintiff had not been legally represented in the proceedings and the proceedings were, therefore, void. He accordingly gave a decree for rent in kind as prayed by the plaintiffs. This finding of law is clearly erroneous. Proceedings under S. 40 of the Bengal Tenancy Act are miscellaneous proceedings by a revenue officer in regard to which there are no provisions as to procedure either in the Act itself or in the rules framed under the Act. The provisions of R. 3, O. 32 of the Code of Civil Procedure have no application. The only matter for a Court to consider in regard to the legality or otherwise of proceedings such as the present where a minor has been represented by a guardian who had not appeared is whether the minor was prejudiced by the non-appearance of his guardian. It is not alleged or suggested that the adult landlords' interests in any way conflicted with those of the minor, and there is no allegation that if the minor had been represented by a guardian who had appeared on his behalf such appearance would have produced a different result in the proceedings. That being so, failure of the guardian to appear is no ground for interference by a civil Court with the orders passed by the revenue officer. There has been no illegality; and, except on the ground of illegality, there can be no interference by a civil Court.

The appeal is accordingly allowed, the decree of the learned Subordinate Judge is set aside and that of the Munsif restored with costs in all Courts.

J.V. *Appeal allowed.*

## A. I. R. 1927 Calcutta 375

MITTER, J.

*Srinath Roy*—Applicant.

v.

*Taraprasanna Roy* and *others*—Opposite Party.

Civil Revision No. 1019 of 1926, Decided on 18th January 1927.

*Provincial Small Cause Courts Act, Art. 31—Suit not for accounts but for price of fruits wrongfully retained by defendant—Article does not apply.*

Art. 31 contemplates that a suit in order to be exempted must be a suit for account, which will include a suit for the profits of immoveable properties belonging to the plaintiffs but which have been wrongfully received by the defendant. Where the suit is not for an account but for a specified sum representing the price of fruits wrongfully retained by the defendant Art. 31 cannot be held to apply: 17 *Bom.* 42 and 32 *Bom.* 560, *Rel. on.* [P 375 C 2]

*Radha Binode Pal* and *Prem Ranjan Roy Chowdhury*—for Applicant.

*Broja Lal Chakravarti, Gunada Charan Sen* and *Abinash Chandra Ghose*—for Opposite Party.

**Mitter, J.**—This Rule was issued on the opposite party to show cause why the decree of the Small Cause Court Judge of Barisal, dated the 23rd August 1926 should not be set aside. This Rule has been obtained by the defendant and the main ground on which it is contended that the decree of the lower Court should be set aside, is that the suit was not cognizable by the Court of Small Causes. The suit to which this Rule relates was commenced by the plaintiffs for realizing the profits of homestead land in which there were a number of fruit trees and other trees, which had been taken by the defendant. The allegation in the plaintiff's plaint is that there was a previous suit between them and the present defendant for declaration of title and joint possession. The plaintiffs purchased the interest of an 8 annas co-sharer in the homestead and the other 8 annas share belongs to the defendant. The Court which tried the title suit, gave a decree in their favour for a declaration of title to a half share in the homestead but refused to give them joint possession in view of the provisions of S. 44 of the Transfer of Property Act. In that suit beyond declaring the plaintiffs title the Court also awarded a certain sum as compensation to the plaintiffs. The present suit was instituted in the Court of Small Causes for compensation due to the plaintiffs as the price of betel nuts and other fruits which had been taken by the defendant since the decree in the title suit. It is argued on behalf of the defendant petitioner that the Small Cause Court has no jurisdiction to entertain such a suit as such a suit is exempted by Article 31 of the Second Schedule to the Provincial Small Cause Courts Act from the cognizance of Small Cause Courts. It is stated that profits of the land belonging to the plaintiffs have been wrongfully taken by the defendant. It is necessary therefore to examine the precise allegation in the plaint. In paragraph 4 of the plaint, the allegation is that the defendant did divide the share of the fruits of trees which he himself appropriated. The case does not seem to me to be one of wrongful receipt of the fruits. It seems to me to be a case where the defendant is said to have rightfully received the fruits but wrongfull retained the same. Consequently in my opinion, the provisions of Art. 31 are not applicable to this case.

There is also another difficulty in plaintiff's way. The suit as framed is not framed as a suit for account; and Art. 31 contemplates that a suit in order to be a suit for account, which will include a suit for the profits of immovable properties belonging to the plaintiffs but which have been wrongfully received by the defendant. Here the suit is not for an account but for a specified sum representing the price of fruits taken. Consequently to such a suit Art. 31 cannot be held to apply. See *Damodar Gopal Dikshit* v. *Chintaman Balkrishna Karve* (1) and the case of *Kesrisang Banesang* v. *Naransang Mannabhai* (2). In either view of the case, even if we read into the plaintiffs plaint an allegation of wrongful receipt by the defendant. I think it would not suffice to bring the suit within the operation of Clause 31, for reason that that clause requires as a condition precedent to its applicabilty that the suit be a suit for an account and the present suit is not a suit for an account. In this view I think the Small Cause Court Judge had jurisdiction to entertain the suit, and Rule must be discharged with costs. I assess the hearing fee at two gold mohurs.

G.B. *Rule discharged.*

(1) [1893] 17 Bom. 42.
(2) [1909] 32 Bom. 560=10 Bom. L. R. 733.

## * * A. I. R. 1927 Calcutta 376

PAGE, J.

*Ramgopal Ghose*—Plaintiff.

v.

*Dhirendra Nath Sen* and *others*—Defendants.

Civil Suit No. 2338 of 1925, Decided on 21st January 1927.

(a) *Civil P. C., O. 6, Rr. 15 and 17—Verification of plaint amended being defective—Plaint will be deemed to be filed on the day of first presentation and not when verification was amended.*

When a pleading does not conform with the provisions of O. 6, R. 15, the defect therein is a mere irregularity that can be cured by amendment and consequently, when the verification in the plaint is amended being originally defective, the plaint must be taken to have been presented not on the day of amendment but on the day when it was first presented : 20 *All.* 442 ; *A. I. R.* 1925 *All.* 79 ; 17 *Cal.* 580 and *A. I. R.* 1921 *P. C.* 50, *Rel. on.* [P. 277, C. 2]

* * (b) *Hindu Law—Joint family—Promissory note executed by karta unconditionally in his own name—Other members or their interest in the joint property is not bound unless their names appear in the pro-note—Plaintiff may elect to sue on the original consideration of the note and the members are entitled to plead want of necessity or benefit.*

The karta of a joint Hindu family, by executing a promissory note unconditionally in his own name for family purposes cannot thereby bind the other members of the family or the interest of any other member in the joint family property. The other members of the joint family would only be bound by a promissory note or bill of exchange signed by the Karta for family purposes if the name of each member of the joint family to be charged appears on the instrument itself and is disclosed in such a way that on any fair interpretation of the document his name is the real name of the person liable upon the bill : 46 *Cal.* 663 ; *A. I. R.* 1925 *Cal.* 1062 and 30 *Mad.* 88, *Foll.* 23 *Mad.* 597 and *A. I. R.* 1922 *All.* 116, *Diss. from* ; 11 *C. W. N.* 139, *Dist.* [P. 379, C. 1 & 2]

A debt contracted under a promissory note signed by a karta for family purposes does not attract the Hindu doctrine of family responsibility for family debts, and such a doctrine is incompatible with the object and effect of the law relating to negotiable instruments.

[P. 381, C. 1]

If a person has lent money to the karta of a joint family for family purposes upon the security of a promissory note, he is entitled to recover the full amount due under the promissory note, irrespective of whether the money was or was not borrowed or applied for family purposes but if he elects to pursue this course, he is restricted to the remedy that he possesses against the party to the promissory note, and must follow the special procedure provided in respect of negotiable instruments. On the other hand in a suit aptly framed he may claim in the alternative the amount of the original debt for which the promissory note was given as security, and may proceed under the Hindu Law against the property of the joint family as a whole ; but if he chooses to adopt the alternative the coparceners will be entitled to raise the defence that the debt was not contracted or the proceeds of the loan applied for family purposes. In short the plaintiff in such a case may enforce the rights that he possesses either under the law relating to negotiable instruments or under the Hindu Law ;but whichever remedy he pursues he is bound by the rules of the Code that he invokes. [P. 381, C. 1]

*J. Bonnerjee*—for Plaintiff.

*Sarat C. Bose* and *M. N. Dutt*—for Defendants.

**Judgment.**—The decision in this suit depends upon whether the karta of a a Hindu joint family, who for family purposes signs a promissory note in his own name, thereby binds the other members of the family or the property belonging to the joint family. The plaintiff claims Rs. 2,026-13-4 as the balance due under two promissory notes drawn in his own favour, one for Rs. 1,500 and the other for Rs. 500, dated respectively 15th November 1916 and 23rd November 1921. Each of these promissory notes purports to have been signed by Norendro Nath Sen and the defendant Dhirendra Nath Sen.

It is not disputed that certain sums were paid to the plaintiff by Noren in reduction of liability under the said notes. The last payment in respect of each note was made on the 12th February 1923.

In 1916 Noren was thirty years of age and at all material times was the karta of an undivided Hindu family living joint in estate and commensality under the Dayabhaga Law. The other coparceners were his brothers Jitendra Nath and the defendant Dhirendra Nath. Noren died in June 1923, and the second and third defendants are his heirs. Upon the evidence I am of opinion that the members of this joint family were not a trading firm, and that the promissory notes in suit were not drawn by Noren as the manager of, or in the course of carrying on a family business ; but I find as a fact that Noren signed the promissory notes in suit as the karta of the family in order to obtain funds to be expended for legitimate family purposes, and I also find that the proceeds of the loans were so applied.

Noren having signed the promissory notes and having undertaken the obliga-

tions thereby created for purposes that were not immoral, the Defendants Nos. 2 and 3, as his heirs, have no defence to the plaintiff's claim under the promissory notes; and a decree will pass against them to the extent to which they are, or have been, in possession of property as the heirs of Noren.

The controversy in this suit is with respect to the liability of the defendant Dhiren, and learned counsel for Dhiren has raised several defences on his behalf. In the first place it is contended that inasmuch as the plaint was not duly verified under O. 6, R. 15 (2) until the 8th December 1926 the plaint must be taken to have been presented for the first time on that day, and as the cause of action accrued on the 12th February 1923 the suit is barred by limitation. The plaint was presented originally on the 25th August 1925 and the verification was in the following form :

I, Ramgopal Ghose, the plaintiff above-named do declare that the statements contained in pragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the foregoing plaint are true to my knowledge, information and belief. I sign this declaration at 19 A, Bagbazar Street in Calcutta this 24th day of August 1925.

An objection having been raised that the verification was not in accordance with O. 6, R. 15 (2) the verification was amended on the 8th December 1926 pursuant to an order of the Court, and as amended ran as follows :

I, Ramgopal Ghose, the plaintiff above named do declare that the statements contained in paras. 1 to 7 of the foregoing plaint are true to my knowledge, and those contained in para. 8 are based on information received by me which I believe to be true. I sign this declaration in the Court house this 8th of December 1926.

In support of his contention learned counsel for Dhiren relied upon the case of *Baroda Prasad Bose* v. *Girija Nath Roy Choudhury* (1). The decision in that case turned upon the provisions of S. 53 (b) of the Civil P. C., (Act 14 of 1882), under which a plaint, if not duly verified, might, at the discretion of the Court "at, or at any time before, the settlement of issues, be returned for amendment." As the order for amendment in that case had not been made until after the issues had been settled it was held to be incumbent upon the Court to order either that the plaint be removed from the file of registered suits, or that the suit be dismissed. Having regard to O. 6, R. 17, however, the Court may now allow a pleading to be altered or amended at any stage of the praceedings, and the case of *Baroda Prosad Bose* v. *Girija Nath Roy Choudhury* (1) no longer can be regarded as *ad rem* of a binding authority. I feel strongly the rights of litigants ought not to be decided upon "the splitting of a straw" per Lindley, L. J., in *Sidebotham* v. *Holland* (2)] and I am glad that I find myself able to hold that there is no substance in this contention. In my opinion when a pleading does not conform with the provisions of O. 6, R. 15, the defect therein is a mere irregularity that can be cured by amendment and the plaint in this case must be taken to have been presented on the 25th August 1925, and not on the 8th December 1926, when the verification was amended : *Rajit Ram* v. *Kateshar Nath* (3), *Fateh Chand* v. *Mansab Rai* (4), *Basdeo* v. *John Smith* (5), *Shibdeo Misra* v. *Ram Prasad* (6). *Mohini Mohun Das* v. *Bungsi Buddan Sahu Das* (7), *Port Canning and Land Improvement Co.* v. *Dharnidhar Sardar* (8) and *Charan Das* v. *Amir Khan*. (9).

The defendant Dhiren further contended that he did not sign either of the two notes, and that his name had been placed thereon without his authority or consent. (The judgment then discussed the evidence and continued.) For these reasons I am clearly of opinion that the defendant Dhiren neither signed the promissory notes himself, nor authorized anyone else to sign them on his behalf. Learned counsel for the defendant Dhiren further contended that the plaintiff's cause of action in this suit, as set out in the pleadings, was based solely upon the obligations created under the promissory notes, and that, as the promissory notes were signed by Noren in his own name without any condition or qualification of his liability as the maker thereof appearing on the document, he alone was liable to pay the amount due according to the apparent tenor of the

(1) [1905] 2 C. L. J. 11.

(2) [1895] 1 Q. B. 378=64 L. J. Q. B. 200=43 W. R. 228=14 R. 135=72 L. T. 62.
(3) [1896] 18 All. 396=1896 A. W. N. 102.
(4) [1893] 20 All 442=1898 A. W. N. 110.
(5) [1899] 22 All. 55=1899 A. W. N. 172 (F.B.).
(6) A. I. R. 1925 All. 79=46 All. 637.
(7) [1889] 17 Cal. 580 (P. C).
(8) [1905] 9 C. W. N. 608.
(9) A. I. R. 1921 P. C. 50=48 Cal. 110=47 I. A. 255 (P. C.).

notes. In my opinion this contention must prevail. It is well-settled according to the principles of Hindu Law that the share of each coparcener in the property of a Hindu joint family is liable for debts contracted by the karta for urgent necessity or for any legitimate family purpose ; and the rule is the same whether the family is governed by the principles laid down in the Mitakshara or in the Dayabhaga : *Dwarkanth Chowdhuri* v. *Bungsi Ch. Saha* (10).

Now, the fundamental basis of this principle of Hindu Law, I venture to think, is the unity of the family, and the doctrine that where one of the members suffers all the members should suffer with him. But it follows from this conception of family union and responsibility (apart from debts contracted by the karta or other member of the family in the course of managing a family trading business, with which I am not concerned in the suit) that the amenability of family property to meet family commitments depends upon whether the debts have been contracted or the proceeds of the loan applied for family purposes. Whenever proceedings have been taken for the purpose of attaching the interest of a coparcener in the family property to liquidate a debt contracted on behalf of the family it has always been open to the coparcener to repudiate liability upon the ground that the debt was not contracted on behalf or for the benefit of the family. This plea, if made out, would provide a valid defence to such proceedings ; and I have not been able to trace in the rules laid down by the Hindu sages or in any commentary upon the principles of Hindu Law any statement or opinion which would lead me to believe that according to Hindu Law the doctrine of family responsibility for family obligations would attach to a transaction in which such a defence would not be available to a coparcener.

Now, when the plaintiff lent to Noren as the karta of the joint family the moneys in respect of which the promissory notes were given, did Noren contract to re-pay the moneys lent by an agreement that was independent of the obligations which he undertook by signing the promissory notes ? If he did, it was open to the plaintiff in proceedings aptly framed to sue him either upon the promissory notes or in the alternative upon the independent agreement into which he had entered. On the other hand, if Noren's obligations under any pre-existing independent agreement to re-pay the moneys lent had become merged in the contract created under the promissory notes, or the receipt of the promissory notes was the consideration for the loans, the plaintiff has no cause of action for money lent, and he cannot recover otherwise than upon the terms of the contract contained in the promissory notes, his sole cause of action being based upon the notes : *Sheik Akbar* v. *Sheik Khan* (11), *Saminathan* v. *Palaniappa Chetty* (12), *Sadusuk Janaki Das* v. *Kishan Pershad* (13); *Hari* v. *Sourendra* (14) and *Parbati Charan Mukerjee* v. *Amarendra Nath Bhattacharjee* (15).

Further, if the plaintiff in this suit is entitled to recover the moneys lent as a debt contracted by Noren as karta otherwise than under the promissory notes, it cannot be doubted that the property of the joint Hindu family, including Dhiren's share therein, is liable for the debt. *Dwarkanath Chowdhuri* v. *Bungsi Chandra Saha* (10). On the other hand, if the plaintiff's sole cause of action is upon the promissory notes, in my opinion the suit against Dhiren must be dismissed. At the hearing I refused to allow an issue to be raised upon the footing that Noren had contracted to repay the loans under an agreement independent of the promissory notes for, having regard to the pleadings, I am of opinion that the cause of action in this suit as framed is based solely upon the promissory notes : *Sadusuk Janki Das* v. *Maharaja Sir Kishan Pershad* (13) and *Vithalrao* v. *Vithalrao* (16).

What, then, are the plaintiffs rights under the promissory notes ? Now, the demands of the law merchant and the exigencies of business require that the obligations of a person who executes a negotiable instrument should be stringent and precise, and that the rights and liabilities of the parties to a negotiable

(10) [1905] 9 C. W. N. 879.

(11) [1881] 7 Cal. 256=8 C. L. R, 528.
(12) [1913] 41 I. A. 142=26 I. C. 228=18 C. W. N. 617 (P. C.).
(13) [1919] 46 Cal. 663=50 I. C. 216=23 C. W. N. 937 (P. C.).
(14) A. I. R. 1925 Cal. 1153.
(15) A. I. R. 1926 Cal. 831=53 Cal. 418.
(16) A. I. R. 1923 Bom. 244.

instrument should be clearly defined and well understood.

It is of the utmost importance that the name of a person or firm to be charged upon a negotiable instrument should be clearly stated on the face or on the back of the document, so that the responsibility is made plain and can be instantly recognized as the document passes from hand to hand.....It is not sufficient that the principal's name should be in some way 'disclosed' : it must be disclosed in such a way that on any fair interpretation of the document his name is the real name of the person liable for the bill .....Their Lordships' attention was directed to Ss. 26, 27 and 28 of the Negotiable Instruments Act, 1881, and the terms of those sections were contrasted with the corresponding provisions of the English statute. It is unnecessary in this connexion to decide whether their effect is identical. It is sufficient to say that these sections contain nothing inconsistent with the principles already enunciated, and nothing to support the contention, which is contrary to all established rules, that in an action on a bill of exchange or promissory note against a person whose name properly appears as party to the instrument, it is open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal *Sadusuk Janki Das* v. *Maharaja Sir Kishan Pershad* (13).

The decisions of the Courts in India prior to this case must now be read in the light of the above observations. Further, if it is proved that legal consideration was given for a bill of exchange or promissory note, the Court will not further enquire into the nature or the adequacy of such consideration nor in a suit upon a bill of exchange or promissory note is the Court concerned with the purpose for which the defendant contracted liability under the instrument, or the use to which the consideration for executing the instrument was put : vide, e. g., Ss. 8, 32, 36, 38, 43, 44, 78 and 118 of the Negotiable Instruments Act (26 of 1881). If the holder of a bill of exchange or promissory note was not able to ascertain upon a perusal of the document and without further investigation the persons who were the parties to it, and the extent of their liability, the purpose for which negotiable instruments were brought into being would be frustrated, and their usefulness seriously impaired. It follows, therefore, that the karta of a joint Hindu family, by executing a promissory note unconditionally in his own name for family purposes, cannot thereby bind the other members of the family, or the interest of any other member in the joint family property. The other members of the joint family would only be bound by a promissory note or bill of exchange signed by the karta for family purposes if the name of each member of the joint family to be charged appears on the instrument itself, and is

disclosed in such a way that on any fair interpretation of the document his name is the real name of the person liable upon the bill :

*Sadusuk Janki Das* v. *Maharaja Sir Kishan Pershad* (13) ; *Sreelal Mangtulal* v. *The Lister Antiseptic Dressing Co., Ltd.* (17), *Hari* v. *Sourendra* (14), *Thaith Othathil* v. *Purushotam Dass* (18), *Subba Narayana* v. *Ramaswami Aiyar* (19), *Govindan Nair* v. *K. Nanu Menon* (20), *Vithalrao* v. *Vithalrao* (16) and *In re Adansonia Fibre Co.* (21).

Learned counsel for the plaintiffs, on the other hand, cited inter alia the following cases in support of his contention that the karta of a joint Hindu family can bind the other members of the family by signing a promissory note for family purposes : *Krishna Ayyar* v. *Krishnasami Ayyar* (22), *Nagendra Chandra Dey* v. *Amar Chandra Kundu* (23), *Baisnab Chandra De* v. *Ramdhan Dhor* (24), *Nataraja Naicken* v. *Ayyasami Pillai* (25), *Krishnanand Nath Khare* v. *Raja Ram Singh* (26), *Raghunath Singh* v. *Sri Narain* (27). *Krishna Ayyar* v. *Krishnasami Ayyar* (22) is the leading case, and the later cases upon which the plaintiff relies do little more than follow the ratio decidendi of the judgments of Shephord and Subramania Ayyar, J.J., in *Krishna Ayyar's* case (22). I must confess, however, that I find it difficult to discover the real ground upon which Subramania Ayyar, J.'s decision was based in that case, for at page 600, his Lordship held that

the rule stated above is not applicable to the present case as the promissory note is not a negotiable instrument within the meaning of the Nogotiable Instruments Act, 1881.

And with all due respect to these learned Judges I find it equally difficult

(17) A. I. R. 1925 Cal. 1062=52 Cal. 802.
(18) [1911] 21 M.L.J. 526=8 I.C. 851=(1911) 1 M. W. N. 45.
(19) [1907] 30 Mad. 88=16 M.L.J. 503 (F.B.).
(20) [1915] 27 M. L. J. 595=26 I. C. 750=(1914) M. W. N. 782.
(21) [1874] 9 Ch. 635=31 L. T. 9=43 L. J. Ch. 732=22 W. R. 889.
(22) [1900] 23 Mad. 597.
(23) [1903] 7 C. W. N. 725.
(24) [1906] 11 C. W. N. 139.
(25) [1916] 32 M. L. J. 354=5 L. W. 410=38 I. C. 339=(1917) M. W. N. 230.
(26) A. I. R. 1922 All. 116=44 All. 393.
(27) [1923] A.I.R. 1923 All. 421=45 All. 434.

to ascertain the reason which led Shepherd, J., in that case to hold the property of the other members of the joint family liable for the debt contracted by the karta. After holding that the members of the family who were not parties to the promissory note were not liable upon the note, his Lordship observedthat

> the liability of persons in the position of the appellants which arises on its being shown that a debt has been properly incurred in the management of the family affairs is founded on Hindu Law, and not on the law of agency,

and that it is

> a liability which is, so to speak, ex-ternal to the obligation arising on the making of the promissory note.

The learned Judge then added that :

> It is argued that the present suit was strictly confined to a demand for payment of the note and that the plaint did not include a demand in respect of original debt. It appears to me on reading the plaint that it contains all the allegations that are needed in order to charge the appellants with liability. The charge is that the debt was incurred for the expenses of the family and that they are bound to discharge it. There can be no doubt that the Courts below as well as the appellants understood fully the case which the plaintiff was seeking to establish.

On the other hand, Davies, J., in a dissenting judgment, held that the plaintiff's cause of action was based solely upon the promissory note, and his Lordship observed that

> the name of no one but the first defendant appears in the promissory note, and that he does not purport to make it on behalf of anyone else but himself: therefore, no one but the first defendant can be held liable to discharge it.

If the ratio decidendi of the decision of Subramania Ayyar and Shepherd, JJ. was that the plaintiff was entitled to recover the amount as a debt contracted for family purposes by a member of the family otherwise than under the promissory note *cadit quocstio* ; but if the real ground of the decision in that case was that the shares of the other coparceners in the joint family property were liable to defray a debt contracted under the promissory note to which they were not parties, I am of opinion that that case was wrongly decided, and having regard to the decision of the Privy Council in *Sadusuk Janki Das* v. *Kishan Pershad* (13) ought not to be followed.

The other cases upon which learned counsel for the plaintiff relied all purport to follow *Krishna Ayyar's* case (22), although in these cases also it is not always made clear whether the learned Judges were basing their decision upon the liability of coparceners for the debt contracted under the promissory note or for a debt under an agreement dehors the promissory note. In *Baisnab Chandra De* v. *Ramdhan Dhor* (24), the decision turned upon the absence in the Indian Negotiable Instruments Act of provisions similar to those to be found in S. 23 of the later English Act (45 and 46, Victoria, Chapter 61) ; but since *Sadusuk Janki Das's* case (13), such an argument will not help the plaintiff.

A contention that prevailed in *Krishnanand* v. *Raja Ram Singh* (26), that a promissory note executed by the karta of a joint Hindu family is in fact signed by the family as the maker thereof because the karta is the head of the family, with all due respect, appears to me to be altogether too fanciful to be accepted. Certain observations passed by Lord Justice James in *In re Adansonia Fibre Co.* (21) will, I think, be found apposite in this connexion. His Lordship observed that

> it is the law of this country, and it has always been the law of this country, that nobody is liable upon a bill of exchange unless his name or the name of some partnership or body of persons of which he is one, appears either on the face, or on the back of the bill. That is the clear law of this country. It was decided in *Nicholson* v. *Ricketts* (28) if authority be required for such a proposition, that an association which is absolutely without a name, has no name by which it can draw, accept or endorse bills of exchange. It was suggested, and the arguments appear to have prevailed with the Vice-Chancellor, that where the members of such an association for the firm constituting such an association, for the purposes of that association, draw or accept bills in their individual names or in the names of their partnerships, that for that purpose and for the purpose of doing equity, or of reaching the real principal, it might be assumed that the name of the partner upon the bill, or the name of the partnership upon the bill might be considered, as being *pro hac vice* the name of the association. That, in my opinion, is a mere *fictio juris*, and although it used to be said in *fictione juris consistit acquitas*. I think that in these prosaic days and in the old days of the Court, we do not indulge in those flights of imagination which our predecessors did.

Learned counsel for the plaintiff further urged that a decision that Dhiren was not liable under the promissory notes would run counter to the Hindu doctrine of family responsibility for family debts. In my opinion, however, that doctrine would be violated if a decree in this case were to be passed against Dhiren, for, as I have ventured

(28) 2 El. & El. 497=8 W. R. 211=1 L. T. 544=29 L. J. Q. B. 55=6 Jur. N. S. 422.

to point out, an essential ingredient of that doctrine is that in proceedings brought for the purpose of rendering the share of a coparcencer in family property liable for a debt contracted by the karta it should be open to the coparcener to prove that the debt was not contracted or the consideration applied for a legitimate family purpose. But if the joint family in the circumstances of this case was deemed to be in law the maker of the promissory notes—and it is upon this footing only that either Dhiren or the family property could be made liable under the promissory notes—such a defence would not be available to the defendant Dhiren in an action by the plaintiff as the holder against Dhiren as one of the makers of the notes. In my opinion a debt contracted under a promissory note signed by a karta for family purposes does not attract the Hindu doctrine of family responsibility for family debts, and such a doctrine is incompatible with the object and effect of the law relating to negotiable instruments. I see no hardship to the plaintiff in so holding.

If a person has lent money to the karta of a joint family for family purposes upon the security of a promissory note, he is entitled to recover the full amount due under the promissory note irrespective of whether the money was or was not borrowed or applied for family purposes; but if he elects to pursue this course, he is restricted to the remedy that he possesses against the party to the promissory note, and must follow the special procedure provided in respect of negotiable instruments. On the other hand, in a suit aptly framed he may claim in the alternative the amount of the original debt for which the promissory note was given as security, and may proceed under the Hindu Law against the property of the joint family as a whole; but if he chooses to adopt this alternative (which may involve the consideration of very different issues) the coparceners will be entitled to raise the defence that the debt was not contracted or the proceeds of the loan applied for family purposes. In short, the plaintiff in such a case may enforce the rights that he possesses either under the law relating to negotiable instruments or under the Hindu law; but whichever remedy he pursues he is bound by the rules of the Code that he invokes. For these reasons, in my opinion, the suit against Dhiren fails, and must be dismissed with costs.

As regards the heirs of Noren, the plaintiff has undertaken to pay the costs of the guardian ad litem, and may add those costs to his claim against the estate of Noren.

G.B. *Suit dismissed.*

---

## A. I. R. 1927 Calcutta 381

MITTER, J.

*Bibhuti Bhusan Rai* and *another*—Petitioner.

v.

*Chinibas Makhal*—Opposite Party.

Civil Revision No. 988 of 1926, Decided on 7th January 1927, from the decision of the 1st Munsiff, Baruipur, D/- 29th June 1926.

*Civil P. C., S. 115—Question of jurisdiction cannot for the first time be raised in revision.*

The question of jurisdiction depends upon disputed facts and it cannot be allowed to be raised for the first time in revision. [P 382 C 1]

*Gunada Charan Sen* and *Syamdas Bhattacharyya*—for Petitioner.

*Mohesh Chandra Chatterjee* and *Srish Chandra Chatterjee*—for Opposite Party.

**Mitter, J.**—This Rule was issued at the instance of the decree-holders in a suit which purports to be one for rent. The decree was obtained against two judgment-debtors who are the sons of one Prem Chand whom the decree-holders admit to be the original tenant. He died leaving behind him three sons, namely, the judgment-debtors and another son by another wife, Chinibas by name, who was a minor step-brother of the two judgment-debtors and who is the opposite party before me. The rent suit was brought on the basis of a kabuliyat said to have been executed by the two step-brothers of the opposite party. The opposite party preferred a claim on the 26th May 1926, claiming possession of the one-third share in the homestead which was attached by the decree-holders in execution of their so-called rent decree, and the claim was allowed by the Munsiff to the extent of one-third of the homestead. Against this order allowing the claim this petition for revision has been put

in and a Rule was issued on the ground that as the decree was a rent decree, Order 21, Rule 58 of the Code of Civil Procedure was not applicable having regard to the provisions of S.143 read with S. 170 of the Bengal Tenancy Act. This objection to the jurisdiction of the lower Court to entertain the claim as the decree was a rent decree was not taken before the lower Court. The opposite party does not accept the position that the decree was a rent decree; on the other hand from the admitted fact that the tenancy originally belonged to the father of the judgment-debtors and the opposite party and that the decree was obtained against the two judgment-debtors alone, and in the absence of any evidence as to the relinquishment by the opposite party of his rights in his father's homestead, it would be difficult to hold that the decree obtained by the petitioner was a rent decree. The question of jurisdiction depends upon disputed facts and if the question had been raised in the lower Court the facts would have been ascertained. I am not prepared to interfere, therefore, with the order of the lower Court under revisional jurisdiction, and allow the question of want of jurisdiction of the lower Court to be raised for the first time here.

The Rule is accordingly discharged with costs. I assess the hearing fee at one gold mohur.

G. B. *Rule discharged.*

---

## * A. I. R. 1927 Calcutta 382

MUKERJI AND GRAHAM, JJ.

*Sahebzada Faridun Seko*—Petitioner.

v.

*Sahebzadi Jehanara Begum*—Opposite Party.

Civil Revision No. 910 of 1926, Decided on 14th December 1926, against an order of the Dist. J., of 24-Parganas, D/- 4th August 1926.

* *Mahomedan Law—Wakf — Court has no power to order a mutwalli appointed during the minority of one entitled to towliat to render accounts on the application of the latter on attaining majority.*

Although the technicalities of law and procedure under the English Law relating to trusts and trustees, cannot be said to apply in their entirety to this country, there is a good deal in common between the appointment of an acting mutwalli during the minority of one who is entitled to the towliat under the foundation deed but happens to be a minor at the time and the appointment under the English statute of a new trustee in the place of an infant trustee appointed by a will. The Court has general powers of supervision over a wakf. In the exercise of such general powers of supervision the Court fixes the remuneration of a mutwalli, removes an incompetent or dishonest mutwalli despite anything to the contrary laid down by the wakif, passes orders authorizing dealings with wakf property if beneficial for the wakf. In the exercise of such general powers of superintendence and for the purpose of removing the mutwalli or taking action against him, the Court may on a proper case being made out call for his accounts, but there is no authority under which the Court has the power to order a mutwalli to render accounts on the application of the minor on his attaining majority whereby he seeks to use the machinery of the Court for that end. The property in the case of a wakf does not vest in the mutwalli; the ownership is extinguished altogether or is vested in the Almighty and the mutwalli is, as the name implies, a mere manager on His behalf.

[P 386, C 1,2]

*Hira Lal Chakravarti* and *Syama Das Bhattachariya*—for Petitioner.

*Sarat Chandra Bose* and *M. Md. Nurul Huq Chowdhuri*—for Opposite Party.

**Mukerji, J.**—Zuhura Begum, one of the wives of Tipoo Sultan, by a deed, dated 1255 B. S. (1848), founded a wakf, to which the proceedings which form the subject-matter of this Rule relate. By this deed one Haider Seko was appointed the first mutwalli and he was to remain in possession of the endowed property *naslan bad naslan*. Haider Seko was succeeded in the office of mutwalli by his son Mahomed Seko and then by his granddaughter Rowshan Jehan Begum. In 1909 one Fakir Mahomed and another person instituted a suit (No. 37 of 1909) for removing Rowshan Jehan Begum from the mutwallishin. During the pendency of this suit, and in January 1910, Rowshan Jahan Begum died leaving an infant daughter Jehanara Begum by her first husband and cousin Asab Seko. The said Jehanara Begum is the opposite party in this Rule. Rowshan Jehan Begum had been married a second time, on the death of her first husband to Faridun Seko who is the petitioner before us. On the death of Rowshan Jehan Begum, Suit No. 37 of 1909 was dismissed on the 1st February 1910 as being no longer maintainable. Several proceedings then arose in connexion with

this wakf of which mention need be made here of the following.

One Mirza Mahomed Ali Noki applied to be appointed mutwalli alleging that Jehanara Begum was a minor and so ineligible to be appointed. To this objections were put forward by one Abbas Ali and one Ahmed Seko respectively, each of them also claiming to be appointed mutwalli in his own right. The opposite party Jehanara Begum, represented by her stepfather Faridun Seko, the petitioner, also objected to the appointment of Mirza Mahomed Ali Noki and put forward her own right to the mutwalliship. Aga Abbas Ali and Faridun Seko also filed independent applications under Act 8 of 1890 to be appointed guardian of the person and property of the minor Jehanara Begum. On the 10th August 1910 the District Judge of 24-Pargannas made an order by which it was directed that in the event of the appointment of Jehanara Begum as mutwalli, Faridun Seko would be appointed guardian of the person and property of the minor on his furnishing substantial security. Subsequently all the aforesaid proceedings came up for final decision before Mr. Richardson, as he then was, the District Judge of 24-Pargannas.

On the 21st December 1910 by an order which is remarkable for the anxious and punctilious care with which the interests of the endowment as also of the minor were meant to be safeguarded—a characteristic of all orders in similar matters which used to be passed by that learned Judge—the learned Judge disposed of all the said proceedings. He held that the applications of Mirza Mahomed Noki, Aga Abbas Ali and Ahmed Seko to be appointed mutwalli, in so far as they purported to claim the office of mutwalli in supersession of Jehanara Begum, all failed and were to be dismissed. He held that as he was not going to appoint Jehanara Begum as mutwalli at the moment, the condition mentioned in his predecessor's order, dated the 10th August 1910, under which Faridun Seko was to be appointed guardian of Jehanara Begum on his furnishing sufficient security, was not fulfilled and that order became inoperative. He then proceeded to say this:

> But inasmuch as I expressly recognize and declare the right of Jehanara Begum to succeed to the office when she attains her majority, the position is very much the position which my predecessor contemplated and I am not prepared definitely to select any person other than Faridun Seko to discharge the duties of the office during the period of minority. In other words, I think that it would be a hardship possibly contrary to the spirit of the foundation deed not to give him an opportunity to show his fitness to discharge those duties. But I do not select him finally.

Four conditions were laid down for the aforesaid appointment of Faridun Seko: (1) That he should within a month file a complete and detailed list of all the wakf properties stating all charges, incumbrances and liens thereon; (2) that he should within the said time file a scheme of management for the approval of the Court showing the income of the property and how it was to be expended; (3) that the list of properties and scheme of management should be assented to by Mirza Mahomed Ali Noki and Aga Abbas Ali; and (4) that he should give such security as he would be directed to do. He expressly stated in the said order thus:

> Lastly as to the appointment of a guardian for Jehanara Begum. As I understand the matter, if some one is appointed to discharge the duties of mutwalli during her minority, it will not be necessary to appoint a guardian of her property. If Aga Abbas Ali is willing to act as guardian of her person and to give such security as I consider necessary to enure her welfare, I propose to appoint him in that capacity.

On the 27th March 1911 the petitioner furnished the requisite security for Rs. 4,000 to the exact terms of which reference will be made hereafter.

This arrangement appears to have been affirmed by this Court on the 30th November 1911 on an appeal which was preferred from the aforesaid order. Thereafter in 1912 a suit, being Suit No. 31 of 1912, was instituted under the provisions of S. 92 of the Civil Procedure Code by the aforesaid Fakir Mahomed Ali Noki praying for a declaration that Mt. Jehanara Begum was not entitled to be mutwalli, for the removal of the petitioner Faridun Seko from the post of mutwalli that he was then occupying and for other reliefs. A Receiver was appointed in respect of the wakf properties during the pendency of the said suit. This suit was dismissed by the trial Court on the 23rd March 1916. Mr. Cuming, the then District Judge, who tried the same having delivered a scathing judgment disapproving of the conduct

of the plaintiffs therein and strongly condemning the motive which actuated the institution thereof. An appeal was taken from this decision to the High Court, and eventually on a compromise being arrived at the suit was withdrawn. The Receiver, who, as I have already mentioned, was appointed in the suit, was discharged on the 11th February 1919. It should be mentioned here that while the Receiver was in charge of the wakf properties, the petitioner Faridun Seko continued to act as mutwalli as before.

The proceedings with which we are concerned in the present Rule originated with an application filed by the Opposite party Jehanara Begum in the Court of the District Judge of 24-Pargannas on the 30th June 1926. The opposite party stated in that application that she had attained majority and that after attaining majority she had assumed the office of mutwalli and was acting as such and that she had demanded accounts and papers, etc., that were with the petitioner in order to be acquainted with the state of affairs of the wakf but had not been able to obtain them. She stated further that she had asked the petitioner to render accounts but that the petitioner had put her off again and again. She prayed in this application for the following reliefs:—

(b) That the late acting mutwalli be directed to render accounts about the period of his management and to make over the accounts, title-deeds, documents and all other papers relating to the wakf estate with the cash in hand to your petitioner. (c) to pass order for delivery to your petitioner of the accounts and papers relating to the wakf estate during the period the Receiver was in possession as well as the papers and accounts submitted by the opposite party (meaning the petitioner in this Rule) for the amounts drawn by him from the Receiver and also the accounts and papers submitted by him to the Court in connexion with the wakf estate. (d) That if necessary to assign the aforesaid security bond in favour of your petitioner.

Prayers (a) and (e) need not be set out. It was not mentioned in this application when according to the applicant she had attained majority but from an affidavit which has been filed in this Court it appears that her contention is that she did so in 1924. This application was opposed by the petitioner Faridun Seko who took various pleas, amongst which may be mentioned the objection that he is not liable to render any accounts, that Jehanara Begum attained majority in 1918 or 1919 and her right to the office of mutwalli was barred, that in point of fact she had not assumed the office and that under the towliutnama of Zohura Begum the petitioner Faridun Seko is entitled to the office of mutwalli. The District Judge of 24-Pargannas has dealt with these proceedings by an order, dated the 4th August 1926.

This order calls upon the petitioner to render accounts for the period commencing from the 11th February 1919, the date on which the Receiver was discharged and ending with the 1st January 1924, which was the date up to which the accounts were pressed for on behalf of the applicant Jehanara Begum. The reason upon which this order is founded is contained in the following passage of the judgment of the learned Judge:

It cannot be disputed that the acting mutwalli Sahebzada Faridun Seko was appointed to act as mutwalli under the orders of this Court, dated the 27th March 1911. In appointing the opposite party (meaning the petitioner in this Rule) the District Judge was presumably acting in his capacity as Kazi and it seems to me that, on the analogy of the Guardians and Wards Act, the District Judge, acting as the Kazi, would have the same powers of control over an acting mutwalli appointed by him as the Court has over the guardian of a person appointed under the Guardians and Wards Act of 1890 and therefore has jurisdiction to call upon an acting mutwalli to render accounts. It is admitted that the opposite party (meaning the petitioner in this Rule is still in possession of the wakf property, and although he was appointed to act as mutwalli during the terms of the petitioner's (meaning of Jehanara Begum) minority, it does not appear that he has ever been discharged. He is therefore liable to render accounts to the petitioner (meaning Jehanara Begum.)

It is the validity of this order which is questioned before us on behalf of the petitioner Faridun Seko in this Rule.

The first contention that has been urged on behalf of the petitioner is to the effect that Jehanara Begum had no locus standi to make the application that she did. In support of this contention reliance has been placed upon the terms of the order passed by Mr. Richardson on the 21st November 1910, and especially to the following passage in that order:

I am not prepared definitely to select any person other than Faridun Seko to discharge the duties of the office during the period of minority. In other words, I think that it would be a hardship possibly contrary to the spirit of the foundation deed not to give him an opportunity

to show his fitness to discharge those duties. But I do not select him finally.

The opposite party on the other hand relies upon the passage in the order which runs in these words :

I expressly recognise and declare the right of Jehanara Begum to succeed to the office when she attains her majority.

The petitioner has also pointed out that Mr. Cuming in his judgment in Suit No. 31 of 1912, dated the 4th March 1916, interpreted the aforesaid order of Mr. Richardson as indicating that "Mr. Richardson did not appoint her mutwalli. He merely recognized her right to be mutwalli when she came of age." I find, however, that in the order which is complained of in the present Rule, there is a clear statement that it was admitted before the learned Judge that Jehanara Begum is, as a matter of fact, the legal mutwalli in respect of the wakf property and the contention that was urged before him—"faintly" as the learned Judge has put it—was that she had lost her right to the mutwallishiip by having acquiesced in the appointment and continuance of Faridun Seko as mutwalli. In view of this attitude taken up by the petitioner before the learned Judge I do not feel disposed to allow the petitioner to urge this contention at this stage, but I must not be understood as expressing any opinion one way or the other as to the merits of this contention. I am of opinion that the question is of very little importance now, because after all it is the liability or otherwise of the petitioner to render accounts to the Court with which we are concerned, and it does not really matter whether that liability has been declared at the instance of a person who has or has not a locus standi to move the Court for that purpose.

The second ground upon which this Rule has been pressed relates to the legality of the order itself, it being urged that the Court has no jurisdiction to call upon the petitioner to render accounts. It is clear to my mind that the liability of the petitioner to render accounts on being called upon by the Court to do so must flow from some statutory or from some contractual obligation. It is necessary then to examine the position from both the aforesaid points of view.

The petitioner was appointed to act as mutwalli during the minority of Jehanara Begum. Now, what is the precise position of a mutwalli appointed under such circumstances under the Mahomedan Law ? In Ameer Ali's Mahomedan Law, 4th Edition, pages 446-447, the matter is dealt with in this way :

So also in Fatawa-l-Ankariwa, Vol. II, p. 217 :

Q.—If the wakif has made a wakf with the condition that its governance shall belong to his children, and among his children are both major and minor, to whom is the towliat to be given ?

A.—The Kazi shall appoint somebody in place of the Sighir (the infant) and if he may appoint the adult children as the kaim mukam (deputy) of the minors.

And quoting Surrat-ul-Fatawa

If the towliat has been entrusted by the wakif to a boy his towliat will remain in abeyance or ineffective until he attains majority when the trust will be made over to him.

And quoting Fatawa-l-Ankaria, Vol. II, p. 217, from the Asaaf

If the wakif appoints as mutwalli a person who is absent the Kazi has the power of nominating in his place another for the time being, and when the mutwalli appointed by the wakif arrives the trust will revert to him.

From these passages it seems to follow that the petitioner when he was appointed mutwalli or acting mutwalli was put very much in the position of a trustee to administer the trust during the minority of Jehanara Begum and until she or somebody else came to assume the office of mutwallishiip. Of course there is little analogy between the position of a trustee as understood in the English sense of the term and that of a mutwalli in whom no property is vested, but as pointed out by the Judicial Committee in the case of *Vidya Varuthi Tirtha* v. *Balusami Aiyar* (1) in view of the obligations and duties resting on him he is answerable as a trustee in the general sense for maladministration. Under the English law a Court of equity interferes in the management and administration of a trust where there is no trustee to carry it on or where the trustee wrongfully declines to act or is acting improperly or where difficulties have arisen which cannot be removed without its assistance or where the decision of the Court on a doubtful question connected with the trust or the proper administration thereof is sought by the trustee or by the *cestui que trust*, and the Court orders the trust funds to be paid into Court where it is necessary or expedient for the preservation of the trust estate or the due performance of the trust.

(1) A. I. R. 1922 P. C. 123=48 I. A. 302=44 Mad. 831.

Where one of the original trustees is an infant and inconvenience to the trust estate is caused thereby, the Court may appoint a new trustee in his place, and a new trustee may also be appointed by the Court where the trust property is vested in or stands in the name of a lunatic or a person of unsound mind or in the place of a trustee who is physically incapable or is a lunatic or of unsound mind. Such appointments, under whatever name they are made, either new trustees, judicial trustees, etc., are made under the general power or special authority given by the statute. The intervention of the Court in such and similar matters is obtained by an action or in a suitable case by an originating summons. In proceedings against trustees for wilful default accounts may be directed on proof of a single instance of wilful default, but accounts on the footing of wilful default cannot be obtained on an originating summons.

The technicalities of law and procedure under the English law relating to trusts and trustees, no doubt, cannot be said to apply in their entirety to this country, but there is a good deal in common between the appointment of an acting mutwalli during the minority of one who is entitled to the towliat under the foundation deed but happens to be minor at the time and the appointment under the English statute of a new trustee in the place of an infant trustee appointed by a Will. In England the order for the appointment of a new trustee is made without prejudice to an application by an infant on his coming of age to be restored to the trust [*Re Shelmerdine* (2), *Re Brunt* (3) and *Re Tallatire* (4)].

The Mahomedan law provides that in such cases the Kazi should appoint somebody who should get the office on attaining majority. This power of the Kazi has been judicially recognized in the case of *Piran* v. *Abdool Karim* (5). Mahomedan jurists maintain that the Court has general powers of supervision over a wakf. In the exercise of such general powers of supervision the Court fixes the remuneration of a mutwalli, removes an incompetent or dishonest mutwalli despite anything to the contrary laid down by the wakif, passes orders authorizing dealings with wakf property if beneficial for the wakf. In the exercise of such general powers of superintendence, and for the purpose of removing the mutwalli or taking action against him, the Court may, perhaps on a proper case being made out, call for his accounts, but we have not been referred to any provision of the law, nor have I been able to discover any under which the Court has the power to order a mutwalli to render accounts on the application of the minor on his attaining majority whereby he seeks to use the machinery of the Court for that end. It does not seem to me that the rights and obligations of an acting mutwalli appointed under circumstances such as are disclosed in the present case are in any way different from those of a permanent mutwalli appointed through the intervention of the Court, and in my view the only difference lies in the periods for which they are respectively appointed.

There is a case in the books in which a mutwalli was directed to file in Court every six months a true and complete account of his income, expenditure and dealings with the property belonging to the endowment [*Syed Imdad Hossain* v. *Mahomed Ali Khan* (6)]. The order in that case, however, was made by this Court on an appeal from a decision in a suit in which the mutwalli had been proved to have been guilty of waste, and the order was made as it was considered more convenient to be carried out than the order of inspection that had been originally made therein. In my opinion it would be quite wrong to import into the case the considerations which arise as between a minor and a guardian appointed in respect of his properties under the Guardians and Wards Act 8 of 1890. The property does not vest in the mutwalli; the ownership in the case of a wakf is extinguished altogether or is vested in the Almighty and the mutwalli is, as the name implies, a mere manager on His behalf. Besides, to impose a liability on the analogy of the provisions of the Guardians and Wards Act, 8 of 1890, in the absence of any provision in Mahomedan law or in any enactment, is, in my opinion, not permissible. It should be remembered that Mr. Richardson

(2) [1864] 33 L. J. Ch. 474=11 L. T. 106.
(3) [1883] W. N. 220.
(4) [1895] W. N. 191.
(5) [1892] 19 Cal. 203.
(6) [1874] 23 W. R. 150.

expressly declined to appoint the Petitioner as guardian of Jehanara Begum.

Turning now to the question of contractual obligation, we have to scrutinize the terms of the bond which was furnished by the petitioner and his surety.

The bond runs in these words:

In the Court of the District Judge of 24-Pargannas, Misc. J. Case No. 18 of 1910 (wakf).

Know all men by these presents that we, Faridun Shekoh, son of late Shahebzada Mahomed Safdur Shekoh of Tollygunge, Thana Tollygunge Sudder, principal, and Rup Chand Ghose, son of late Becharam Ghose, by caste Gope, by profession landholder and contractor of 12 and 13, Joynuddi Mistri's Lane, Chetla, Thana Alipur, surety, are held and firmly bound on to the District Judge of 24-Pargannas and his successor in office for the time being in penal sum of Rs. 4,000 four thousand only to be paid to the said District Judge of 24-Pargannas or his successor in office, for which payment we bind ourselves, our heirs, executors and administrators only and every one of them jointly by these presents.

(Sd.) Md. Faridun Shekoh,
*Principal.*
(Sd.) Rup Chand Ghose,
*Surety.*

Whereas the said District Judge of 24-Pargannas has directed in the above case by an order, dated the 27th March 1911, the said principal to furnish a security in sum of Rs. 4,000 four thousand only for due discharge of duties as mutwalli of the wakf estate endowed by the late Shahebzada Zurra alias Zohra Begum, widow of Tipoo Sultan, and whereas the said Faridun Shekoh in consideration of such appointment has engaged for due collection, getting in and management of the said wakf estate. Now the condition of the above written obligation is such that if the said Faridun Shekoh shall duly collect, get in and manage the said wakf estate and shall do all things necessary and required by law in order to the due collection, getting in and managing the said wakf estate, the above written obligation shall be void and of no effect; or else shall remain in full force and effect till his mutwallishiip, dated the 29th March 1911.

(Sd.) Faridun Shekoh,
*Principal.*
(Sd.) Rup Chand Ghose,
*Surety.*

The bond, it will be seen, closely follows that prescribed under S. 34 of the Guardians and Wards Act 8 of 1890, but the stipulation that if the person appointed:

do and shall justly and truly account whenever called upon to do so, for what he may receive in respect of the property .and do and carefully observe, perform and keep all orders and directions of the said Court of the District Judge touching or concerning the estates and effects of the said minor and his property and touching and concerning all such moneys and estates as he shall receive as such guardian as aforesaid and in all things conduct himself properly, then the above written bond or obligation shall be void and of no effect, otherwise the same shall remain in full force and virtue

is absent in it. Instead of this stipulation, the liability is confined only to "due collection, getting in and management of the wakf," and an obligation to render accounts to the Court and a reservation of the power in the Court to call for accounts cannot, in my opinion, be inferred from the terms. The omission and modification to which I have referred, in my opinion, seem to be deliberate. To add to it there is the significant fact that during the long years that have elapsed the petitioner was never asked by the Court to submit his accounts nor did he as a matter of fact submit any. He from time to time made applications for obtaining the sanction of the Court to validate alienations or transfers and in support of such applications only showed the then existing state of the finances in the shape of statements which, however, can in no sense be regarded as submission of accounts to the Court.

I am accordingly of opinion that whatever other remedies the opposite party may have against the petitioner, the proceedings to which she has resorted in the present case are wholly inappropriate and the learned Judge's order was without jurisdiction, and that order must be discharged.

The rule is accordingly made absolute with costs three gold mohurs.

**Graham, J.**—I concur, though not without some degree of hesitation. The main question involved in the case is whether the acting mutwalli, the petitioner before us, is liable to render accounts to the District Judge by whom he was appointed in that capacity, and whether the learned District Judge had jurisdiction to make the order demanding accounts.

There cannot be any doubt, nor has it been disputed, that the District Judge had by virtue of his powers as Kazi jurisdiction to make the appointment. The facts are that the petitioner was appointed acting mutwalli so far back as the 27th March 1911. He acquiesced in the appointment, has been managing the wakf properties ever since, and from time to time submitted some sort of accounts

to the Court on occasions when he sought permission to effect transfers or leases of the properties. In these circumstances it might be thought that the Court, which had the power to make the appointment, would have power to make orders incidental thereto and arising therefrom, e. g., to call for the submission of accounts.

It is noteworthy, however, that in this particular instance no stipulation was made by the Court for the rendering of accounts; the security bond is silent on the point, nor have accounts ever been called for, and it seems probable that the omission to make any such order was not due to inadvertence on the part of the learned District Judge, but to a correct appreciation of his powers. As my learned brother has pointed out, we have not been referred to any authority in support of the proposition that the Court can in a case like this demand the submission of accounts. Such accounts could not be demanded from a mutwalli appointed by the Court, and the position of the Court can hardly be stronger in the case of an acting mutwalli than in the case of a mutwalli. If there had been allegations of malfeasance, the position would no doubt have been different. But that is not the case here.

On the whole, therefore, I agree with my learned brother that the rule must be made absolute.

G.B. *Rule made absolute.*

---

## A. I. R. 1927 Calcutta 388

GRAHAM, J.

*Dhananjoy Das* and *others* — Petitibners.

v.

*Ram Chandra Das*—Opposite Party.

Civil Revision No. 273 of 1926, Decided on 23rd June 1926, from the decision of the Munsiff, Bhola.

(a) *Provincial Small Cause Courts Act, S. 32 (2)—Sub-S. (2) applies where Officer entertaining suit is invested with Small Cause Court powers.*

Sub-S. (2) of S. 32 is applicable to the case where the same officer who originally entertained the suit is subsequently vested with Small Cause Court powers or with increased powers. [P. 389, C. 1]

(b) *Civil P. C., S. 115—Objection as to jurisdiction cannot be raised for first time in revision.*

High Court will decline to interfere in revision on an objection as to jurisdiction where it has been shown that no objection was taken and that the parties submitted to the jurisdiction of the Court: 19 *C. W. N.* 900, *Rel. on.* [P. 389, C. 2]

*Mahendra Kumar Ghose* for *Suresh Chandra Talukdar*—for Petitioners.

*Probodh Chandra Kar* — for Opposite Party.

**Judgment.**—In this case a Rule was issued calling upon the opposite party to show cause why the order of the Munsiff of Bhola, 1st Court, exercising Small Cause Court powers dated the 18th December 1925 dismissing a suit for money brought by the petitioners should not be set aside upon certain grounds stated in the petition to this Court. The suit in question was instituted on the 12th February 1925 and was for realization of a sum of Rs. 195-1-0 upon a bond alleged to have been executed by the defendant, now the opposite party. It appears that from that date until the 18th December 1925 the suit in question was treated as an ordinary money suit. The written statement was filed on the 8th April 1925 and issues were settled on the 30th April 1925. After that there followed a number of adjournments. Subsequently another Munsiff took charge of the Court and on the 18th December 1925 that officer was invested with Small Cause Court powers up to Rs. 250. Thereafter he passed an order transferring the suit in question, in which no evidence had up to then been recorded, from his ordinary file to his Small Cause Court file and disposed of the case under the Small Cause Court procedure and dismissed it as already stated. The plaintiffs then moved this Court and obtained the present Rule. Three points have been urged by the learned vakil who appears on their behalf: firstly that the Court below acted without jurisdiction and with material irregularity in disposing of the case summarily as a Small Cause Court suit instead of as a regular suit to the great inconvenience and prejudice of the petitioners; secondly, that the learned Munsiff acted without jurisdiction and with material irregularity in disposing of the case summarily as a Small Cause Court suit inasmuch as the suit was regarded by the parties as a money suit

from the 12th February up to the 18th December 1925 without the consent of the petitioners and to their great inconvenience and prejudice; and thirdly and lastly that in view of the fact that the plaintiffs proved their case and in view of the finding that the defendant "looks and speaks like an idiot," the learned Munsiff erred in law and acted with material irregularity in dismissing the suit. The first two points may be taken together. Reference has been made to sub-S. (2) of S. 32, P. S. C. C. Act and also to cases *Mahima Chandra Sirdar* v. *Kali Mandol* (1) and *Hari Kamayya* v. *Hari Venkayya* (2), and it has been argued that for the purpose of jurisdiction it is necessary to look to the state of things at the date when the suit was instituted, and that the fact that the Munsiff was subsequently vested with Small Cause Court powers up to Rs. 250 did not confer upon him jurisdiction to try the suit under that procedure. I do not think that there is any substance in this contention. Apparently sub-S. 2 of S. 32 is applicable to the case where the same officer who originally entertained the suit is subsequently vested with Small Cause Court powers or with increased powers, and the cases which have been referred to are cases of that description, where, for example, an officer having Small Causes Court powers of a similar denomination is subsequently empowered with greater powers.

Further more it is to be observed in this case that no objection was made by the plaintiffs at the time when the suit was transferred from the ordinary file to the Small Cause Court file. The statements which have been made in paragraph 4 of the affidavit in this connexion have been traversed in para. 3 of the counter-affidavit filed on behalf of the opposite party. It is stated therein that when the presiding Judge transferred the case from the ordinary file to the Small Cause Court file neither of the parties or their pleaders raised any sort of objection to the said transfer of the case from one file to another and that both the parties tendered their respective evidence to the Court and the case was fully argued by the pleaders of both the sides. Having regard to this fact I do not think that this Court ought now in revision to entertain the objection which was not raised at the time of the trial. It seems clear that the parties submitted to the jurisdiction of the Court and that the decision having been unfavourable to the plaintiff-petitioners they now seek in their present application to find some defect in the proceedings relating to the trial. This Court has on numerous occasions declined to interfere in revision where it has been shown that no objection was taken and that the parties submitted to the jurisdiction of the Court: *Srimati Parameswari Dassi* v. *Jagat Chandra Das* (3). In the case just referred to their Lordships quoted with approval certain remarks made in another case to which they referred.

We are not in favour of assisting parties to set aside a decree upon points which they did not raise before the Court which tried the matters in issue and of which they gave no notice to opposite party.

I do not think, therefore, that it can be said that there has been any error of law in this case having regard to all the circumstances of the case. The Munsiff who subsequently took charge of the Court was empowered with Small Cause Court powers up to Rs. 250 and he therefore had jurisdiction to try this suit the value of which was within that amount. He exercised that jurisdiction, and I am not prepared to say that any error of law has been committed which renders interference necessary.

The third point may be briefly dismissed as it clearly involves a question of fact and I am not disposed to go into the facts of the case.

In my judgment no case has been made out for interference in revision and the Rule is accordingly discharged with costs. I assess the hearing-fee at one gold mohur.

G.B. *Rule discharged.*

(1) [1907] 12 C. W. N. 167.
(2) [1902] 26 Mad. 212 (F. B.).
(3) [1914] 19 C. W. N. 900=27 I. C. 972=21 C. L. J. 141.

## A. I. R. 1927 Calcutta 389

GREAVES, J.

*Lionel Ashby Dunkley*, and *another*—*In the matter of.*

Application for the appointment of a guardian, Decided on 20th August 1926.

*Guardians and Wards Act, S. 7 (3)—Guardian appointed by will—Other person should not be appointed unless such guardian is unfit.*

Where a guardian has been appointed under the Will of the minors' father, it is impossible for Court to ignore or disregard the provisions

of the Will unless it is satisfied that the person appointed as guardian under the Will is not a fit and proper person to have their custody. In such a case the Court must consider the welfare of the minors and also that any order that might be made will not infringe sub-S. (3) of S. 7 of the Act. [P 390, C 2]

*C. Bagram & S. Ghosh*—for Petitioner.

*S. N. Bannerjee*—for Respondent.

**Greaves, J.**—This is an application for the appointment of a guardian of two minor boys. There are two applicants for guardianship, the mother and the paternal grandmother of the minors. The father of the minors died a short time ago and by his Will which bears the date the 28th May 1926, he appointed his mother Mary Wilfred Dunkley during her lifetime and after her death his trustee D. William Dunkley, to be the guardian of his minor sons Lionel Ashby and William Gregory Dunkley and certain sums of money are directed to be invested or deposited in the Imperial Bank of India for the benefit of the minor sons and the trustee is directed to pay to the testator's mother money from the Bank for maintaining and bringing up the minors in a suitable manner, and on attaining majority they are entitled to the balance of any money remaining in the Bank to their credit. It is not necessary I think, to go into many of the matters that are raised in the affidavits on both sides, either with regard to the alleged separation between the testator and his wife some few weeks before his death or to deal in detail with the charges that are made in the affidavits on both sides against the moral character of the other. I am bound of course in an application of this kind to consider only the interest of the minors themselves and carefully weigh any charges of immorality or misconduct that are made against any person who is applying for guardianship of the minors. I have carefully considered the various affidavits which have been filed on both sides and I am not prepared after so doing to attach any credence to the charges of immorality either on one side or the other. The result is that I have to approach the question from the point of view of the testamentary guardianship created by the Will on the one hand and the rights of the mother on the other. I confess I feel the greatest hesitation in depriving the mother of the guardianship of two minor boys of seven and five years of age unless I am constrained by law to do so or unless of course as is not the case here, the mother is a person unsuited to have the custody of her two minor sons; but I am bound to take the law as I find it, and it seems to me that in view of the provisions of the Guardians and Wards Act and the decided cases it is impossible for me to ignore or disregard the provisions of the testator's Will unless I am satisfied that the paternal grandmother of the infants is not a fit and proper person to have their custody and as I have already indicated I am satisfied that this is not the case—I cannot ignore the provisions of the Will.

There are two authorities one of this Court, and the other of the Bombay Court. The authority of this Court is to be found in *In the matter of Akshoy Kumari Devi* v. *Hazari Dasi Devi* (1), where Sir Lawrence Jenkins says that in an application such as the one before me I must consider the welfare of the minor and also that any order I make will not infringe sub-S. (3) of S. 7 of the Act, and the case of *Sayad Shahu* v. *Hapija Begum* (2) points in the same direction. S. 7, sub-S. (3) of the Guardians and Wards Act provides that where a guardian has been appointed by a Will or other instrument or appointed or declared by the Court, an order under the section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared have ceased under the provisions of the Act. Of course this must be read subject to the provisions of S. 15 of the same Act which provides that on the death of a European British subject, who by his Will or other instrument appoints a guardian of his minor child the Court may appoint the mother to be the guardian of the child jointly with the guardian appointed by the father. A European British subject is defined by Cl. 4, sub-S. (7) of the same Act. The result, I think, therefore, is that I am bound to declare that by the testator's Will Mary Wilfred Dunkley is the guardian of the person and property of the two minors, because I am satisfied that it is for the welfare of the minors under S. 7, that is to say, I am not able to say

(1) [1915] 42 Cal. 953=28 I. C. 972=19 C. W. N. 513.

(2) [1892] 17 Bom. 560.

that she is not a fit and proper person to take up the guardianship entrusted to her by her son by his Will made a few days before his death. I consequently make that declaration.

I then have to consider whether assuming for a moment that the father was a European British subject within the meaning of S. 4, sub-S. (7), I ought to appoint the mother guardian of the children jointly with the grandmother. As I have already indicated I am most anxious to do what is best for the minors and also not to ignore the natural rights of the mother, but I do not think it will be in the interest of the minors that I should make her their joint guardian. Assuming but not deciding that Cl. 15, S. 2 applies I am not prepared to exercise my discretion under that section, but at the same time there must be inserted in the order appointing the grandmother guardian a provision that the mother is to have access at all reasonable times to the minors and that she is to be allowed at least three times a week on due notice to their guardian to take them out with her and keep them with her for a period not exceeding three or four hours at a time provided she returns them to the custody of the guardian at the end of this time, and if there is any difficulty in this being carried out or any opposition is made by the guardian to the mother having access to the children, I shall reconsider this order and either appoint the mother as joint guardian or possibly take other steps with regard to the minors, and there will be liberty to apply if there is any dispute with regard to the times and occasions on which access is to be given or on which the minors are to be taken out by their mother from time to time. I think the mother should write stating the time at which she desires to have access to the children and also the days and times that she desires to take them out, and as I have already said there will be liberty to apply if there is any obstacle placed in her way.

I understand that the mother is living at Entally which is outside the jurisdiction of the Court and there is no objection to her taking the minors to any house which she occupies in Entally, but of course if she desires to take them a further distance outside the jurisdiction of this Court she must apply for permission in the ordinary way.

The guardian should bring in a scheme providing for the application of the sums paid under the terms of the will for the maintenance and education of the minors within two weeks from date.

G.B.

---

## * A. I. R. 1927 Calcutta 391

PEARSON, J.

*Heeralal Agarwalla & Co.*—Applicants.

v.

*Joakim Nahapiet & Co., Ltd.*—Respondents.

Ordinary Original Civil Jurisdiction, Decided on 3rd December 1926.

* *Arbitration Act, Ss. 6 and 10 to 15—Award by a private appellate tribunal, hearing appeal from award of umpire by agreement between parties cannot be filed.*

Sections 10 to 15 are general sections applying to all awards under the Act whether the provisions of the first schedule are applicable to the particular arbitration or whether they are excluded by the expressed intention of the parties. Under these sections the only persons or tribunals considered as having seisin of the arbitration are the "arbitrators or umpire." There is no recognition to be found in the Act for an award by a tribunal superior to the umpire. Umpire does not mean "umpire or any higher domestic tribunal upon which the parties may agree." Therefore where, according to the terms of a contract between the parties, the award made by the umpire is submitted to a Committee of Appeal and reversed by them the Committee's award cannot be filed as an award under the Indian Arbitration Act. [P 392, C 2]

*N. N Sarkar* and *N. N. Bose (Jr.)*—for Applicants.

*Langford James* and *A. K. Roy*—for Respondents.

**Pearson, J.**—This is an application to take off the file an award made under the rules of the Calcutta Baled Jute Association. The arbitration clause is that of the ordinary printed association contract, which provides for the appointment of the arbitrators and an umpire.

Then the concluding words are :

The award made by them respectively, if no appeal therefrom, shall be admitted by the Committee, or the award of the Committee made on any appeal therefrom as provided for in the Association rules and by-laws (which is printed on the reverse form part of this contract,) shall be final.

The rules and bye-laws of the Association carried out the scheme of the clause and provided for an appeal to the Committee. Rr. 28 and 29 are as follows :

28. The Committee may at their discretion, and upon payment of the prescribed fees, hear appeals from arbitrators' awards provided they proceed in conformity with the bye-laws of the Association.

29. The award of the Committee in any appeal considered by them confirming, varying or setting aside the award of arbitrators or umpire shall be accepted as finally binding on all parties.

The arbitrators failed to agree, whereupon the umpire took the matter up and made an award in favour of the applicant. An appeal to the Committee resulted in the decision of the umpire being reversed and an award made in favour of the opposite party. It is contended by the applicant that the award of the Committee is not within the terms of the Indian Arbitration Act, and cannot be filed under it. It is argued on the other hand that no such restriction is to be found in the Act, and that the intention of the parties is the deciding factor.

It is to be observed that it is only by virtue of Exception 1 to S. 28 of the Indian Contract Act that a contract to refer a dispute to arbitration is saved from the general rule that agreements to oust the jurisdiction of the ordinary Courts are void. The Arbitration Act gives effect to that exception under a certain procedure within the limits laid down by its provisions. It is plain that it does contemplate some latitude being allowed to the parties in certain particulars : S. 6, for example, makes applicable to a submission to arbitration the provisions in the first schedule, "unless a different intention is expressed" and the same will be found in the language of Ss. 9 and 10. It has indeed been conceded in argument that by agreement there may be, for instance, a reference to more than two arbitrators, or that the umpire may be a body or committee. But although the intention of the parties may be expressed to exclude the operation of the provisions of the first schedule, the question is whether that intention can prevail so as to bring within the Act an award made by a Committee sitting in appeal over an umpire.

The purpose of the Act is to allow of arbitration by agreement, under a procedure provided by it, but subject to certain safeguards, and in particular the powers of the Court to supervise or intervene in certain matters. Thus the Court is given important powers after the award is made ; it may remit the award under S. 13, or may set it aside under S. 14. According to the language of Ss. 10 to 15, which are the important ones for the present purpose, the only persons or tribunals considered as having seisin of the arbitration are the "arbitrators or umpire." It is they who are to make the award and cause it to be filed under S. 11 ; to them it may be remitted under S. 13 : and for this misconduct it may be set aside under S. 14. These are general sections applying to all awards under the Act, whether the provisions of the first schedule are applicable to the particular arbitration, or whether they are excluded by the expressed intention of the parties. Unless therefore the meaning of the word "umpire" itself as used in the Act can be enlarged beyond its ordinary, there is no recognition to be found in the Act for an award by a tribunal superior to the umpire. I think that it would be impossible to hold that "umpire" meant "umpire or any higher domestic tribunal upon which the parties may agree." The word cannot bear such a construction. The result is that this award does not conform to the scheme of the Act, and the parties therefore cannot have the benefit of the other provisions of the Act applicable to awards which do so conform.

Reference has been made in argument to the case of *In re Keighly Maxsted & Co. and Durant & Co.* (1), but so far as the present case is concerned it amounts to no more than this : that there are certain matters in an arbitration where the intention of the parties may be allowed to prevail, and that a body or committee may act in the capacity of umpire. I should only say further that although this form of Association contract has been the subject of consideration by the Judicial Committee, the present point was never raised before their Lordships in that case : see *Sassoon & Co.* v. *Ramdutt Ramkissen* (2). The question now before me is not how the award of the Appeal Committee may affect, if at all, the rights of the parties

(1) [1893] 1 Q. B. 405.
(2) A. I. R. 1922 P. C. 374=50 Cal. 1=49 I. A. 366.

who have agreed to be bound by it : it is only whether that award is one to which the provisions of the Act can apply, so that it may be filed under the Act. For the reasons given I think it is not. To that extent the application is therefore allowed with costs.

G.B. *Application partly allowed.*

---

## A. I. R. 1927 Calcutta 393

MUKERJI AND GRAHAM, JJ.

*Durga Charan Chandra*—Applicant.

v.

*Ambica Charan Chandra* — Opposite Party.

Civil Revision No. 921 of 1926, Decided on 3rd January 1927, against the decision of the Offg. Sub-J., 2nd Court, Mymensingh, D/- 17th May 1926.

(a) *Civil P. C., S.* 100—*New point—Question of law not requiring fresh investigation of facts can be allowed.*

A contention though not raised in the Court of first instance but urged as a pure question of law requiring no fresh investigation into facts can be allowed in second appeal. [P 393 C 2]

(b) *Contract Act, S.* 69 — *Second mortgagee paying off decree of first mortgagee to save mortgaged property can sue under S.* 69—*S.* 74, *Transfer of Property Act does not take away this right—Transfer of Property Act, S.* 74.

Where the second mortgagee pays off the amount under the decree obtained by the first mortgagee to save the mortgaged property from sale he can bring a suit under S. 69, Contract Act, to realize the amount so paid. S. 74 of the Transfer of Property Act does not take away this right, but if the first mortgagor would not in such a case be a person bound by law to pay the money due under the first mortgage S. 69 of the Contract Act would scarcely help the subsequent mortgagee who makes the payment. A mortgagee who abandons his lien under the mortgage is competent to bring a simple suit for recovery of the money the payment of which created the lien in his favour. [P 394 C 1, 2]

*Sasanka Jiban Ray* and *Bhupendra Nath Guha*—for Petitioner.

*Annada Charan Karkoon* — for Opposite Party.

**Mukerji. J.**—The facts as they may be gathered from the record, are these : The petitioner had mortgaged some lands to one Ishan Chandra Dutta on the 3rd Jaistha 1324. He then executed another mortgage in respect of the same lands to the opposite party on the 11th Ashar 1325. Ishan Chandra Dutta sued on his mortgage, obtained a decree and advertised the mortgaged properties to sale. The opposite party deposited the decretal amount due to Ishan Chandra Dutt and saved the mortgaged properties from sale, and then instituted the suit out of which this Rule has arisen for recovering the amount so deposited by him together with costs of the deposit. The Munsiff decreed the suit, and that decree has been affirmed on appeal by the Subordinate Judge. The petitioner then obtained this Rule.

The contention urged on behalf of the petitioner is that the suit as laid was not maintainable and that the rights acquired by the opposite party under S. 74 of the Transfer of Property Act are the only rights which he is competent to enforce under the law. It may be mentioned here that this contention was not put forward in the trial Court. It was taken for the first time in the Court of appeal which overruled it, relying on the authority of the decision in the case of *Shib Lal* v. *Munni Lal* (1). At first we were not inclined to allow the petitioner to raise this contention as it was not raised in the Court of first instance, but as the petitioner is content to urge it as a pure question of law requiring no fresh investigation into facts, we have heard both sides on it and propose to deal with it on that footing.

It has been urged on behalf of the petitioner that S. 74 of the Transfer of Property Act lays down all the rights which a second mortgagee acquires on paying off the first mortgagee and that to allow a suit of this description will in many cases lead to hardship, e. g., where the mortgagor may not have any property other than the one mortgaged or in cases where there was not or there is no longer any personal remedy available to the first mortgagee himself.

Section 74 of the Transfer of Property Act confers a statutory right on the subsequent mortgagee to pay off the prior mortgagee and contemplates a tender being made and a receipt being given and on these conditions being fufilled a statutory right is created in and the power is conferred on the subsequent mortgagee in respect of the mortgaged property itself. Such payment must be of the whole amount due, and if the money is not accepted and receipt is not given the money may be tendered

(1) A. I. R. 1922 All. 153=44 All. 67.

in Court under S. 83 of the Transfer of Property Act or the tenderer may sue for the enforcement of his rights. There are thus special conditions on which the right and power mentioned in the section are founded. There is, in my opinion, no foundation for the supposition that the right of a person to be reimbursed for paying money due by another in the payment of which he is interested, a right which is recognized, in S. 69 of the Contract Act is a much wider right than is permitted by the English Common Law rule, was intended to be in any way taken away by S. 74 of the transfer of property Act. Where there was originally no charge on the property and payment has been made under circumstances which attach the operation of the S. 69 of the Contract Act, the Courts have often, in addition to the right of reimbursement, declared in favour of the person making the payment, a charge upon the property in respect of the money paid, enuring either by operation of law or upon equitable grounds. Where the requirements of S. 69 of the Contract Act are satisfied and payment has been made in order to pay off an existing charge or a mortgage debt, this right to be reimbursed has never been denied, though there is a sharp conflict of judicial opinion on the question as to whether apart from the principle of subrogation an equitable charge may not also be recognised. If this right to be reimbursed was meant to be taken away simply for the reason that the person making this paymant happens to be subsequent mortgagee and the payment happens to be made for paying off the prior mortgagee, the legislature, would have somewhere given a clear indication of that intention. Then as regards hardship I fail to see any force in this argument, because if the first mortgagee had no personal remedy, the mortgagor would not, in such a case be a person bound by law to pay the money due under the first mortgage and S. 69 of the Contract Act would scarcely help the subsequent mortgagee who makes the payment. It is not necessary in the present case to pursue this matter any further as there are no findings as to whether there was a personal covenant in the first mortgage or whether the personal remedy was available to the first mortgagee at the date of his suit, and indeed the proper materials on which a decision on these questions could be arrived at were not brought on the record as the questions were never raised.

On principle also there is hardly anything that militates against this view. There is abundant authority for the proposition that a mortgage who abandons his lien under the mortgage is competent to bring a simple suit for recovery of the money the payment of which created the lien in his favour : see *Lachman Singh* v. *Salig Ram* (2), *Anandi Rim* v. *Dur Najaf Ali Begam* (3), and *Sarajubala* v. *Kamini Kumar* (4), and this view receives support from the decision of the Privy Council in *Nugender Chunder Ghose* v. *Sreemutty Kaminee Dossee* (5). In my judgment there is no appreciable reason why a case like the present should not be governed by a similar principle.

The petitioner's contention, in my opinion, fails. The Rule accordingly is discharged with costs. Hearing fee : 2 gold mohurs.

**Graham, J.**—The point involved, namely, whether the subsequent mortgagee is restricted to his right of suit under S. 74 of the Transfer of Property Act, or can independently maintain a suit in the present form and obtain a personal decree, is not altogether free from doubt. I agree, however with my learned brother. that both remedies are available.

G.B. *Rule discharged.*

(2) [1886] 8 All. 384=(1886) A. W. N. 134.
(3) [1890] 13 All. 195=(1890) A. W. N. 228.
(4) A. I. R. 1926 Cal. 765.
(5) [1867] 11 M. I. A. 241=8 W. R. P. C. 17 =2 Suther. 77=2 Sar. 275 (P. C.).

---

## A. I. R. 1927 Calcutta 394

DUVAL AND MITTER, JJ.

*India General Navigation and Ry. Co. Ltd.*—Defendants—Appellants.

v.

*Girdharilal Gobardhone Drs* and *others*—Plaintiffs—Respondents.

Appeal No. 1951 of 1924, Decided on 3rd January 1927, from the appellate decree of the Dist. J., Bankura, D/- 2nd July 1924.

(a) *Carriers Act, S.* 10—*Notice to local agent is sufficient.*

Notice to local agent is sufficiant.

The essential of a good notice appears to be that it should reach the person who is liable to make good the loss.

*(b) Carriers — Goods to be carried by several carriers—Contract is an indivisible one — With which carrier the contract was made is a question of fact.*

Where goods are booked to be carried over the lines of several carriers, the proper person who is liable is the person to whom the goods were delivered and the contract is not a divisible one and the question with whom the contract was made is a question of fact : *Muschamp* v. *The Lancaster and Preston Junction Railway Company*, (1841) 8 *M.* and *W.* 421, *Rel. on.* [P 398 C 2]

*Amulya Charan Chatterjee* and *Prakash Ch. Pakrashi*—for Appellants.

*P. C. Mitter*, *Ambicapada Chowdhury* and *Bijan Kumar Mukherjee*—for Respondents.

**Mitter, J.**—This is an appeal from the decree of the District Judge of Bankura which reversed the decree of the Munsif of Bankura. The India General Navigation and Railway Co., Ltd., and Rivers Steam Navigation Co., Ltd. have preferred this appeal which arises out of an action commenced by the plaintiffs' firm for recovery of damages for short delivery of goods. The plaintiffs' case is that one Rambilas Muralidhar consigned 129 maunds 31 seers of betel-nuts in 71 gunny bags to defendants-appellants at Daulat Khan Steamer Station for delivery to them at Bankura. The Defendant No. 4, appellant, undertook to carry the goods from Daulat Khan to Bankura via the Eastern Bengal Railway (Defendant No. 3), the East Indian Railway (Defendant No. 2) and the Bengal-Nagpur Railway (Defendant No. 1).

The plaintiffs further alleged that when they went to take delivery of the goods at Bankura Station there was short delivery by 31 maunds 28½ seers of which the then current price was at Rs. 19 per maund ; and that they exchanged correspondence with the different Companies from which it transpired that servants of Defendant No. 2 misappropriated the same and the reason for making all the Railway and Steamer Companies parties to the action was stated to be the fact that the goods passed through the lines of all the defendant Companies. The claim was laid at Rs. 629. The defendant Steam Navigation Co. and another who are the appellants before us contended inter alia that the suit should fail for want of proper notice, that they made over the goods in good order to the Eastern Bengal Railway at Khulna on the 1st February 1922 and that thereupon their liabilities ceased. The Munsif found that notices had been served on the defendant Companies according to the provisions of S. 77 of the Railways Act and that the loss of the goods in question occurred while the goods were in transit on the East Indian Railway (Defendant No. 2) and passed a decree for the amount claimed against the East Indian Railway and dismissed the suit against the other Railway Companies as also against defendant Steam Navigation Co. and another who are the appellants before us.

The East Indian Railway appealed to the District Judge making the plaintiffs' firm alone as party respondent. Some time after the period of limitation had expired for filing the appeal, Defendant No. 4 was made a party respondent to the appeal. The appeal was heard and the appeal was decreed and the plaintiffs' suit was dismissed against the East Indian Railway Co., on the ground that notice under S. 77 of Indian Railways Act was not a proper notice as it was served more than six months after the delivery of the goods for carriage by the East Indian Railway Co. But a decree was made against defendant Steam Navigation Co. and another. It will be noticed here that plaintiff preferred no appeal against the decree of the Munsif dismissing his suit against Defendant No. 4. The lower appellate Court in passing a decree against Defendant No. 4 was evidently purporting to act under O. 41, R. 33 of the Code of Civil Procedure and it may be a question if the Defendant No. 4 could be added as a respondent if the period of limitation for filing an appeal against him has expired.

However, as this point was not taken by the appellant in their memorandum of appeal nor urged before us, we do not think we should permit it to be raised. In second appeal the learned Advocate for the appellants raises two points : first, that the suit should have been dismissed against Defendant No. 4 as there was no service of notice on them under S. 10 of the Indian Carriers Act (3 of 1865). It is said that although notice was served on the local agents of the Company at Daulat Khan, no notice having been served on their agent at Calcutta the notice is invalid, and reliance is placed on *Rivers Steam Navigation Co.*

v. *Messrs. Hazarimall Multan Mal* (1) in support of the contention.

The second point raised is that as the goods were admittedly in order when the river journey was completed and the goods were made over to the Eastern Bengal Railway the liabilities of the defendant Steam Navigation Company ceased, as it is admitted by the plaintiffs that the loss occurred in transit over the East Indian Railway. To the first contention the learned vakil for the respondents replies by arguing that the Carriers Act does nowhere state that the notice under S. 10 should be served on the agent at Calcutta and there is no such corresponding provision in the Carriers Act as we have in S. 140 of the Indian Railways Act and consequently the cases cited have no application. We think this contention of the learned vakil for the respondents is well founded and must prevail. All that the cases cited by the appellants lay down is that where notice under S. 10 of the Carriers Act has not been shown to have been duly served knowledge aliunde of the service if notice by the common carrier is not sufficient.

The second point raised by the appellants is one of considerable difficulty. The argument for the appellants assumes that there are a series of contracts with different Companies and there is not one contract with the Steam Navigation Company, or Rivers Steam Navigation Company at Daulat Khan. This argument receives considerable support from the decision of Mr Justice Brett in *Norang Rai Agorwalla* v. *Rivers Steam Navigation Co., Ltd.* (2) and of Mr. Justice Mitra and Mr. Justice Caspersz in *Gokul Ch. Das* v. *I. G S. N. & Ry. Co., Ltd.* (3) to this extent that so far as liability for any loss for the river portion of the journey is concerned it is to be governed by the Carriers Act and liability for any loss arising in the journey by rail is to be determined by the Indian Railways Act. As to how far this view about the differentiation of liabilities is right may be a matter open to question and we find indications of a contrary opinion in an elaborate and learned judgment of the learned Chief Justice in the case of *The Dekhari Tea Co.* v. *The Assam Bengal Railway Co., Ltd.* (4). In that case the learned Chief Justice observed as follows :

> The facts here seem to me to be distinctly stronger than those in any of the leading cases which were decided with reference to contracts by Railway Companies to carry to places that were on other Companies' lines [*Muschamp* v. *Lancaster and Preston Junction Railway Co.* (5), *Scothern* v. *South Staffordshire Railway Co.* (6) and *Collins* v. *Bristol and Exeter Railway Co.* (7)], or to carry to a point beyond their own lines which involved transport by water [*Wilby* v. *W. Cornwall Railway Co.* (8)].
>
> Subject to any written documents, it is a question of fact for a jury to say whether there was one contract or more than one. The basis, however, of the above decisions is that it would be a strained and improbable inference to hold that a sender on an ordinary 'through booking' transaction enters into a series of contracts with carriers Nos. 1, 2 and 3, making each carrier except the last his agent to make a further contract or treating him as the next carrier's agent to a further contract with the sender. If it be said that though there is an entire contract with the first carrier for the whole journey, yet there may also be a contract with each of the other carriers for their own part of the transit, this no doubt is true. But as an inference it is still more elaborately improbable. It involves a contract and a parallel series of other contracts. This series has to be operated either by each carrier being treated as the sender's agent to contract with the next which involves a doubtful scheme for the transmission of authority ; or else by each carrier being treated as having made the previous one (or perhaps the first one) his agent to contract on his behalf, while himself being the previous carrier's agent to perform. Again, this latter view is possible and in some cases it is right such a position is quasi-partnership and is illustrated by *Gill* v. *M. S. and L. Railway Co.* (9) and *Great Indian Peninsula Railway Co.* v. *Radhakissen* (10).
>
> It has been put in argument that where for their mutual advantage two Companies are in the habit of handling through traffic for a reward to be divided in proportions, there is in substance a quasi-partnership and each is the agent of the other to contract. I do not agree. Mutual advantage is the pre-supposition in every contract and not the less so that it is often vitiated by mistake or sadly falsified by events. It is not of itself a principle of confusion which obliterates the distinction between a sub-contract to perform and an agent's or partner's authority to contract. The case of *Foulkes* v. *Metropolitan District Railway Co.* (11), if the facts be considered is no authority for any proposition so

(1) [1918] 37 C.L.J. 294=41 I.C. 919.
(2) [1907] 34 Cal. 419=11 C.W.N. 1071.
(3) [1907] 11 C.W.N. 1076.
(4) [1919] 47 Cal. 6=57 I.C. 403=43 C.W.N. 998.
(5) [1841] 8 M. & W. 421=5 Jur. 656=2 Railw. Cas. 607.
(6) [1853] 8 Exch. 341.
(7) [1859] 7 H.L.C. 194=1 H. & N. 517=29 L. J. Ex. 14=11 E.R. 78=5 Jur. (N.S.) 1367.
(8) [1858] 2 H. & N. 703.
(9) [1878] 8 Q.B. 186=31 W.R. 525=42 L.J. Q.B. 89=28 L.T. 587.
(10) [1881] 5 Bom. 371.
(11) [1880] 5 C. P. D. 157=28 W. R. 526=49 L. J. C. P. 361=42 L. T. 345.

wide. It was a case where the defendant Railway carried for the whole journey by their own rolling stock partly over their own line and partly over another as to which they had running powers. There was a body of evidence as to the relationship between the Companies and the position of the booking clerk who issued the ticket. It was not a case of carriage by successive Companies over their own lines.

It is true in that case the Steam Navigation Co. was made liable for loss due to their own negligence not on the basis of any contract with the owner of the goods but on the basis of their liability as common carrier under the Indian Carriers Act even in the absence of privity of contract with the owner. But the observations of the learned Chief Justice quoted above throws considerable light on the present controversy. The law in England is to the effect that where goods are addressed to a place beyond the sphere of the carrier's business so that from another point he must forward them by another carrier he is responsible for the goods for the whole journey unless he limits his liability by agreements: see *Shepherd* v. *Bristol and Exeter Railway Co.* (12) and *Muschamp* v. *Lancaster and Preston Junction Railway Co.* (5).

We have in second appeal received in evidence a risk-note in form H tendered on behalf of the appellants, which was executed by the present plaintiffs in favour of the Eastern Bengal Ry. Co., as through mistake the risk-note in another case was filed by the Eastern Bengal State Railway Co. But as the loss did not take place while the goods were in transit in Eastern Bengal State Railway the risk-note does not protect the detendants from liability even if we take the decision of Mr. Justice Brett in *Norang Rai Agorwalla* v. *R. S. N. Co., Ltd.* (2), to be a sound one. At one time in the course of argument it seemed to us that this fact of the execution of the risk-note in favour of Eastern Bengal State Railway Co. shows that there was one contract with the first carrier as also a separate contract with each of the other carriers for their own part of the transit, and as the loss occurred in transit over the East Indian Railway line the defendant Steam Navigation Co. were absolved from all liability. But as has been pointed out by the learned Chief Justice in the case of *The Dekhari Tea Co.* v. *The Assam Bengal Railway Co., Ltd.* (4), as an inference it is improbable as it involves a contract and a parallel series of contracts.

The District Judge has made the defendant Steam Navigation Co., Ltd. liable for the negligence of the East Indian Railway Co., treating the latter as the agent of Steam Navigation Co., within the meaning of S. 8 of the Indian Carriers Act. Whether in the absence of the terms of arrangement between the different companies it is impossible to infer that the East Indian Railway were the agents of the Steam Navigation Company may be a matter open to doubt. But, under S. 9 of the Indian Carriers Act, it is not necessary for the plaintiff to prove that

such loss, damage or non-delivery was due to the negligence or criminal act of the carrier, his servants or agents.

It is difficult to say how the Steam Navigation Company and another can escape liability if the contract was one and indivisible contract with them, as the carrier would be responsible for any loss which occurred before delivery of the same to the plaintiffs. The view which we take receives support from the decision of the House of Lords in *London and North-Western Railway Co.* v. *Richard Hudson* (13). We have given our most anxious consideration to this case and we do not see our way to hold that Defendant No. 4, i. e., Steam Navigation Co., and another are not liable for the loss. The result is that the appeal fails and must be dismissed with costs.

**Duval, J.**—The facts of this case are that one Rambilas Muralidhar had made over certain bags of betel-nuts to the joint steamer agent of India General Navigation and Railway Company, Ltd. and Rivers Steam Navigation Co. at steamer station at Daulat Khan for their being sent to Bankura. The goods had to proceed by river to Khulna and thence across the Eastern Bengal Railway to Naihati and thence on the East Indian Railway to Asansole and the rest of the journey by the Bengal-Nagpur Railway. It is admitted that some pilfering took place of the goods on the East Indian Railway and it is also clear that there was no risk-note under the Railways Act to cover the risk on either the E. I. R.

(12) [1868] 8 Exch. 189=18 L. T. 528=16 W. R. 982=37 L. J. Ex. 113.

(13) [1920] A. C. 324.

or B.-N. R., nor did the Steamer Companies limit their liabilities by taking any risk-note which they might have been able to take under the Carriers Act. Now the learned District Judge has given a decree against the Steamer Company after coming to certain findings of fact. He found that the East Indian Railway Company was acting as an agent of the Steamer Company to carry goods and, therefore, he held that as the goods were lost the Steamer Company, which had entered into a contract to send the goods to Bankura, were liable for the loss.

In appeal two points were taken. The first was that the notice issued to the Steamer Company was a bad notice under the Carriers Act. The notice was sent by post and was received by the Joint Agent of India General Navigation and Railway Company, Ltd. and Rivers Steam Navigation Company at Daulat Khan. He was the local representative of the two Companies and the plaintiff did not know when he consigned the goods by which Steamer Company his goods would be taken to Khulna. I cannot see that there could be a better service of notice than was served on the joint representative. I was referred to some remarks made in the case of *British and Foreign Marine Insurance Co.* v. *India General Navigation and Railway Company, Ltd.* (14), where it is stated that a notice by a letter to the Managing Agent would be a good notice, but that decision does not say that the notice such as was given here is not also a good notice. The essential of a good notice appears to be that it should reach the person who is liable to make good the loss. The local agent received the notice and in fact it is clear from the pleadings that the Companies were made aware of the claim lodged.

Now, the second point is whether the Railway Company is an agent of the Steamer Company. Here reference was made to the case of *Gokul Chandra Das* v. *India General Steam Navigation and Railway Company* (3) and to the case decided by Mr. Justice Brett. As to these cases I may remark that there is no definite finding as to whether in point of law one Company is an agent of another and as to whether there were separate contracts. Those cases were decided with reference to the fact that the value and description of the articles lost were not expressly declared as the law required them to be declared. But it appears to me that the matter is really one of fact. The Judge has come to a finding, though I must admit that he has not dealt very much with the evidence, that the East Indian Railway was an agent of the Steamer Company. The present case therefore appears to me to be strictly speaking governed by the ruling in the case of *Muschamp* v. *The Lancaster and Preston Junction Railway Company* (5) (which is still the law) that the proper person who is liable is the person to whom the goods were delivered and that the contract is not a divisible one and that it is really a matter for the jury to decide with whom the contract really was.

I agree with the District Judge that in this case the Steamer Companies were the people who entered into a contract for delivery of the goods undamaged at the place of their destination using the Railway Companies as their agents and were liable to make good the loss.

In this view the appeal is dismissed with costs.

G.B. *Appeal dismissed.*

(14) [1910] 38 Cal. 28=9 I. C. 364=15 C. W. N. 226.

---

## * A. I. R. 1927 Calcutta 398

RANKIN, C. J., AND C. C. GHOSE, J.

*Azimuddy* and *another*—Appellants.

v.

*Emperor*—Opposite Party.

Criminal Appeal No. 674 of 1926, Decided on 28th January 1927, against the order of the Addl. S. J., Bakerganj.

*(a) *Evidence Act, S. 33—Witness examined in committal proceedings but not cross-examined immediately—Witness dying before Sessions trial—His deposition in committing Court can be admitted in Sessions trial—Refusal to allow cross-examination of Police Inspector recording witness' statement under S. 161, Criminal P. C., is not an 'irregularity—Criminal P. C., S. 162,*

One of the witnesses who was examined in the committing Magistrate's Court died before trial in the Sessions Court. He was not cross-examined immediately after his examination-in-chief. The Sessions Judge refused to allow the Sub-Inspector of Police to be cross-examined on the statements said to have been made to him by the witness and recorded by him under the provisions of S. 161.

*Held*: at the time when the deposition of the witness was taken before the committing Magistrate there can be no question that the accused had the right and opportunity of crose-examining him in terms of S. 33 of the Evidence Act, and as the accused did not exercise his right and did not avail of the opportunity of cross-examining this witness immediately after her examination-in-chief before the committing Magistrate had been finished his deposition could not be excluded. [P. 399, C. 2]

*Held*: further that the terms of S. 162, if applicable at all could only have been applicable during the stage of the enquiry before the committing Magistrate and could not in any view of the matter be held to be applicable when the case was in the Sessions Court and therefore the Sessions Judge did not err at all in refusing the prayer of the accused to be allowed to cross-examine the Sub-Inspector. [P. 399, C. 2]

(*b*) *Practice—Jury trial—High Court will not interfere unless miscarriage of justice is caused.*

The High Court is not entitled to interfere with the verdict of the jury in jury trials unless there has been a miscarriage of justice. [P. 400. C. 1]

*Sures Chandra Taluqdar*—for Appellants.

*Khundkar*—for the Crown.

**C. C. Ghose, J.**—The appellants before us are two in number. They were charged along with four other accused persons before the learned 2nd Additional Sessions Judge of Bakerganj and a jury with having committed offences under Ss. 120B, 395 and 396 of the Indian Penal Code. The jury did not bring in a verdict against the accused under S. 396, but, so far as the two appellants are concerned, they brought in a verdict of gulty under Ss. 395 and 120B, Indian Penal Code. The learned Judge agreeing with the verdict of the jury sentenced each of the two appellants to undergo seven years' rigorous imprisonment.

In this appeal which has been argued by Mr. Taluqdar five points have been taken for the purpose of showing that the learned Judge's charge to the jury is open to the comment that there have been misdirections in it and for the purpose of inducing us to interfere with the verdict of the jury.

Mr. Taluqdar's first point is that in the events which happened the deposition of the witness named Jamila Khatun could not be used at the Sessions trial as the accused had no opportunity of cross-examining this witness before she died. It appears that a few days after the date when Jamila was examined before the committing Magistrate, she died. At the time when her deposition was taken before the committing Magistrate there can be no question that the accused had the right and opportunity of cross-examining her in terms of S. 33 of the Evidence Act. The record shows that the accused did not exercise their right and did not avail themselves of the opportunity of cross-examining this witness immediately after her examination-in-chief before the committing Magistrate had been finished. That being so, having regard to the provisions of S. 33 of the Evidence Act, in my opinion, there is no substance whatsoever in this contention, and it must be negatived.

The second point is that, having regard to the circumstances just alluded to, the learned Judge was wrong in refusing to allow the Sub-Inspector of Police to be cross-examined on the statements said to have been made to him and recorded by him under the provision of S. 161 of the Criminal P. C. It is argued that having regard to the events which had happened, the accused should have been allowed an opportunity of repairing the omission, if any, mode by them in not cross-examining the witness Jamila Khatun immediately after her examination-in-chief in the committing Magistrate's Court by being given an opportunity later on in the Sessions Court to cross-examine the Sub-Inspector of Police. It is very important to bear in mind in this connexion when one deals with a contention like this, the terms of S. 162 of the Criminal P. C. Now, looking at the terms of S. 162 and bearing in mind the circumstances of this case the conclusion to which I come is that the terms of S. 162, if applicable at all, could only have been applicable during the stage of the enquiry before the committing Magistrate and that it could not in any view of the matter be held to be applicable when the case was in the Sessions Court. In my opinion therefore the learned Sessions Judge did not err at all in refusing the prayer of the accused to be allowed to cross-examine the Sub-Inspector. The second contention must therefore be negatived.

Mr. Taluqdar's third point is that the learned Judge in advising the jury, on the question as to whether in arriving at a decision on the evidence adduced in the case they should give effect to any reasonable doubt, explained that "reasonable doubt" could only arise if there

was defect in the prosecution evidence. By the word "defect" I understand the learned Sessions Judge to have meant if there was something in the nature of a lacuna in the evidence adduced on behalf of the prosecution. The learned Judge might not according to Mr. Taluqdar have been very felicitous in his expression; but what he meant is quite clear, and it is also equally clear that he could not have meant anything such as has been suggested to us by Mr. Taluqdar. The learned Judge told the jury in so many words that if the evidence on the side of the prosecution was full and sufficient in all particulars, there could not arise any room for "reasonable doubt," but that if the evidence adduced on behalf of the prosecution was such as to convey to the minds of the jury an impression that something was lacking, in that case there would be room for "reasonable doubt." There is therefore, in my opinion, no substance whatsoever in Mr. Taluqdar's third point.

The fourth point is that the learned Judge was not correct in telling the jury that each one of the juror was to think for himself as to what the conclusion should be on the evidence adduced in the case and that it was the duty of the foreman to collect the separate opinions of the jury. What the learned Judge really meant was, in my opinion, this: The learned Judge told the jurors that each one of them was expected to consider the evidence for himself; in other words they were not to follow anyone in the jury blindly; but they were to exercise their own independent powers of judgment and reasoning for the purpose of arriving at a just conclusion on the evidence in this case. The learned Judge nowhere suggested that there should not be joint deliberations after the jurors had thought out for themselves what their conclusions would be on the evidence adduced in the case. The passage quoted from the learned Judge's charge does not bear the construction which Mr. Taluqdar seeks to put on it; and, in my opinion, it can only bear that construction if the words are tortured altogether.

Mr. Taluqdar's fifth point is that in this case the learned Sessions Judge ought to have excluded the confession of Naimuddy altogether. His reasons in support of this argument are these: It appears that the confession of Naimuddy was not recorded in open Court as it should have been in accordance with the Circular Orders of this Court. It was recorded before Court hours at the residence of the Sub-Divisional Officer and the reason suggested by the Sub-Divisional Officer for the procedure adopted by him was that he wanted to finish the recording of the confession of Naimuddy before he began his work in Court at the usual hour; in other words, it is suggested that the Sub-Divisional Officer did not record the confession of the accused Naimuddy in open Court because he thought that a part of his time in Court would be occupied thereby and that it would interfere with his ordinary Court work.

I may state at once that the reasons advanced by the Sub-Divisional Officer for the procedure adopted by him do not commend themselves to me at all. It was the clear duty of the Sub-Divisional Officer to comply with the rules and directions to be found in the Circular Orders of this Court and he should have recorded the confession of Naimuddy in Court and during Court hours. But the point that now requires our attention in this case is that whether, having regard to what had happened, namely, that the confession was recorded at the residence of the Sub-Divisional Officer and not in open Court, that is sufficient to induce us to hold that there has been a failure of justice in that the confession so recorded has been placed before the jury and that therefore we should interfere with the verdict of the jury. The confession was retracted subsequently by Naimuddy and the learned Judge cautioned the jury as regards the value to be attached to a retracted confession. He told the jury, as he was entitled to do, that the retracted confession should not be paid any attention to unless the jury came to the conclusion that that confession was supported by independent evidence appearing on the record. He also told the jury that that confession, if they were satisfied that it was supported by independent evidence on the record, could only be used against Naimuddy.

These were the only cautions that the learned Sessions Judge could have given to the jury, and he did give them at length. The learned Judge also drew the attention of the jury to the irregula-

rity such as it was that was committed by the Sub-Divisional Officer. In these circumstanees, having regard to the verdict which the jury brought in, a verdict of a majority of 8 to 1, it is very difficult to say that the irregularity which was committed by the Sub-Divisional Officer in the first instance was such as to have caused a failure of justice in this case. Having regard to the other circumstances which appear in the learned Sessions Judge's charge to the jury I am of opinion that there has been no failure of justice in this case by reason of what took place before the Sub-Divisional Officer. We are not entitled to interfere with the verdict of the jury in jury trials unless we are satisfied that there has been a miscarriage of justice. Bearing that cardinal rule in mind, I am of opinion that no ground whatsoever has been made out which will induce this Court to interfere with the verdict of the jury.

The result, therefere, is that, in my opinion, this appeal stands dismissed.

**Rankin, C. J.**—I agree.

G.B. *Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 401

GREAVES AND M. N. MUKERJI, JJ.

*Srimati Bhaba Sundari Devi* and *another*—Defendants—Appellants.

v.

*Aditya Nath Chaudhuri* and *others*—Plaintiffs—Respondents.

Appeal No. 318 of 1925, Decided on 12th April 1926, from the order of the Addl. Dist. J., Midnapore, D/- 5th June 1925.

*Civil P. C., O. 41, Rr. 23 and 25—Anomalous order of remand—Whole case sent down—Remand should be deemed under R. 23.*

There is a broad distinction between orders which may be passed under R. 23 and R. 25. In the case of an order passed for remand under O. 41, R. 23 the whole case goes for decision to the Court of first instance; whereas in the case of an order for remand passed under O. 41, R. 25 the case is retained on the file of the Court which passes the order for remand. Anomalous orders, i. e., orders which are neither passed under R. 23 nor R. 25 are very often passed by the Subordinate Courts, and in a case in which the case is not kept on the file of the Court itself, but the whole case is sent down for proper investigation on remand it is not unreasonable to suppose that the Court means to act under the provision of O. 41, R. 23. [P. 402, C. 2]

Where the lower appellate Court in remanding the case for further evidence on the point of attestation gave the following direction: "The suit be sent back on remand to the Court below to allow the plaintiffs to examine the attesting witnesses to the bond that may be still alive and if there be satisfactory evidence of due attestation of the mortgage bond in suit to pass a decree on it as prayed for in plaintiffs' favour. If, however, no other attesting witness be alive, or if in the opinion of the Court the other alive attesting witness be considered hostile then too to pass a decree on the mortgage bond in suit upon the evidence of P. Ws. 1 and 2 already on the record. If, however, the alive witnesses do not appear to be hostile, and if the due attestation of the mortgage bond is not proved satisfactorily, then to pass a money decree in plaintiffs' favour. [P. 402, C. 1]

The directions were absolutely wrong, They would not have the effect of assisting the Court for whom they are meant, but would only have the effect of fettering the judicial discretion of that Court in the investigation of the facts which it would have to investigate. [P. 403, C, 1]

*Mritunjoy Chatterjee* and *Nirmal Chandra Chakravarty*—for Appellants.

*Rishindra Nath Sarkar* and *Kali Sankar Sarkar*—for Respondents.

**Mukerji, J.**—This appeal is directed against the order of remand passed by the Additional District Judge of Midnapur on the 5th June 1925. The defendants are the appellants before us, The plaintiffs instituted this suit out of which the appeal arises for enforcement of a mortgage. The mortgage bond in question is alleged to have been executed by one Dhanada Debya. The learned Munsiff found that there was no legal necessity for the loan, that there was no proof of proper attestation of the bond and that the suit was instituted nearly 12 years after the due date of payment and that the payments alleged to have been made were not proved, and upon these findings the learned Munsiff dismissed the plaintiffs' suit. The plaintiffs thereupon preferred an appeal which was heard by the Additional District Judge. He held in the first instance that the legal necessity for the loan had been proved and there was satisfactory evidence that the mortgagee made the advance after honest enquiry. On the question of attestation the learned Judge held that that was spoken to by two witnesses, namely, the scribe and an attesting witness named Adhar Roy. He found that Adhar Roy in his examination-in-chief, gave evidence which would go to show that the bond was duly attested but in cross-examination made certain

statements detracting from what he had deposed to in his examination-in-chief. The learned Judge felt doubt as to the truth of the evidence that was given by this witness in his cross-examination and he was of opinion that the witness had been gained over. He, therefore, thought that the plaintiffs might have been under a bona fide mistake in not putting forward other witnesses to the bond who may have been alive, and he, therefore, made the order granting the plaintiffs a further opportunity of calling such other witnesses to the bond as may be alive and who may be able to give evidence about its attestation. As regards the payments the learned Judge was of opinion that they had been proved and he disagreed with the opinion expressed by the learned Munsiff that in case of the proper attestation of the bond not being proved the plaintiffs would not be entitled even to a decree for money. The learned Judge, however, after proceeding to record the order granting the plaintiffs an opportunity to call other attesting witnesses, proceeded to give certain directions in these words:

> The result is that the appeal be allowed and the lower Court's judgment and decree be set aside and the suit be sent back on remand to the Court below to allow the plaintiffs to examine the attesting witnesses to the bond that may be still alive, and if there be satisfactory evidence of due attestation of the mortgage bond in suit to pass a decree on it as prayed for in plaintiffs' favour. If, however, no other attesting witness be alive, or if in the opinion of the Court the other alive attesting witness be considered hostile then too to pass a decree on the mortgage bond in suit upon the evidence of P. Ws. 1 and 2 already on the record. If, however, the alive witnesses do not appear to be hostile, and if the due attestation of the mortgage bond is not proved satisfactorily then to pass a money decree in plaintiffs' favour against the assets of Dhanada Debya in defendant's hands.

It is against this order that the present appeal has been preferred.

A preliminary objection has been taken on behalf of the respondents as to the competency of this appeal. It is urged on their behalf that the order from which the appeal has been preferred is not one which comes within the purview of O. 41, R. 23, Civil P. C. and that, therefore, no appeal lies to this Court from that order. Strictly speaking, the objection taken on behalf of the respondents is well founded, for the order does not in point of fact conform to the provisions of O. 41, R. 23, which contemplates an order for remand being passed in a case in which the Court of first instance disposed of the suit upon a prdliminary point. The order, however, does not also come under the provisions of O. 41, R. 25 of the Code. There is a broad distinction between orders which may be passed under these two rules. In the case of an order passed for remand under O.41, R. 23 the whole case goes for decrsion to the Court of first instance; whereas in the case of an order for remand passed under O. 41, R. 25 the case is retained in the file of the Court which passed the order for remand. Anomalous orders of the description such as the order now before us are very often passed by the subordinate Courts, and in a case in which the case is not kept in the file of the Court itself, but the whole case is sent down for proper investigation on remand it is not unreasonable to suppose that the Court means to act under the provisions of O. 41, R. 23. It is unnecessary, however, to pursue this matter any further, for in my opinion, even if there is no appeal allowable under the law as against the order from which the present appeal has been preferred, we have ample powers under the provisions of S. 115, Civil Procedure Code to interfere with the order, and in my opinion this is pre-eminently a case in which this order should be interfered with even under the provisions of that section although no appeal lies to us against it.

As regards the merits it seems to me that the Additional District Judge has given very good reasons for holding that legal necessity has been duly proved. On the question as to whether the payments had been proved or not there is a finding of fact arrived at by the learned Judge upon the evidence in the case with regard to that matter. These findings, therefore, cannot be interfered with by us either on appeal or in the exercise of our powers of revision.

As regards the propriety of the order for remand there can be no question. It is clear to my mind that the plaintiffs are entitled to a further opportunity having regard to the peculiar facts of this case, to examine such witnesses as they may be able to produce with regard to the attestation of the bond. The directions given by the learned Judge, however, seem to me to be absolutely wrong.

These directions will not have the effect of assisting the Court for whom they are meant, but will only have the effect of fettering the judicial discretion of that Court in the investigation of the facts which it will have to investigats.

In view of these circumstances the proper order for us to make is to set aside those directions and to pass an order of remand bringing the order passed by the learned Judge in conformity with the provisions of O. 41, R. 27 of the Code, and we, therefore, set aside the order passed by the learned Judge and direct that the plaintiffs be given an opportunity of examining such witnesses as they desire to produce in order to prove the attestation of the bond. The evidence given by such witnesses will be recorded by the learned Munsiff and will be certified to the Court of the learned Additional District Judge. The learned Judge will thereafter proceed to rehear the appeal after taking into consideration such further evidence as may be adduced and then proceed to dispose of the appeal in accordance with law.

The costs of this appeal will abide the result. We assess the hearing-fee at two gold mohurs.

Let the record be sent down without delay.

**Greaves, J.**—I agree.

G.B. *Order set aside:*
*Case remanded.*

---

## * A. I. R. 1927 Calcutta 403

GREAVES AND MUKERJI, JJ.

*Debendra Lal Khan* — Plaintiff—Appellant.

v.

*Secretary of State for India*—Defendant—Respondent.

First Appeal No. 66 of 1922, Decided on 30th July 1926, against the decree of the Sub.-J., 1st Court of Zillah Midnapur, D/- 28th September 1921.

(a) *Evidence Act, Ss. 35 and 36—Thak map is no evidence of title.*

No inference can be drawn from thak map whether a particular river was included in the grant of permanent settlement, Thak authorities having nothing to do with title or possession: 30 *Cal.* 291 and 22 *Cal.* 252, *Rel. on.* [P 404 C 2]

* (b) *Adverse possession — Public navigable river—Right of fishery can be acquired by adverse possession.*

Adverse possession of fishery rights can be established in a public navigable river if exclusive acts of possession are shown for the statutory period. [P 405 C 1]

*Basak, Khirode Narain Bhunya, Lalit Kumar Roy, Rama Prasad Mukherjee, Amullya Kumar Sen* and *Dhirendra Krishna Roy*—for Appellant.

*Dwarka Nath Chakravarti, Surendra Nath Guha* and *Ramendra Mohan Mazumdar*—for Respondent.

**Judgment.**—This is an appeal by the plaintiff against a decision of the Subordinate Judge of the 1st Court of Midnapur dismissing his suit except as regards that portion of the river, which was in dispute in the suit, which extends from Bhoora Khal to Benasooli Khal.

The dispute relates to the portion of the river Kansabati or Cossye which extends from Kankapati Ghat to Patra, this portion is some 12 miles long. The river rises in the hills of Chota Nagpur and enters the District of Midnapur, and the river is a tributary of the Haldi which flows into the river Hooghly.

The plaintiff claims the portion of the river in dispute (except the portion marked A, B, C, D on the map, Ex. 1, and a certain portion 400 ft. to the east and 100 ft. to the west of the Midnapur Anicut) as part of his permanently settled estate, his contention being that it was settled with his predecessors-in-title at the time of the Permanent Settlement, and in support of this claim he relies on the fact that at the time of the thak settlement in 1856 and at the time of the preparation of the thak map the river was not shown as Government property but was included in the permanently settled private estates through which it flows. In the alternative the plaintiff claims the same portion of the river-bed by 60 years' adverse possession against Government, and under the same right, against the private proprietors through whose land the river flows. As a third alternative the plaintiff claims the right of fishery in the river either by adverse possession of 60 years or as an easement or profit a prendre enjoyed openly, peaceably as of right for 20 years.

The plaintiff also claims certain *pal* lands and *chur* lands under various claims.

One of the main questions in issue between the parties is whether the Cossye river was or was not a large navigable river at the time of the Permanent Settlement. The Secretary of State says that it was and that consequently it would not have been included in the permanently settled estate at the time of the Permanent Settlement ; the appellant, on the other hand denies that at the time of the Permanent Settlement the river was navigable throughout the year. The Secretary of State contends that this question is res judicata by reason of a decision to which I shall presently refer. It will, I think, be convenient to consider the appellant's claim under the following heads :

(1) Was the portion of the river Cossye which is in dispute included in the appellant's permanently settled estate at the time of the Permanent Settlement ? And this involves the consideration of two other questions which can conveniently be dealt with under this head, namely—(a) Was the Cossye a large navigable river at the time of the Permanent Settlement ? (b) Is the main question under this head barred by reason of the decision in the prior suit (Title Suit No. 265 of 1914) ?

(2) If this portion of the river Cossye was not so included has the appellant obtained as against the Secretary of State a title to the river-bed and to the churs and pal lands by adverse possession for 60 years ?

(3) If not, has the appellant obtained by the like period of adverse possession an indefeasible title to the fishery in this portion of the river ?

(4) If 60 years' adverse possession has not been established by the appellant, has he obtained an easement or profit a prendre to such fishery rights by enjoyment for 20 years ? (After dealing with the documentary and oral evidence the judgment continued.) The conclusion I have come to is that upon the construction of Ex. Y the Cossye was not included in the grant and I think there are indications that it was excluded from the expressions "inundation and diluvion" which would not, I think, have occurred had the river been included. Nor do I think that inclusion can be inferred from the thak maps and subsequent events if, as I think, the terms of the grant exclude it.

Nor in any case should I infer from the thak maps that it was included, the thak authorities had nothing to do with title or possession [*Jogadindra Nath Roy Bahadur* v. *Secretary of State* (1) and *Satcowrie* v. *Secretary of State* (2) ] and I think no deduction as to title or possession can legitimately be drawn from them. The other incidents as to payment of compensation and such like cannot be relied on by themselves as establishing the respondent's title.

As to the oral evidence, whilst it is not convincing, there is I think evidence upon which the Judge in the Court below could hold as he has done, that the river was a large navigable river.

Moreover I think the question of navigability and of the inclusion of the river is res judicata between the parties by virtue of the decision on Issue No. 5 in Title Suit No. 265 of 1914, dated the 31st May 1916.

The parties were the appellant's predecessor and the Secretary of State. The issue was :

Is the river Cossye or that portion of it where the disputed chur has been thrown up a non-navigable river ? Was the bed of the river or that portion of it where the disputed chur has been thrown up settled with the plaintiff and the predecessors during the Permanent Settlement and does it form part of the permanently settled estate ?

Ex. 1 in that case was over Ex. Y and it was held that it did not include the river ; this was a matter directly in issue as was also the question of navigability and the finding was that that part of the river was navigable and much of the same evidence as is before us was before the Court in that case and I am not prepared to give the decision the very narrow application now sought to be imposed on it. I think therefore it operates as res judicata as regards Ex. Y and on the question of navigability. But even if I am wrong in this, I hold, for the reasons given above, that the Cossye is a navigable river.

I now come to the second question, namely, whether the appellant has obtained as against the Secretary of State a title to the river-bed and to the churs and pal barati lands by adverse possession for 60 years.

The answer to the question is in the negative. On the evidence before us no

(1) [1903] 30 Cal. 291=30 I. A. 44=7 C. W. N. 193 (P. C.).
(2) [1895] 22 Cal. 252.

such possession has been shown, The acts of possession upon which the appellant relies are almost entirely fishery leases which were acted upon, receipt and payment of jalkar rents and such like, and whatever may be the effect of such acts as regards the fishery rights I do not think that they are sufficient upon which to found any claim to the river-bed or to the churs and pal barati lands. This claim accordingly fails.

This brings us to the third question, namely, whether the appellant by adverse possession for 60 years has obtained by prescription an indefeasible title to the fishery in the disputed portion of the river. There is, I think, no doubt that such a right can be obtained by prescription; see Law of Riparian Rights, Alluvion and Fishery, Doss' Tagore Law Lectures for 1889, pp. 307 and 371 and cases there cited. (The judgment then further discussed the evidence and proceeded). I think the appellant is entitled to claim that he has satisfactorily shown possession of the fishery rights of the portion of the river in dispute for more than 60 years up to the institution of the suit, notoriously and of right, except as to that portion which stretches from the Sadar Ghat at Midnapur to the lock gates as to which no continuous possession has been shown and over which undoubtedly the respondent has exercised rights of ownership. It is said, however, that if, as we hold, that is a public navigable river no title can be acquired by prescription and that such rights as were exercised for the appellant and by his predecessors were exercised by him as a member of the general public. It is not, however, possible, I think, to refer the acts of possession established to any such origin and I do not see why adverse possession of fishery rights cannot be established in a public navigable river if exclusive acts of possession are shown, as here, for the statutory period. See the authorities already referred to, cited in Doss' Tagore Law Lectures for 1889.

Then it is said that there is evidence of other persons fishing in the river without any lease, in some cases it appears permission was obtained but I am not prepared to attach much importance to the isolated and casual acts shown in the evidence in face of the large body of evidence stretching over many years of facts of possession of the fishery shown by the appellant and his predecessors and although I think no claim has been established by these acts to the river-bed I think the plaintiff is entitled to a declaration of his right of fishery acquired by adverse possession over the whole of the disputed portion except the part from the Sadar Ghat at Midnapur to the lock gates. And of course the portion marked A, B, C, D must be excluded also. In view of the finding at which I have arrived on the third question propounded for consideration it is not necessary to consider the fourth question of easement especially as this does not involve any further findings of fact after the findings at which I have arrived on the third question but only involves a question of law and if necessary I should be prepared to hold that an easement had been acquired by the uses referred to above, and in view of my finding it is not necessary to discuss the legal question which was raised before us, namely, whether prior to the last Limitation Act an easement could be acquired against the Crown by 20 years' uses, a point on which some difference of opinion seems to exist. The claim to the chur lands fails as adverse possession has not been shown, the claim to the pal barati lands also fails as they must belong to the riparian owners. This disposes of the appeal but the cross-appeal remains. (The judgment then dealt with the cross-appeal and allowed it except in so far as not to affect the appellants' right to the fishery.)

G.B. *Appeal partly allowed.*

---

## A. I. R. 1927 Calcutta 405

CUMING AND GREGORY, JJ.

*Radhika Mohan Das*—Petitioner.

v.

*Hamid Ali*—Opposite Party.

Criminal Revision No. 907 of 1926, Decided on 8th December 1926.

(a) *Criminal P. C., S. 250—Report of an Excise Sub-Inspector is not police report for S. 250—Criminal P. C., S. 190—Bengal Excise Act (5 of 1909), S. 74 (4).*

The report of a Sub-Inspector of Excise to a Magistrate is a police report only for the purposes of S. 190, Criminal P. C. The report is not a police report for other purposes.

[P 406, C 1 & 2]

(b) *Criminal P. C., S. 250—Report of an Excise Sub-Inspector is complaint or information for S. 250 and the Sub-Inspector is the person giving the same.*

The report of a Sub-Inspector of Excise to a Magistrate is for the purposes of S. 250, either a complaint, as defined in S. 4 (h) or at any rate is information given to a Magistrate and the Excise Officer is the person giving such complaint or information. [P 406, C 2]

*Heramba Chandra Guha* and *Surendra Mohan Ghose*—for Petitioner.

*Kundkar*—for the Crown.

**Judgment.**—The facts of the case are as follows. The petitioner is a Sub-Inspector of Salt and Excise. On receipt of certain information he prosecuted the opposite party for selling liquor without a license. On trial the opposite party was acquitted. The Court held that the case was false and ordered the Sub-Inspector to pay Rs. 51 as compensation to the opposite party under S. 250. Against this order the petitioner has moved this Court and was granted a Rule on the ground that the case not having been instituted on complaint or information to a Police Officer or Magistrate as contemplated under S. 250 of the Criminal Procedure Code the order directing payment of compensation is ultra vires.

The argument put forward by the petitioner is this. The Excise Officer acted upon the information of an informer. He then under S. 73 and S. 74 of the Excise Act investigated the matter and under S. 74 (4) submitted a report to the Magistrate, that under S. 74 (4) the report is a Police report and so he is in the same position as a Police Officer making a report to the Magistrate. S. 250 contemplates that it is the person who made the complaint to the Magistrate or the person giving information to the Police who is to be held liable unnder S. 250 and hence that in the case of an Excise Sub-Inspector it is the informer who is liable to pay the compensation. His contention really amounts to this. That in a case like this the Sub-Inspector is in the position of a Police Officer who makes a report to the Magistrate after investigating an information made to him by some person or other. The simple answer to this argument is that this report of the Sub-Inspector of Excise to the Magistrate is a Police report only for the purpose of S. 190 of the Criminal Procedure Code. S. 74 (4) says it shall be deemed to be a Police report for the purposes of S. 190. The logical deduction from this is that for other purposes the report is not a Police report. It is quite clear that it falls within the definition of complaint in S. 4 (h), Criminal Procedure Code, for it is obviously an allegation made to the Magistrate in writing with a view to his taking action under the Code, that some person known or unknown has committed an offence. It is, no doubt, added that this does not include the report of a Police Officer. But the report of the Excise Sub-Inspector is only deemed to be a Police report for the purpose of S. 190, Criminal Procedure Code, and not for the purpose of S. 4 (h). So far as S. 250, Criminal Procedure Code, is concerned S. 74 (4) has no application, and the information given to an Excise Officer is not for the purpose of S. 250 information given to a Police Officer.

Even if the report to the Magistrate by the Excise Officer be not a complaint, it is information given to a Magistrate and the Excise Officer is the person on whose complaint or information the accusation was made.

The result is the Rule must be discharged.

J.V. *Rule discharged.*

---

## A. I. R. 1927 Calcutta 406

MUKERJI, J.

*Surja Kumar Tewari*—Plaintiff—Appellant.

v.

*Ratan Choura* and *others*—Defendants—Respondents.

Appeal No. 1766 of 1924, Decided on 17th November 1926, from the Appellate Decree of the Dist. J., Zillah Midnapore, D/- 5th May 1924.

*Bengal Tenancy Act, S. 30—Potta containing stipulation that additional rent would be payable for additional area is not conclusive on the point of perpetuity of rent.*

A stipulation in the pottah to the effect that if any additional area was discovered in future in the tenants' possession, rent would have to be paid therefor at the rate fixed in the pottah, though forms an important factor in the determination of the question whether the rent was fixed in perpetuity, is not the sole determining factor ; 38 *C. L. J.* 369 ; 9 *C. W. N.* 334 and *A. I. R.* 1924 *Cal.* 513, *Rel. on.* [P 407, C 2 ; P 408, C 1]

*Bejoy Kumar Bhattacharjya*—for Appellant.

*Gopendra Nath Das*—for Respondents.

**Judgment.**—This appeal arises out of a suit for rent in which the plaintiff claimed rent at an enhanced rate under S. 30, Cl. (b) of the Bengal Tenancy Act. His suit has been decreed at the existing rate, the prayer for enhancement being refused by the Courts below. He has appealed.

The plaintiff's case was that there was an occupancy jote held by Keshab Pal and Jadab Pal which stood in the name of the former and consisted of 19 and odd bighas of land and bore a rental of Rs. 23 and odd, that Keshab Pal having left, Jadab Pal alone held the said jote, that thereafter some more lands were settled with Jadab Pal and on that the area of the jote became 27 bighas and odd and the rental was raised to Rs. 37 and odd, that in 1295 Jadab Pal took settlement of some more lands and obtained a pottah in respect of the total area which was then found to be 31 and odd bighas and the rental was again enhanced to Rs. 42 and odd. The defendants purchased a portion, namely, 24 and odd bighas of this jote and on that the plainiff instituted a suit for ejectment, being Suit No. 354 of 1911, which eventually ended in a compromise by which the defendants were, according to the plaintiff, recognised as occupancy raiyats in respect of the said 24 and odd bighas on a rental of Rs. 33 and odd.

The defence in so far as it is necessary for the purposes of this appeal was that this jote had nothing to do with Keshab Pal, that Jadab Pal and his predecessors held the jote which originally consisted of 27 bighas and odd with a rental of Rs. 37 and odd from time immemorial, that on measurement it was found to consist of 31 bighas and odd, and the rent of the total area was fixed at the old rate at Rs. 42 and odd and Jadab Pal obtained a pottah therefor on the said rental in 1925 and that the defendants have obtained recognition of their purchase of a portion of the jote by the compromise in Suit No. 354 of 1911. The defendants' case is that the rent is not enhancible.

One of the contentions urged in support of the appeal is that the defendants, having obtained recognition of their purchase under the compromise in Suit No. 354 of 1911 on the footing of the holding being a mere occupancy holding, cannot turn round and set up a different status or assert that the tenancy is one at a fixed rate of rent. A number of authorities have been cited before me to establish this position, but I am of opinion that there is no room in the present case for the application of this doctrine of estoppel. Nor do I think that it is necessary to discuss those cases which have been cited before me to establish the proposition that where a person in taking settlement from a superior landlord expressly stipulates that he would be bound to recognize the rights of the intermediate or subordinate or other holders whose rights have been recorded in the settlement proceedings, he is bound to respect those rights, even if they do not exist in fact. I am inclined to agree with the learned Munsif in the view he has taken of the expression " being in possession as a raiyat with occupancy rights " to be found in the compromise. In my opinion it would not be right to read the expression as an admission on the part of a representation by the defendants as regards their status, but that it was only meant to be a recital, narrating though not quite happily the allegations upon which the suit was founded. Assuming, however, that it was meant to be an admission, the defendants are not precluded from showing that it was wrong unless the admission can be held to operate as an estoppel. That it cannot operate as estoppel is beyond question, for it is impossible to hold that the recital was contractual or essential for the purposes of the instrument or that it was ever the intention of the parties to make the fact recited a basis of their action in the matter of the compromise. This ground therefore has no substance.

The other arguments of the appellant resolve themselves into one main question, namely, whether the learned District Judge was right in holding that the rate of rent payable by the defendants was fixed in perpertuity. In arriving at his conclusion in the affirmative on this point, the learned District Judge has proceeded entirely upon a stipulation which is to be found in the pottah of 1295 and is to the effect that if any additional area was discovered in future in the tenants' possession, rent would have to be paid therefor at the rate fixed in the pottah. He has relied upon two cases, namely, *Amar Nath Bhatta-*

*charya* v. *Raja Hrishikesh Laha* (1) and *Golam Rahaman Mistri* v. *Guru Das Kundu Chowdhuri* (2) as warranting the conclusion from that stipulation alone. In this the learned Judge seems to have been in error for all that these cases suggest is that this stipulation forms an important factor in the determination of the question. That it is not the sole determining factor can be gathered from the cases of *Surja Prasad Sukul* v. *Midnapur Zamindary Co.* (3) and *Ram Kumar Singh* v. *Messrs. Robert Watson & Co.* (4), which, though they dealt with the liability of a tenure-holder to pay an enhanced rent under S. 7 of the Bengal Tenancy Act notwithstanding a stipulation of this nature, may be usefully referred to in this connexion. That this stipulation cannot by itself determine the question is also clear from the case of *Bhairab Chandra Das* v. *Midnapur Zemindary Co., Ltd.* (5).

The judgment of the learned District Judge to my mind seems faulty. The question then is what course should be adopted. The defendants' liability has to be determined upon a construction of the pottah of 1295 in the light of the compromise referred to above. No investigation of facts appears to be necessary and I do not feel pressed by the appellants' argument that the learned Judge has not arrived at any finding on the question whether the present holding has any connexion with that of Keshab Pal which consisted of an area of 19 and odd bighas and bore a rental of Rs. 23 and odd, and which was afterwards found to consist of an area of 27 bighas and odd and then the rent was enhanced to Rs. 37 and odd —an enhancement which, if it took place, establishes a variation in the rate of rent. The matter was decided against the appellant by the learned Munsif and I am not satisfied that the learned District Judge was asked to investigate the matter further or arrive at a different conclusion.

To my mind the pottah read with the compromise leads but to one conclusion. The pottah fixes no term, but states that the tenant was holding, for upwards of 12 years, 27 and odd bighas of land at a rental of Rs. 37 and odd, that on measurement 3 and odd bighas were found to be in excess and therefore additional rent was being assessed thereon at the same rate, that if in future any excess area is found rent of such area also will have to be paid for it at the same rate and that there would be no remission of rent on any ground. The compromise states that the tenants, their sons, grandsons and other heirs in succession would be tenants under the plaintiff in accordance with the terms of the pottah. Reading the two documents together I am of opinion that a tenancy in perpetuity at a fixed rate of rent has been created.

It has been argued that the pottah conferred only a right of occupancy and the compromise only made it heritable in perpetuity, and reference has been made to the case of *Lakhi Charan Saha* v. *Hamid Ali* (6) in support of the proposition that where the occupancy raiyat holds at a fixed rent not from the Permanent Settlement but only under an engagement since the time of the settlement, he is not protected from enhancement at the instance of a purchaser at a revenue sale under the proviso to S. 37 of Act 11 of 1859. I do not see what bearing the case last cited has upon the point now before me. In my opinion it is not possible to read the pottah as creating an occupancy holding only, and the terms thereof to which I have already referred as well as the stipulation in favour of the landlord reserving rights to only two trees standing on the holding points to the status of the tenant as being that of a raiyat at a fixed rate.

I am accordingly of opinion that the rent of the defendants is not enhancible under S. 30, Cl. (b) of the Bengal Tenancy Act and that this appeal should be dismissed with costs.

G.B. *Appeal dismissed.*

(1) [1921] 35 C. L. J. 138.
(2) A. I. R. 1923 Cal. 505.
(3) [1908] 38 C. L. J. 369.
(4) [1904] 9 C. W. N. 334.
(5) A. I. R. 1924 Cal. 513.
(6) [1917] 27 C. L. J. 284=44 I. C. 548.

## A. I. R. 1927 Calcutta 409

SUHRAWARDY AND DUVAL, JJ.

*Harendra Kumar Ghosh*—Petitioner.

v.

*Emperor*—Opposite Party.

Criminal Revision No. 117 of 1926, Decided on 3rd May 1926, from the order of the S. J., Mymensing, D/- 16th January 1926.

*(a) Penal Code, S. 409—Prosecution proving receipt of money by accused—Burden is on accused to prove non-conversion of money to his own use.*

When the prosecution has proved the receipt by the accused of the several amounts, it is for the accused to show that he had not converted them to his own uses. [P 409, C 2]

*(b) Criminal P. C., S. 234—Criminal breach of trust in respect of 4 items of money realized at the same time under one receipt—One charge is not bad.*

Though the amount in respect of which breach of trust is committed is composed of different sums payable in respect of four different amounts realized at the same time under one receipt, one charge in respect of all such items is not bad. [P 409, C 2]

*Bagram, Suresh Chandra Talukdar* and *Kiran Mohan Sarkar*—for Petitioner.

*Khundkar* and *Satyendra Kishore Ghose*—for the Crown.

**Judgment.**—The rule was obtained by the petitioner Harendra Kumar Ghosh who was the Tax Daroga and cashier of Mymensingh Municipality against his conviction under S. 409 and concurrent sentence of 1 year's rigorous imprisonment under each of the three heads contained in the charge and fine of Rs. 1,000 under the first two counts on four grounds. The first is that the elements constituting an offence under S. 409, I. P. C., were not proved or found. The Courts below have found that the petitioner was a tax daroga and cashier of the Municipality, that the amounts which he is said to have embezzled were received by him and he failed to account for them. These being the findings we think that all the elements constituting an offence under S. 409, I. P. C., have been found and this ground must fail.

The second ground on which the rule was issued was that the burden of proof was wrongly placed upon the petitioner. There is no substance in this ground either. The Courts below have found that certain sums of money came into the hands of the petitioner and that he has failed to account for them; in other words he has failed to prove how that money was legitimately used. The burden was initially placed on the prosecution and when the prosecution succeeded in proving the receipt by the petitioner of the several amounts it was for the petitioner to show that he had not converted them to his own uses. In these circumstances we do not think that the burden was wrongly placed upon the petitioner.

The third ground is that the first charge is bad in law inasmuch as it consists of 4 different items for different holdings realized by 4 different receipts and entered in the books under 4 different heads and accordingly the charge as framed contravenes the provisions of S. 234, Criminal P. C. What has been found is that the petitioner realized Rs. 236-10-0 on the 19th June 1923 in respect of four holdings from the firm of Maharaja Harendra Kumar Roy Chowdhury. Though the amount was composed of different sums payable in respect of four different holdings it was realized at the same time and one receipt was originally granted by the petitioner for the whole amount. On this finding, it cannot be said that there were four different items in respect of which he was charged. There was one item of Rs. 236-1-0 which he had realized. This ground also fails.

The last ground is that there has been a contravention of the provisions of S. 234, Criminal P. C. inasmuch as the third charge consisted of a total amount which was made up by adding together the several amounts which the petitioner was said to have embezzled during different periods. The petitioner was charged under this count under S. 222 (2), Criminal P. C., for misappropriating a certain amount between April of 1923 and the 31st March 1924. In ascertaining the amount misappropriated the learned trying Deputy Magistrate had to go into details and found the different dates on which the different amounts came into his hand. He found that on some dates certain sums were realized by him and that between some other dates certain other sums were realized by him. The

method adopted by him was to facilitate the calculation of the total amount for the misappropriation of which he was charged. It is not a fact that the petitioner realized and misappropriated different periods. The finding arrived at by the trial Magistrate in a very careful and lucid judgment is that the petitioner misappropriated the sum of Rs. 1,618-8-6 between April 1923 and 31st March 1924. The learned Judge in an equally lucid judgment has also found that and further observed that in the circumstances of the case the charge that was framed was right and that there was no contravention of the provisions of S. 234, Criminal P. C.

All the grounds, therefore, fail and this rule is discharged. The petitioner must surrender to his bail.

G.B. *Rule discharged.*

---

## * A. I. R. 1927 Calcutta 410

CAMMIADE, J.

*Jatindra Nath Roy* and *another*—Plaintiffs—Appellants.

v.

*Indu Bhushan Basu* —Defendant—Respondent.

Appeal No. 2178 of 1924, Decided on 18th November 1926, from the appellate decree of the Offg. Sub-J., Jessore, D/- 27th August 1924.

* *Civil P. C., S.* 100—*Rent suit dismissed on the ground that plaint lands were not comprised in the tenancy—Appeal lies.*

Where in a rent suit, although the tenancy and rental dues were admitted and no plea of payment thereof was taken, but the Court dismissed the suit on the ground that the lands described in the plaint were not comprised in the tenancy,

*Held*: that it was not necessary for the Court to decide the question as to what lands were comprised in the tenancy and hence this irrelevancy of the decision made the judgment appealable. [P 410 C 2]

*Radhabincde Pal* for *Prafulla Kamal Das*—for Appellants.

*Hemendra Chandra Sen*—for Respondents.

**Judgment.**—This is an appeal by the plaintiffs against the dismissal of a suit by the Court of appeal below. The suit was for rent of a holding bearing an annual rental of Rs. 8-4-0 for the years 1325 to 1328. The total amounts claimed excluding cess and damages comes to Rs. 34-0-6. The suit was decreed in the first Court but it was dismissed on appeal.

A preliminary objection has been taken to the hearing of this appeal on the ground that none of the questions which make the decision appealable have been decided by the Court of appeal below. When we turn to the judgment of the lower Court we find that although the defendant admitted the tenancy and although he admitted the anuual rental and there was no plea of payment by him, the learned Subordinate Judge dismissed the suit on the ground that the lands described in the plaint as comprised within the tenancy are not ths properties of the plaintiffs but are the properties of the defendant. As there is no dispute regarding the existence of the relationship of landlord and tenant or with regard to the amount of rent due, which are ordinarily the only two matters to be considered in a suit for rent, the Subordinate Judge went out of his way unnecessarily in considering what lands were or were not comprised in the tenancy. It is useless to contend that because the Subordinate Judge has decided this question unnecessarily, therefore, his judgment cannot be made appealable on account of the irrelevancy of the decision on the question of what lands are comprised in the tenancy. If he had not decided the question he must have necessarily decreed the suit and dismissed the appeal. Therefore, his decision that the lands which are described in the plaint are the properties of the defendant and not the properties of the plaintiff gives the plaintiff the right of appeal. I, therefore, overrule the preliminary objection.

As regards the point of law arising in the case, as I have already said the rent being admitted, the tenancy being admitted and there being no plea of payment, the Court had no option in the matter and was bound to give a decree. It is not necessary for the Court to enter into the question of what lands are comprised in the tenancy.

The appeal is allowed. The decree of the Court below is set aside and the suit will be decreed with costs in all Courts with interest at per 6 cent. per annum. until realization.

As the Courts below have disagreed on the subject of what lands are comprised in the tenancy that question will be left open between the parties.

J.V. *Appeal allowed.*

---

## A. I. R. 1927 Calcutta 411

DUVAL AND MITTER, JJ.

*Sabjan Bibi* and *another*—Plaintiffs—Appellants.

v.

*Asanulla Sheikh* and *others* — Defendants—Respondents.

Appeal No. 473 of 1925, Decided on 13th December 1926, from the Appellate Order of the Offg. Sub-J., Zillah Rangpur, D/- 28th August 1925.

*Partition—Suit for—Plaintiff must be in actual or constructive possession of the subject-matter—Execution of decree for khas possession barred — Second suit for khas possession is barred.*

The plaintiff is entitled to maintain a suit for partition if his possession to some part of the joint property is admitted or established. It is essential that he should be in actual or constructive possession of the properties, and whether he has such possession or not, is to be determined in view of the principle that the possession of one co-owner is prima facie the possession of all the co-owners, and his possession must be presumed to be in conformity with his right and title as co-owner. If it is established, that he is not in possession at all of any portion of the joint property, that there has been a complete ouster, he must sue for recovery of possession and partition and pay ad valorem Court-fees upon a plaint appropriately framed for the purpose. It, however, the possession of the plaintiff is admitted or established over what forms part of the joint estate, the suit does not cease to be one for partition, merely because the defendant denies the title of plaintiff to a share of the estate or to specific lands of the estate and asserts a hostile title and adverse possession therein.

If the right of the plaintiff to execute the decree for khas possession is barred by the statute of limitation, he cannot again sue for recovery of khas possession. [P 412, C 1, 2]

*Atul Chandra Gupta* and *Jitendra K. Sen Gupta*—for Appellants.

*Nasim Ali* and *Diptendra Narain Ghosh*—for Respondents.

**Mitter, J.**—This appeal has been preferred by the plaintiffs and is directed against an order of remand. Plaintiffs' case is that the defendants kept the plaintiffs out of possession of the lands in suit and the plaintiffs consequently had to bring a title suit for recovery of possession of the lands. In that suit plaintiffs got a declaration of title in respect of 10 annas 7¼ pies share. On appeal by the defendants the extent of the plaintiffs' share was reduced to 9 annas 10-23/28 pies and plaintiffs' decree for khas possession in respect of that share was confirmed in appeal by the decree, dated the 31st of May 1919. The plaintiffs asked the defendants to have the lands partitioned amicably and to give up possession of plaintiffs' share of the lands but the defendants refused to give up possession and have been exclusively possessing all the lands. It may be mentioned here that it does not appear that the plaintiffs made any attempt to execute the decree for recovery of joint possession through Court. They did not even obtain symbolical possession. The plaintiffs commenced the present suit to which this appeal relates for partition of the lands in suit by metes and bounds and pray that they may be put in possession of the lands which may fall to their share on partition. There was also a prayer for recovery of mesne profits. One of the issues raised in the trial Court was: Is the suit for khas possession barred by the law of limitation?

The Munsif held that the suit was not so barred as the previous title suit between the parties was decided in 1917 and the appeal was decided in 1919 and the present suit was instituted in the year 1925, i. e., within twelve years from the date of decision of the first suit. The Munsif granted a preliminary decree for partition and appointed a Commissioner to effect the partition of the jote into two allotments, one for plaintiffs' share and the other for Defendant No. 1's share, and directed that the plaintiffs would get khas possession of their lands. Wasilat was also granted. On appeal by the defendants, the lower appellate Court held that the plaintiffs' claim for khas possession was barred by S. 47 of the Civil Procedure Code, but allowed the plaintiff to convert the present suit into a proceeding in execution under S. 47, Cl. (2) of the Code of Civil Procedure, subject to any objection as to limitation. But as there was no sufficient material on the record to decide the question of limitation he framed an issue on the point and remitted the

case to the Court below for the trial of that issue. The issue which was framed by the lower appellate Court runs as follows:

If there is no bar of limitation to this suit being treated as a proceeding in execution.

The lower appellate Court further observed that:

as the finding of the lower Court on other points was not assailed and is not being disturbed in appeai, the suit will be decreed with costs if the issue is decided in plaintiffs' favour and will stand dismissed with costs if it is decided against them.

Against this order of remand an appeal has been preferred in this Court and it has been contended before us by the learned advocate for the appellant that the lower appellate Court is wrong in holding that S. 47 of the Civil Procedure Code bars the present suit and that it should have held that the decree in the previous suit between the parties having declared piaintiffs' title they must be deemed to be in constructive possession of the suit-lands and as they were in possession within twelve years of the suit they are entitled to a decree for partition by metes and bounds and to a decree for recovery of possession after partition.

We are unable to accept this contention for we think that the plaintiffs cannot now be heard to say that they are in constructive possession of the disputed lands after having alleged in the previous suit that they are dispossessed in 1320 B. 3. and having succeeded in the previous suit in obtaining a decree for khas possession on the basis of such allegation. Plaintiffs' present suit for partition must therefore be regarded as having been brought by persons who are out of possession of joint lands. Such a suit is not maintainable, for, as has been pointed out in the case of *Bidhata Rai* v. *Ram Charitar Rai* (1), the plaintiff is entitled to maintain a suit for partition if his possession to some part of the joint proptrty is admitted or established. It is essential that he should be in actual or constructive possession of the properties, and whether he has such possession or not, is to be determined in view of the principle that the possession of one co-owner is prima facie the possession of all the co-owners, and his possession must be presumed to be in conformity with his right and title as co-owner. If it is established, that he is not in possession at all of any portion of the joint property, that there has been a complete ouster, he must sue for recovery of possession and partition and pay ad valorem Court-fees upon a plaint appropriately framed for the purpose. This follows from the principle that partition signifies the transformation of joint possession into separate possession. If, however, the possession of the plaintiffs is admitted or established over what forms part of the joint estate, the suit does not cease to be one for partition, merely because the defendant denies the title of plaintiff to a share of the estate or to specific lands of the estate and asserts a hostile title and adverse possession therein.

It follows therefore that if the right of the plaintiffs to execute the decree for khas possession is barred by the statute of limitation he cannot again sue for recovery of khas possession. And consequently being out of possession the plaintiffs are not entitled to sue for partition. In such a case the Court can only pass an ineffective decree for partition for it cannot grant to the plaintiffs the relief of possession on partition. It has been ingeniously argued by the learned advocate for the appellants that his inability to execute the decree for joint possession, assuming such inability to exist, does not preclude him from suing for possession after partition which is not the same as joint possession. This argument is unsound, for, a suit for partition pre-supposes a joint possession either actual or constructive. Reliance has also been placed by the learned advocate for appellants on the case of *Corea* v. *Appuhamy* (2) for the proposition that the right to partition is not lost unless there is an ouster for the statutory period which would bar the title of the co-owner claiming partition. All that that case lays down is that a co-owner's possession of joint lands is not prima facie adverse against another co-owner and that a co-owner's possession is possession on behalf of all the other co-owners. But it is no authority for the proposition that where a co-owner admits that he is not in possession of joint lands and that the possession of the other co-owners is not possession on his behalf but exclusive and hos-

(1) [1907] 12 C. W. N. 37=6 C. L. J. 651.

(2) [1912] A. C. 230=81 L. J. P. C. 151=105 L. T. 836.

tile possession, still such hostile possession is to be regarded as possession on behalf of all including the excluded co-owner.

In this view we think that the decision of the lower appellate Court is right and as the defendants did not raise the plea under S. 47 in bar of suit in the Court of first instance plaintiffs should be given an opportunity of showing that his right to execute the decree for joint possession in the previous suit is still subsisting and is not barred by limitation. If the plaintiff had obtained symbolical possession in execution of the decree in the previous suit then that symbolical possession would have amounted to actual possession as between the plaintiffs and defendants and plaintiffs' right to sue for partition would have been subsisting within twelve years of the previous suit: see : *Juggobundhu Mukherjee* v. *Ram Chandra Bysack* (3) as also the decision of the Judicial Committee, *Midnapore Zamindary Company* v. *Naresh Narain Roy* (4). But as we have stated at the outset no symbolical possession was obtained in this case and the principle of the decision of the Judicial Committee does not apply.

The result is that the order of the lower Appellate Court must be affirmed and the appeal dismissed with costs, two gold mohurs.

**Duval, J.**—I agree.

G.B. *Appeal dismissed.*

(3) [1880] 5 Cal. 584=5 C. L. R. 548 (F. B.).
(4) A. I. R. 1924 P. C. 144=51 Cal. 631=51 I. A. 293 (P. C.).

---

## A. I. R. 1927 Calcutta 413

DUVAL AND MITTER, JJ.

*Karuna Chandra Das* and *others*—Plaintiffs—Appellants.

v.

*Secretary of State*—Defendant—Respondent.

Appeals Nos. 1765 and 2018 of 1924, Decided on 29th November 1926, from the Appellate Decrees of the Dist. J., Noakhali, D/- 11th April 1924.

***(a) Bengal Tenancy Act, S. 5—Presumption—Rebuttal—Test is the purpose of tenancy and the attendant circumstances.***

**In order to determine whether the presumption under S. 5 is rebutted, the real and the true test is to see for what purpose the tenancy was created, and where the lease is equivocal the attendant circumstances have to be looked to to judge of the purpose for which the tenancy was created.** [P 414, C 1]

*(b) Landlord and tenant—Raiyat—Whether tenants are raiyats is a question of fact—Mere form of kabuliyat or use of word "Raiyat" is not the test.*

The question whether the tenants are raiyats ultimately depends on the question of fact and Court must look to the attendant circumstances.

No importance can be attached to the mere form of the kabuliyat or to the use in it of the word "cultivator." Nor does the receipt of rent in which the tenant is described as a raiyat carry the matter any further: 45 *Cal.* 805 (*P. C.*); 46 *Cal.* 90 (*P. C.*) and 29 *Cal.* 707 (*P. C.*), *Rel. on.* [P 414. C 1]

*(c) Landlord and tenant—Tenant's status as regards parent tenure determines his status regarding accretions.*

Persons who have a status of tenure-holders with regard to the parent tenure, have the same status with regard to accretions. [P 415, C 1]

*(d) Bengal Tenancy Act, S. 104—Tenant's holding over—Settlement Officer can determine fair rent on basis of tenant's status.*

Where the tenants hold over, it is open to the Settlement Officer to determine fair rent after determining the true status of the tenants irrespective of the stipulation in the time-expired kabuliyats. [P 415, C 1]

*Gunada Charan Sen* and *Jitendra Kumar Sen Gupta*—for Appellants.

*Dwarka Nath Chakravarti* and *Surendra Nath Guha*—for Respondent.

**Mitter, J.**—These two appeals have been preferred by the plaintiffs and arise out of two suits filed on their behalf under S. 104 (h) of the Bengal Tenancy Act to correct an entry in the Record of Rights wherein the plaintiffs have been recorded as tenure-holders. The plaintiffs claim their status to be that of raiyats. The plaintiffs ask for the further relief that it be declared that the entry with regard to rent was wrong. In Appeal No. 1765 the lands are covered by two leases, Exs. 1 and 2 and the area in each lease is much in excess of 100 bighas. In appeal No. 2018 of 1924 the area is also over 100 bighas. In each of these appeals the plaintiffs have consequently to rebut the statutory presumption arising under S. 5 of the Bengal Tenancy Act. They have also to rebut a further presumption arising out of the entry in the Record of Rights. That presumption is sought to be rebutted by the description of the plaintiffs in the kabuliyat in the first case as a raiyat and by the use of the word "cultivator" therein. As the first

two kabuliyats concern land which form the subject-matter of Appeal No. 1765 and are printed in official forms, the lower Courts were right in holding that the kabuliyats do not rebut the presumption under S. 5 of the Act and in holding that the real and the true test in this case is to see for what purpose the tenancy was created, and where the lease is equivocal the attendant circumstances have to be looked to to judge of the purpose for which the tenancy was created. Here we find that Palwan who was the original tenant was a *bhadralogne* Mussalman carrying on business elsewhere. The question whether he is a raiyat or a tenure-holder ultimately depends on a question of fact.

The Judicial Committee have in two recent cases, namely, in *Debendra Nath Das* v. *Bibudhendra Mansingh* (1) and in *Rajani Kanta Ghose* v. *Secretary of State for India* (2), pointed out that the question whether the tenants are raiyats ultimately depends on the question of fact and we must look to the attendant circumstances. The whole evidence which was placed before the first Court leads to the conclusion which has been arrived at by both the Courts below that Palwan employed the agency of tenants to cultivate the disputed land. He was in fact a middle man and was a very useful one. He reclaimed the char in order to make money by letting out the lands to cultivators. Nor can very great stress be laid on the words in the kabuliyat of 1882 of raiyat and cultivator as pointed out by the Judicial Committee in *Gokul Mandar* v. *Pudmanund Singh* (3):

> Their Lordships did not attach any importance to the mere form of the kabuliyat or the use in it of the word "cultivator."

It has been suggested in this case that there are some rent receipts which show that the status of the tenant is that of raiyat. With regard to these receipts the following remarks of the Judicial Committee in the case just referred to apply: *Gokul Mandar* v. *Pudmanund Singh* (3):

> Nor does the receipt of rent in which the appellant is described as a raiyat carry the matter any further.

(1) [1918] 45 Cal. 805=45 I. C. 411=45 I. A. 67 (P. C.).
(2) [1919] 46 Cal. 90=51 I. C. 226=45 I. A. 190 (P. C.)
(3) [1902] 29 Cal. 707=29 I. A. 196=6 C. W. N. 825=8 Sar. 323 (P. C.).

We think that so far as this appeal is concerned the double presumption which arises in favour of the Secretary of State has not been rebutted by the proof of the two kabuliyats and by the use of the expressions "raiyats and cultivators" therein.

In Appeal No. 2018 a special feature which distinguishes it from the other case and which has been pointed out to us is that the printed forms are not used and that the words in the printed forms "not possessed of the rights of occupancy' are struck out and instead of them the words "possessed of the rights of occupancy" are to be found. It is true that deliberate alteration would have considerable effect in making the plaintiffs raiyats but for two circumstances, viz., 1st, the lands are said to be accretions and re-formations in situ of lands in respect of which the plaintiffs have accepted the position of tenure-holders from 1902 till the date of the institution of the suit. In 1902 a previous Record of Rights was prepared in which the plaintiffs were described as tenure-holders. That record stood unchallenged. It is argued on behalf of the appellants that it is not necessary for them to challenge the entry as to their status being that of tenure-holders as there was no alteration in the rental and suit under S. 104-H could only be brought if they were aggrieved by any entry of rent. Materials have not been placed before us to show that there was no change in the rental in 1902 and we cannot assume the contrary, nor is it admitted on behalf of the Secretary of State that the rent remained unchanged.

Now the plaintiffs having accepted the position of tenure-holders with regard to the present tenure they cannot rely on the kabuliyats executed in 1911 in which certain officers of Government gave a lease or allowed the description of the status in connexion with the accretions to be different from the description with regard to the parent tenure. It was a misapprehension of the legal rights of Government by its officers and could anything done under such misapprehension not affect the title of Government in this land nor can it make the law one way or the other. Though the kabuliyats created larger rights in favour of the appellants nothing done by the officers of Government could

create any right in the accreted land not belonging to them. If the appellants were tenure-holders with regard to the parent tenure, they have the same status with regard to accretions. This position is supported by the decision of the Judicial Committee in the case reported in *Secretary of State* v. *Srinivasa Chariar* (4).

With regard to the argument that the Settlement Officer should not have fixed the rent on the basis of assets...but on the basis of hasila rent we hold that the kabuliyats in which this condition was incorporated spent their force long before the institution of the present suit and the tenants were really holding over. In the circumstances it was open to the Settlement Officer to determine fair rent after determining the true status of the tenants, irrespective of the stipulation in the time-expired kabuliyats.

As these grounds fail, both the appeals must be dismissed with costs.

**Duval, J.**—I agree.

G.B. *Appeals dismissed.*

(4) A. I. R. 1921 P. C. 1=44 Mad. 421=48 I. A. 56.

---

## A. I. R. 1927 Calcutta 415

B. B. GHOSE AND PANTON, JJ.

*Secretary of State for India*—Appellant.

v.

*Fakir Mohammad Mandal* and *others*—Respondents.

Appeals Nos. 55 to 61 of 1925, Decided on 2nd December 1926, from the Original Decrees of the Special Land Acquisition Judge of 24-Parganahs, D/- 3rd December 1924.

*(a) Land Acquisition Act, S. 18—Objection not specifically taken in application for reference cannot be allowed in Court.*

Unless an objection is specifically taken in the application for reference with regard to a matter stated in the award of the Collector such question cannot be urged at the time of the hearing of the case before the Court. [P 416, C 1]

*(b) Interpretation of Statutes — Absurdity should be avoided.*

It is one of the cardinal rules of construing a statute that in construing it absurdity should be avoided. [P 416, C 2]

*(c) Bengal Sanitary Drainage Act (1895), S. 16—S. 16 applies to lands within and outside the Municipality.*

Section 16 applies in the case of lands acquired within or outside the Municipality. [P 416, C 2]

*(d) Land Acquisition Act, S. 23—Money paid by lessee to sub-lessee as compensation for using land as brickfield need not be considered.*

Where there were under-tenants on the land at the time of taking the lease and as the lessee was taking the land for the purpose of making a brickfield he had to pay something to those tenants.

*Held* : that cannot be taken into consideration in ascertaining the market value of the land. [P 417, C 2]

*Dwarka Nath Chakravarti* and *Surendra Nath Guha*—for Appellant.

*Rupendra Kumer Mitter* and *Manindra Kumar Bose*—for Respondents.

**B. B. Ghose, J.**—All these appeals are on behalf of the Secretary of State against the judgment of the Special Land Acquisition Judge of Alipur in a number of cases which were heard by him on reference made under the Land Acquisition Act. The reference was with respect to the valuation of the property made by the Collector.

Appeal No. 57 should be taken up first as it involves a question of law with reference to the interpretation of the Bengal Sanitary Drainage Act 8 of 1895 (B. C.). The land in question in all these cases were acquired for the purpose of constructing a drainage under that Act. The land in connexion with Appeal 57 was in the bed of a watercourse and the Collector purporting to act under the provisions of S. 16 of Act 8 of 1895 allowed no compensation for the land in question. The appellant asked for reference on the ground that the land was within his zemindari and was valuable, and having regard to its advantageous position he ought to be allowed 750 rupees per bigha. I ought to state that no objection was taken on the ground that the land was not recorded as a watercourse in the Land Revenue Survey map. The learned Judge on hearing the reference came to the conclusion that it comprises the bed of a Khal, and as the Collector has stated it was not proved that such land had been under cultivation for a period of not less than 12 years previous to the acquisition. He held that as the land lies within the area of the Municipality of North Barackpore the provisions of S. 16 of the Drainage Act are not applicable and therefore the

claimant was entitled to get the market value of the land acquired. The rate fixed by him was Rs. 75 per bigha. The area in question is very small being only 3 bighas 4 cottahs. But the Assistant Government pleader who has argued the case before us states that as the case involves a question of law it is very important that the Secretary of State should obtain an opinion of this Court on the question of principle.

The contention on behalf of the appellant is that no compensation is payable for this land under the Act. On behalf of the respondent Babu Rupendra Kumar Mitter advanced the very same arguments which found favour with the learned Judge below, and he relies upon the provisions of S. 1, sub-S. 2 of the Act and contends that as there is no provision extending the Act to the Municipality of North Barackpore his client is entitled to receive compensation for the land in question. It was further argued that the Collector's statement that the land was recorded in the last Revenue Survey map as a watercourse is not correct. This objection as I have already stated was not taken in the application for reference, and it has been held by this Court in several previous cases that unless an objection is specifically taken with regard to a matter stated in the award of the Collector such question cannot be urged at the time of the hearing of the case before the Court. Much less can this question be allowed to be raised here in this case as this question of fact was not raised even before the Judge below. The appeal must therefore proceed on the supposition that the land formed part of what was recorded as a watercourse in the last Revenue Survey map as provided in S. 16 of Act 8 of 1895 B. C.

The only question therefore that we have to decide is whether S. 16 applies to land within a Municipality. The preamble to the Act says that it was enacted for the purpose of facilitating the construction of drainage works and it laid down the procedure therefor other than the procedure provided by S. 37B of the Bengal Municipal Act. Sub-S. 2 of S. 1 provides that :

> except as hereinafter otherwise provided, it shall extend to all the territories administered by the Lieutenant-Governor of Bengal, which are not included within the limits of any Municipality.

This provision clearly means that no scheme for construction of drainage works within a Municipality can be undertaken under the provisions of this Act. The question then arises, if in pursuance of a scheme for the purpose of construction of drainage works outside a Municipality what would happen when any action is to be taken within the Municipal area. This is provided in S. 6 sub-S, 1 (b), that is, a report has first to be made containing an estimate of the total cost of the undertaking including the cost of any land to be acquired under S. 16; and there is a proviso which runs thus : provided that if the tract affected includes any Municipal area the estimate to be framed under clauses (b) and (c) of the section shall show separately the portion of the cost under each clause which will be included in respect of such Municipal area. The first paragraph of S. 16 provides that any land likely to be needed in carrying out any scheme may be acquired under the provisions of the Land Acquisition Act, and the proviso to the section runs thus :

> Provided that no compensation shall be paid for land recorded as a watercourse in the last Revenue Survey map published under S. 4 of Act 9 of 1847 or any similar enactment for the time being in force, unless it be proved that such land has been under cultivation for a period of not less than twelve years previous to the acquisition.

Section 25 to which reference has been made in the lower Court only refers to the proportion and the manner in which costs should be recovered from the Municipality for any drainage work. Reference to S. 16 in Cl. (b) of sub-S. (1) of S. 6 of the Act read along with the proviso indicates that in the case of lands acquired within the Municipality S. 16 would apply, as S. 16 has been directly referred to in that clause, and if that is so the proviso to S. 16 must necessarily apply. To hold otherwise would lead to an absurd and anomalous result. It is one of the cardinal rules of construing a statute that in construing it absurdity should be avoided. The absurdity to which the construction as pressed on behalf of the respondent would lead is this, that where land such as that mentioned in the proviso is outside any Municipality the owner would get no compensation, but if it happens to fall within the Municipality the owner is entitled to compensation. There is

absolutely no reason for this differential treatment. But it is contended on behalf of the respondent that land within a Municipality is more valuable than land outside a Municipality. That may be so, but land which is or has been a water-course, whether within or outside a Municipality cannot be used for any other purpose. It must remain a water course. It is further urged that a water-course may also be very valuable as in this case it is said that there is evidence that there was valuable fishery in it. But a fishery may be more valuable outside a Municipality than inside a Municipality. This argument therefore does not remove the absurd result which would follow if the construction pressed for by the respondent is accepted. Under these circumstances it should be held that no compensation is payable for the land which has been acquired in Appeal 57 of 1925.

Appeal No. 57 of 1925 must therefore be allowed and the order directing compensation to be paid with regard to this land must be set aside. The appellant is entitled to his costs in both Courts. The hearing fee in this Court will be two gold mohurs.

The cross-objection which was preferred in this appeal has not been pressed. It is accordingly dismissed without cost. (His Lordship then dealt with Appeals Nos. 55, 56, 58, 59, 60 and 61 and dismissed them).

With regard to Appeal No. 60 there is a cross-objection, and after placing the evidence before us it is urged on behalf of the respondent that the value of the firm land should have been 380 rupees intead of 300 rupees as the Judge has found. The argument is that when the lessee took the lease there were cultivating tenants on the land to whom the lessors have to pay a certain sum of money which may be taken as 70 rupees per bigha. This point is somewhat difficult for the respondent to take, because at the time of the acquisition there were no tenants in the land and the market value is to be calculated upon the document that was effective at the time of the acquisition. As there were under-tenants on the land at the time of taking the lease and as the lessee was taking the land for the purpose of making a brick-field it is possible that he had to pay something to those tenants whigh need not be the present real value of their interest. That cannot be taken into consideration in ascertaining the market value.

This cross-objection must therefore fail and it is dismissed without costs.

**Panton, J.**—I agree.

*Appeals Nos.* 55, 56, 58 *to* 61 *dismissed*; *Appeal No.* 57 *allowed*; *Cross-objections dismissed.*

G.B.

---

## A. I. R. 1927 Calcutta 417

CAMMIADE, J.

*Hachanuddi* — Defendant No. 1—Appellant.

v.

*Asimaddi* and *others*—Plaintiffs—Respondents.

Appeal No. 2316 of 1924, Decided on 18th November 1926, from the Appellate Decree of the Sub-J., 1st Court, Bakarganj, D/- 26th May 1924.

*Limitation Act, Art.* 144—*Limitation runs from the date of hostile claim.*

Limitation with regard to suits for the recovery of immovable property runs from the date on which an open assertion of hostile title to such property is made. [P 418, C 2]

*Suresh Chandra Talukdar* and *Mohendra Kumar Ghose*—for Appellant.

*Probodh Chandra Kar*—for Respondents.

**Judgment.**—This is an appeal by the defendant against a decree declaring the title of the plaintiffs to certain lands and ordering recovery of possesssion. The suit was instituted on the 26th February 1923. The defendant's case is that the land had never belonged to the plaintiffs and he has pleaded further that if the lands had ever belonged to the plaintiffs, the plaintiffs' title was extinguished by lapse of time. It would appear that two of the plaintiffs, as representing the entire body of the landlords, instituted a suit for rent in the year 1910 against this defendant. The written statement filed by the defendant is not on the record; but from the judgment of the Court of first instance, which is dated the 29th of September 1910 it would appear that the defendant denied the relationship of landlord and tenant and that that defence was given effect to by the Court. More than twelve

years elapsed between the 29th of September 1910 and the 26th of September 1923 when the suit was filed. It is not disputed that the defendant has been in possession throughout this period. The learned Subordinate Judge who decided the appeal held that limitation had run against the plaintiffs not from the date on which the defendant filed the written statement but from the date of the order in appeal in the rent suit, which order is dated the 4th of March 1911. This finding is incorrect. The real date from which limitation ran is the date on which open assertion or hostile title was made by the defendant in his written statement. That date is not known but it necessarily was earlier than the 29th of September 1910, when the judgment of the Munsif was delivered. As more than twelve years have elapsed since the defendant asserted a hostile title to the land and began possessing the land adversely to the plaintiffs, the defendant, if he had no title before, has acquired one by prescription.

The appeal is accordingly allowed, the decree of the Subordinate Judge is set aside and the decree of the Munsif is restored with costs in all Courts.

J.V. *Appeal allowed.*

---

## A. I. R. 1927 Calcutta 418

SANDERSON, C. J., AND BUCKLAND, J.

*Rameshwar Khemka* and *another*—Petitioners.

v.

*Siddeshwar Ghosh* and *others*—Opposite Party.

Application for leave to appeal to Privy Council No. 17 of 1924, Decided on 1st December 1924, from the Appellate Decree in Appeal No. 1476 of 1921.

*Civil P. C., O. 45, R. 5—Plaintiff undervaluing his suit—Defendant acquiescing in the valuation—Case cannot be referred for a report at defendant's instance—Civil P. C., S. 110.*

The plaintiffs valued their suit at less than Rs. 10,000 and defendants objected to the valuation but did not press their objection and the suit was decided, plaintiff's valuation being accepted. Defendants put the same value on their appeal to the District Judge and their appeal was allowed. Plaintiffs appealed to the High Court and the decree of the District Judge was reversed. Defendants applied for leave to appeal to His Majesty in Council and applied for a report under O. 45, R. 5, contending that the value of the subject-matter was more than Rs. 10,000.

*Held*: that the defendants acquiesced in the valuation placed upon the subject-matter of the suit by the plaintiffs and obtained the advantage of an appeal to the lower appellate Court as a ground for appeal to His Majesty in Council, and having regard to the facts of the case it is not one in which High Court ought to refer the matter to the Court of first instance for a report as to the value of the subject-matter of the suit. [P. 419, C. 2]

*Held*: further, that para. 2 of S. 110 could not apply to the facts of the case: 10 *M. I. A.* 313 (*P. C.*), *Ref.* [P. 419, C. 2]

*H. D. Bose* and *Bijan Kumar Mukherjee*—for Petitioners.

*C. C. Biswas*, *Bireswar Bagchi* and *Manindra Kumar Bose*—for Opposite Party.

**Sanderson, C. J.**—This is an application by the defendant in the suit for a certificate that the case is a fit one for appeal to His Majesty in Council.

The suit was brought by the plaintiff to establish his title to, and recover possession of certain plots of land measuring about 4 cottas and 9 chittaks situated in the town of Howrah.

The suit was brought in the learned Munsiff' Court and the subject matter of the suit was valued at Rs. 872. The defendants objected to the valuation and thereupon the learned Munsiff took evidence and found that the value of the subject matter of the suit, was at least Rs. 600 per cotta and he accordingly returned the plaint to the plaintiff for presentation to the proper Court.

The suit was then filed in the Court of the learned Subordinate Judge and the value of the subject matter of the suit was stated to be Rs. 2,737-8-0. It is obvious that the plaintiff adopted the valuation which the learned Munsiff had arrived at after taking the evidence, to which I have already referred. In the Court of the learned Subordinate Judge one of the defendants raised an objection to the amended valuation alleging that the value of the dispute land was Rs. 1000 per cotta aad consequently an issue was raised upon the point, viz., "Was the plaint undervalued and insufficiently stamped." It appears, however, from the learned Judge's record that the point was not pressed and he therefore decided this point in favour of the plaintiff.

The learned Subordinate Judge decided the suit and made a decree in the plaintiff's favour in part.

The defendants then appealed to the learned District Judge and in the Court they raised no objection to the learned Subordinate Judge's finding on the issue in respect of the value. On the contrary they valued their appeal to the lower appellate Court at the figure which the plaintiff had named, namely Rs. 2,737-8-0. It may, therefore, be taken that the defendant acquiesced in the valuation which the plaintiff had placed on the subject matter of the suit. The learned District Judge allowed the appeal presented by the defendants and dismissed the suit. Thereupon the plaintiff appealed to the High Court and the learned Judges, who heard the appeal, reversed the decision of the lower appellate Court and restored that of the learned Subordinate Judge.

The defendants now desire to appeal to His Majesty in Council. The judgment of the High Court reversed the decision of the lower appellate Court, and therefore the only question which it is necessary to consider is that of value. There is a dispute as to the value and the applicant has asked that the dispute should be referred under O. 45, R. 5.

It is material to notice the first two grounds of the petition. The first is as follows :

> For that the Hon'ble Court erred in law in interfering with the findings of fact arrived at by the Court of appeal below.

and the second ground is

> that the findings of the lower appellate Court being clear, specific and unambiguous and being based upon the evidence in the record this Hon'ble Court could not in law set aside those findings even if they were improper or perverse.

It is therefore clear that one of the main grounds upon which the defendants rely in respect of the appeal to the Judicial Committee of the Privy Council is that the learned Judges of this Court ought to have accepted the findings of fact of the lower appellate Court. The defendants now allege that the value of the subject matter of the suit and the value of the subject matter in dispute on appeal are Rs. 10,000 or upwards.

If they had substantiated this allegation in the Court of the learned Subordinate Judge, they would have had no appeal to the lower appellate Court and to obtain the findings of fact which were arrived at by the lower Court and upon which they now rely. If they had established the allegation, which they now make as to the value of the subject matter of the suit, the appeal from the learned Subordinate Judge would have been to the High Court direct, and the discretion of the learned Judges of the High Court would not have been fettered by the findings of fact of the lower appellate Court.

We have been referred to the case of *Mutusawmy Jagavera Naiker* v. *Venkataswara Yettia* (1). The facts are no means the same as in this case but some of the expressions of opinion are relevant to the question now under consideration. Lord Chelmsford in delivering the opinion is reported to have said at page 321 :

> Supposing that, upon the face of the plaint, it appeared the demand was really beyond the value of Rs. 25,00, it was competent to the defendant to have pleaded to the jurisdiction of the Court but no such course was taken, and a decision having been given, and an appeal made to the High Court, both parties proceed on the footing and upon the admission that the sum in dispute is under Rs. 10,000, the appealable amount to Her Majesty in Council. Supposing, therefore, that an application had been made to the High Court for leave to appeal, it would not have been competent to the parties, in this state of circumstances, to turn round and say that the value was above Rs. 10,000 ; and if not so, the High Court would have had no power to give leave to appeal.

In the case now under discussion the defendants took objection to the jurisdiction of the learned Subordinate Judge. They however abandoned the objection to the jurisdiction. They acquiesced in the valuation placed upon the subject matter of the suit and obtained the advantage of an appeal to the lower appellate Court as a ground for appeal to His Majesty in Council.

In my judgment having regard to the facts of this case it is not one in which this Court ought to refer the matter to the Court of first instance for a report as to the value of the subject matter of the suit.

The learned vakil who appeared for the defendants in reply argued that this case came within the second paragraph of S. 110 of the Code of Civil Procedure. In my judgment that paragraph does not apply to the facts of this case, indeed the learned counsel who appeared on the

(1) [1865] 10 M. I. A. 313=2 Sar. 131 (P.C.).

previous occasion based his case upon the first paragraph of S. 110.

For these reasons in my judgment this application must be dismissed with costs —5 gold mohurs.

**Buckland, J.**—I agree, and have nothing to add.

G.B. *Application refused.*

---

## A. I. R. 1927 Calcutta 420

MUKERJI AND GRAHAM, JJ.

*Sarat Chandra Haldar*—Applicant—Petitioner.

v.

*Mitra Mukerjee & Co.* and *another*—Decree-holders—Opposite Parties.

Civil Rule No. 635 of 1926, Decided on 21st December 1926, from an order of the 1st Munsif, Diamond Harbour, D/- 30th April 1926.

*(a) Civil P. C., O. 9—Order is inapplicable to exeeution proceedings dismissed for default.*

Order 9 is not applicable to cases where execution proceedings have been dismissed for deiault. [P420 C 1]

*(b) Civil P. C., S. 151—Exercise of inherent power is discretionary—Lower Court's exercise of such discretion should not ordinarily be interfered with.*

The exercise of the residuary powers of Court under S. 151 is purely a matter of discretion and an appellate Court should not ordinarily interfere with the exercise of that discretion, unless a strong case is made out. [P 421 C 1]

*Hira Lal Chakravarti*—for Petitioner.

*Gunada Charan Sen* and *Kali Kinkar Chakravarti*—for Opposite Parties.

**Mukerji, J.**—As regards the main contention of the petitioner which is to the effect that O. 9, R. 9 applies to the case of dismissal of execution proceedings for default, we are completely in agreement with the view which the learned Munsif has taken. In an excellent judgment the learned Munsif has dealt with this question of law and has arrived at a conclusion which is to the effect that O. 9 is not applicable to cases where execution proceedings have been dismissed for default. He has also taken the correct view of the applicability of S. 151 of the Code of Civil Procedure. He, however, proceeds to observe, when considering the question as to whether in the present case, he should exercise his powers under that section or not, that he has considered the allegations made in applicant's petition and has examined the records of the case and that he has come to the conclution that the facts of the case are not such that he should exercise the extraordinary power which the Court possesses under S. 151 of the Code. I am somewhat doubtful as to the correctness of the view which the learned Munsif has taken, as regards the nature of the power which a Court possesses under S. 151 and I am not at all sure that that power can justly be said to be of an extraodinary nature. If the learned Munsif was of opinion that the power is of an extraordinary nature, then naturally, he would before exercising that power, look for the presence of extraordinary circum stances which would justify its exercise, and that is really what he seems to have done. The power is inherent in every Court and if there are proper materials it has got to be exercised *ex debito justitiæ*. It has been repeatedly laid down that the provision in S. 151 has been made for the purpose of allowing a Court to do that substantial justice for the administration of which alone the Court exists, and in matters about which the Code is silent. Of course, the power cannot be exercised to do something which is prohibited by the Code or is repugnant either to the letter or the spirit of the Code. In the present case the learned Munsif took the view that the power was an extraordinary one, and that because he could not find any circumstance on an examination of the record of the case nor any allegation in the applicant's petition which would justify the exercise of that power he has refused to give relief to the applicant. An examination of the record, however discloses very little that is relevant and as regards the allegations in the applicant's petition there has been no enquiry as to their truth or otherwise. I am of opinion that once it is conceded that Court may proceed under S. 151 the Court must in order to arrive at a conclusion whether relief should or should not be granted, inquire into the allegations unless the Court is of opinion that the allegations even, if true, would not justify the Court's interference. I have examined the contents of the petition that was filed on behalf of the petitioner in the present case and I am of opinion that those allegations, if they would certainly form a ground for the exercise of the Court's power under S. 151. It appears also that four witnesses

were present on behalf of the petitioner on the 20th of April 1926, the day on which the matter was heard by the learned Munsif, but those witnesses were not examined. I am of opinion that the allegations contained in that petition should be properly inquired into and that on the conclusions at which the Court will arrive as to the truth or otherwise of those allegations will depend the determination of the question whether it will exercise the inherent power which the law provides for. In my judgment, therefore the order passed by the Munsif as complained of in this Rule should be set aside and the case sent back to his Court so that a proper inquiry may be made with regard to the allegations contained in the petitioner's petition to which I have referred and then after hearing the parties the case will be dealt with and disposed of in accordance with law.

The Rule should thus be made absolute. We make no order as to costs.

**Graham, J.**—I agree and have only a few words to add. The exercise of the Court's jurisdiction under S. 151 of the Code of Civil Procedure is purely a matter of discretion, and speaking for myself I should not ordinarily be in favour of interfering with the exercise of that discretion unless a strong case has been made out. When, however, it has been recognized, as it has been in the Court below, that the case is one for the exercise of the residuary power of the Court under that section, I think that the learned Munsif should have inquired into the allegations which were made on behalf of the petitioner, and should have examined the witnesses who were present in Court.

I accordingly concur in the order which my learned brother has made.

J.V. *Rule made absolute.*

---

## * A. I. R. 1927 Calcutta 421

B. B. GHOSE AND PANTON, JJ.

*Dwijapada Das* and *others*—Defendants—Appellants.

v.

*Kalipada De* and *others*—Plaintiffs—Respondents.

Appeal No. 248 of 1924, Decided on 29th November 1926, from the Original Decree of the Sub-J., Burdwan, D/- 19th June 1924.

* (a) *Civil P. C., S.* 11—*Decision in probate proceedings can operate as res judicata.*

The question of res judicata is not a rule of technicality but is based upon general principles of law which must be given effect to for the purpose of giving finality to judicial decisions. [P. 423, C. 1]

If a matter has been fought out in a Court having jurisdiction to decide that matter, the decision on that matter would operate as res judicata although the Courts might not be the same. Consequently where a question of relationship of parties has been decided in a previous probate proceedings, a subsequent suit between the same parties involving the same question is barred: 43 *Cal.* 694; *A. I. R.* 1922 *P. C.* 80 and 38 *Bom.* 309, *Rel. on*; 15 *C. W. N.* 1021, *Diss. from.* [P. 423, C. 2 & P. 424, C. 1]

(b) *Civil P. C., S.* 11—*False case set up—Evidence in support not called—Decision is binding.*

If a man fighting a case fights it on false statements and does not call necessary evidence to support his own statements, he cannot afterwards gain any advantage for those omissions of his. He must be considered to be as much bound by the decision as he would have been if he put forward a true case and called all the evidence that was available. [P. 425, C. 1 & 2]

*Panchanon Chaudhury*—for Appellants.

*Brojo Lal Chakravarti* and *Susil Kumar Bose*—for Respondents.

**B. B. Ghose, J.**—This is an appeal by Defendants Nos. 1, 2 and 3 against the judgment and decree of the Subordinate Judge of Burdwan, dated the 19th June 1924. The suit was instituted by three persons for possession of 8-annas share of certain properties which originally belonged to one Durga Charan Baral. The Plaintiffs Nos. 2 and 3 claimed as heirs of one of the daughters of Durga Charan named Nistarini Dasi and Plaintiff No. 1 claimed on the strength of purchase of the share of another heir named Jogesh Chandra Dhar, and a portion of the shares of Plaintiffs Nos. 2 and 3. Durga Charan had two daughters, Nistarini and Gokul Sundari. He died in 1872 after having executed a Will. Letters of Administration with the Will annexed were obtained by Nistarini and Gokul Sundari, the two daughters of Durga Charan. After that this property was the subject of various legal proceedings. Two attempts were made during the lifetime of those ladies for revocation of the Probate on various grounds which it is unnecessary to mention now. Gokul Sundari died in 1313 *B. S.* Nistarini died in 1316 *B. S.* The exact date of Nistarini's death is not mentioned, but it was sometime in November 1909. After the death of Nistarini various persons claimed the

properties left by her and applied for Letters of Administration of her estate as her heir, as under the Will of Durga Charan the heirs of Nistarini were entitled to succeed to the property before other persons. The question as to who was entitled to the Letters of Administration was raised in the proceedings in 1910 and the matter was decided by the Subordinate Judge on the 20th August 1912. The Letters of Administration were issued in favour of the Defendant No. 1 as the nearest heir of Nistarini. It will be necessary here to give the genealogy under which the plaintiff based their title. (After setting out the genealogy his Lordship continued.) The Defendant No. 1 admits the genealogy except that he says that Bhubaneswari his mother was the daughter of Krishna Prosad and that he is the nearest heir of Nistarini's stridhan properties being her husband's sister's son. His opponent in the Letters of Administration proceedings was Gokul, whose case was that Dwijapada, Defendant No. 1, had no connexion with the family. The other brother of Gokul who was then alive does not appear to have made any application for Letters of Administration, and it is a question whether he was a party to those proceedings in the Court of first instance. The Defendant No. 1 has been in possession of the properties since the grant of Letters of Administration and Defendants Nos. 2 and 3 are purchasers of certain lands from Defendant No. 1.

The present suit was instituted on the 3rd November 1921. The Subordinate Judge has found that it was brought on the last date on which the suit might have been instituted according to the Law of Limitation, that is, on the very last day of the expiry of 12 years from the death of Nistarini. The plea of the plaintiffs is that the Defendant No. 1 was really the son of a daughter of Ramdhan, in other words, Bhubaneswari his mother was the daughter of Ramdhan; therefore, the Defendant No. 1 would not be the heir of Nistarini as regards her stridhan property, but the heirs at the time of her death would be Banwari and Gokul. The Plaintiffs Nos. 2 and 3 claim these properties by virtue of inheritance from Gokul and Plaintiff No. 1 by purchase from the son of Banwari and also from Plaintiffs Nos. 2 and 3. The Defendant No. 1's case, on the other hand, is that he is really the nearest heir of Nistarini's stridhan and the question as regards the relationship is barred by the rule of res judicata.

The Subordinate Judge has put the question in a short way: If Defendant No. 1 is the sister's son of Hari Madhab, then the plaintiffs are not entitled to succeed, but if he is found to be the son of a female cousin of Hari Madhab then the plaintiffs are entitled to succeed. Several issues were raised in the Court below. Some of the issues were taken up first for decision by the Subordinate Judge who was a different Judge from the one who decided the case finally. The important question that he decided was the question of res judicata and, in his opinion, the question as to the relationship was not res judicata, because he thought that the decision of the Subordinate Judge of 1912 was the decision of a Court acting under Act 5 of 1881 (the Probate and Administration Act) and cannot, therefore, operate as res judicata in the present suit. The judgment with regard to this issue was delivered in April 1923. The case then came on for trial on the other issues and the final judgment was delivered in June 1924. The Subordinate Judge, who finally tried the case rightly considered that he was bound by the decision on the issue on res judicata by his predecessor, and upon that finding he proceeded to decide the question on the evidence as regards the fact of the relationship of the parties to Nistarini Dasi and her husband. He came to the conclusion upon the evidence that the plaintiffs have succeeded in proving that Dwijapada the Defendant No. 1 was not Nistarini's husband's sister's son, but he was the son of the daughter of Ramdhan, and, therefore, the plaintiffs were entitled to succeed in their suit.

The question of res judicata is of great importance in this case. The first case that was cited on behalf of the appellants was that of *Ramnandan Prosad* v. *Sheo Parson Singh* (1). The Subordinate Judge in his judgment of April 1923, referred to that case. But he was of opinion that on account of the judgment of the Judicial Committee in *Sheoparsan Singh* v. *Ramnandan Parshad Narayan*

(1) [1910] 11 C. L. J. 623=6 I. C. 301.

*Singh* (2) in that very case which was carried up to the Privy Council, the opinion of the learned Judges was reduced to a mere obiter dictum. That suit was brought for a declaration that a certain person was the next reversionary heir with regard to certain properties, and it was pleaded by his opponent that the question was res judicata. The High Court held that such a suit was maintainable, but the question was decided in a previous Probate proceeding and was, therefore, res judicata and dismissed the suit. On appeal to the Privy Council their Lordships held that a suit such as that was not maintainable under the provisions of S. 42 of the Specific Relief Act. But with regard to the question of res judicata the pronouncement of their Lordships is very important. They pointed out that the question of res judicata was not a rule of technicality but was based upon general principles of law which must be given effect to for the purpose of giving finality to judicial decisions. If that principle is given effect to there cannot be any doubt that the question now debated in this appeal is res judicata by reason of the decision of the Subordinate Judge of the 20th August 1912, in the Probate proceedings.

It is contended, however, on behalf of the respondents that the Subordinate Judge was acting in the previous matter as a Court of Special Jurisdiction, therefore, the judgment delivered in that case cannot operate as res judicata in the present case. This argument is based upon the decision of this Court in *Lalit Mohan Das* v. *Radha Raman Saha* (3). That case certainly supports the contention of the respondents, but the authority of that case has been undermined by the decisions of the Privy Council and particularly the decision in the case of *Rama Chandra Rao* v. *Ramachandra Rao* (4). Their Lordships at page 137 of the Indian Appeals stated:

> How the proceedings were commenced is a matter that is not material provided that they were instituted in the manner that gave the Court jurisdiction, for they ended in a decree made by the High Court and appealable to this Board.

In the present case it cannot be disputed that the Probate proceedings were tried in the Court of the Subordinate Judge who had jurisdiction to decide that matter. There was an appeal to this Court which affirmed the decision of the Subordinate Judge, and the matter might have been carried to a higher Court had the conditions satisfied the provisions of the Civil Procedure Code for its being carried to the Judicial Committee. The case reported in *Lalit Mohan Das* v. *Radha Raman Saha* (3) cannot now, therefore, be treated as an authority which we are bound to follow. The same may be said of another case on which the respondents rely, *Arunmoyi Dasi* v. *Mohendra Nath Wadadar* (5). In addition to the decisions of the Privy Council already cited the following cases decided by their Lordships may also be referred to on the question of res judicata. *Badar Bee* v. *Habib Merican Nooridin* (6), *G. H. Hook* v. *Administrator-General of Bengal* (7), *Ram Kirpal* v. *Rup Kuari* (8), *Beni Ram* v. *Nanhu Mal* (9), *Rameshwar Singh* v. *Hitendra Singh* (10) and the principles laid down in all these cases have been followed by the Full Bench decision of the Bombay High Court in *Kalyanchand Lalchand* v. *Sitbai Dhan sa* (11) and *Maung Hmat* v. *Ma Htay* (12). It appears from all these cases that the real principle is that if a matter has been fought out in a Court having jurisdiction to decide that matter, the decision on that matter would operate as res judicata although the Courts might not be the same. But in the present case it is very difficult to say that the Subordinate Judge was not acting as a civil Court in deciding the previous case. Under the provisions of the Bengal, North-Western Provinces and Assam Civil Courts Act, S. 23, sub-S. 2 (d) the District Judge may in certain circumstances transfer this class of cases to the Subordinate Judge, and when the

(2) [1916] 43 Cal. 694=38 I. C. 914=43 I. A. 91 (P. C.).
(3) [1911] 13 C. L. J. 547=10 I. C. 434=15 C. W. N. 1021.
(4) A. I. R. 1922 P. C. 80=45 Mad. 320=49 I. A. 129 (P. C.).
(5) [1893] 20 Cal. 888.
(6) [1909] A. C. 615=101 L. T. 161=78 L. J. P. C. 161.
(7) A. I. R. 1921 P. C. 11=48 Cal. 499=48 I. A. 187 (P. C.).
(8) [1884] 6 All. 269=11 I. A. 37=4 Sar. 489 (P. C.).
(9) [1885] 7 All. 102=11 I. A. 181=4 Sar. 564 (P. C.).
(10) A. I. R. 1924 P. C. 202.
(11) [1914] 38 Bom. 309=23 I. C. 325=16 Bom. L. R. 5.
(12) A. I. R. 1923 Rang. 257=1 Rang. 258.

Subordinate Judge is in seisin of a case of this class he does not cease to be a Subordinate Judge who exercises his ordinary jurisdiction.

In my opinion, therefore, the previous decision of the Subordinate Judge of 1912 on the question of the relationship of the Defendant No. 1 with reference to the parties to this suit should be held to operate as res judicata, as the issue was distinctly raised in the previous proceedings as to whether Dwijapada the son of Bhubaneswari was the sister's son of Nistarini's husband.

It is, however, said that if it was res judicata, that would bar the suit of Plaintiffs Nos. 2 and 3, but it does not debar the Plaintiff No. 1 who derived title from Jogesh the son of Banwari from raising the same question as Banwari was no party in the previous litigation and that is what the Subordinate Judge has said in his judgment. The appellants, however, point out that Banwari was a party as will appear from the decree of the High Court to which Gokul carried his appeal. It is argued on behalf of the appellants that if Banwari was no party to the suit either as applicant or as objector it is difficult to imagine how he could have been made a party in the appeal in this Court where he was described as one of the objectors. The decree of the High Court will be found at page 82 of the 2nd part of the paper-book. The point that the respondents raise is that you do not find the name of Banwari in the decree prepared by the trial Court. As there is nothing to show how Banwari was made a party in the appeal this matter seems to have been left in some obscurity. From the order of the Subordinate Judge in those proceedings (at page 50 of the paper-book, part II) it appears that there were two petitioners and nine objectors, which number does not appear in the decree. But at the same time we find that Banwari filed two petitions in the Probate case, one has been printed at page 40 in which he describes himself as the petitioner and his brother Gokul as the opposite party, and there is another petition printed at page 42 in which the cause title has been given as Gokul petitioner and Banwari opposite party.

From this it would appear that Banwari was the opposite party to the petition presented by Gokul for Letters of Administration. If that is so Banwari and his heirs would be as much bound by the decision in the previous case as the heirs of Gokul. But assuming that Banwari was no party, it is quite clear that Banwari never disputed the relationship of Defendant No. 1 Nistarini as claimed by him. There is a kabuliyat executed by Banwari in favour of Defendant No. 1 which is marked Ex. A (3) in January 1912, i. e., during the pendency of the proceedings for Letters of Administration. By that kabuliyat Banwari purported to take a lease of certain property from the Defendant No. 1 admitting the relationship as claimed by the Defendant No. 1. The Subordinate Judge seems to have held that this admission was made by Banwari for the purpose of defeating the claim of his brother Gokul because he was in dispute with his brother. The Subordinate Judge further seems to hold that the kabuliyat was not a bona fide and valid transaction and the recital in the lease cannot operate as an admission of the defendant's right. The kabuliyat was obtained by undue influence and so forth. No evidence of undue influence has been adduced in this case and the Subordinate Judge does not give any sufficient reason why this admission by Banwari should not be taken as against him and his heir.

The next thing that requires consideration in this case is whether the Subordinate Judge is right in holding upon the evidence that the plaintiffs have succeeded in proving their title. The Subordinate Judge starts his decision with regard to that question by reference to the statements made by one Shyama Charan Nath who brought a suit in 1913 against Defendant No. 1 for possession of these very properties. In that suit Shyama Charan was defeated and because Shyama Charan stated in that suit that the maternal grandfather of Defendant No. 1 was Ramdhan Dhar that statement seems to have been taken as evidence against the Defendant No. 1. In this there cannot be any doubt that the Subordinate Judge is clearly wrong, The next two documents which the Subordinate Judge has taken into consideration again are two genealogical tables filed by Gokul Sundari and Nistarini in 1899 and in 1907. Two different persons applied for revocation of the Letters of Adminis-

tration granted to the ladies. In those proceedings those two ladies filed genealogical tables in support of their petition that the applicants for revocation of Probate were not entitled to come into possession of the properties under the terms of Will as the ladies had nearer heirs surviving. In those documents the name of Dwijapada as husband's sister's son of Nistarini does not appear. In the petition filed by those ladies they do not profess to give an exhaustive list of the heirs of Nistarini, but what they said was that they gave certain names as nearer heirs than the petitioners in those cases and they said that there were other heirs too. The omission of the name of Dwijapada cannot be decisive of the question of his not being related as he claims. The absence of his name may be explained in many ways. It may be that the ladies thought that the husband's sister's son was not an heir of stridhan property and they thought it was only necessary to give the names of Nistarini's husband's agnates, or it might possibly be due to forgetfulness as Dwijapada was not a member of the family living in the village. The Subordinate Judge also relied upon certain rent decrees and proceedings which do not appear to be at all relevant to this enquiry or evidence against the defendant.

The next question is with regard to the oral evidence. The Subordinate Judge states in his judgment in more than one place that the decision of the Subordinate Judge in the Probate proceedings was based upon insufficient evidence. He seems to have been of opinion that Gokul was a very poor man and for that reason he was unable to cite any number of witnesses to prove that he was the nearest heir and not Dwijapada. The Subordinate Judge also comments on the fact that Gokul stupidly pleaded in the previous proceedings that Dwijapada was a person who was not known to him and no connexion with the family, and this plea enabled Dwijapada to establish the fact of his relationship with the family very easily. These are matters, however, which the Subordinate Judge ought not to have taken into consideration. If a man fighting a case fights it on false statements and does not call necessary evidence to support his own statements, he cannot afterwards gain any advantage for those omissions of his. He must be considered to be as much bound by the decision as he would have been if he put forward a true case and called all the evidence that was available. (His Lordship then discussed the evidence and concluded.) It is difficult, no doubt, to prove the genealogy of persons who have died more than 50 years ago, and the Defendant No. 1, therefore, probably has not been able to give such satisfactory evidence as might have been expected. But Defendant No. 1 has been in possession of this property as the nearest heir of Nistarini for nearly 12 years. The burden on the plaintiffs must be very heavy to displace that title, and they have certainly not succeeded in doing it.

On these grounds this appeal must be allowed and the suit dismissed with costs in both Courts.

**Panton, J.**—I agree.

G.B. *Appeal allowed.*

---

## * A. I. R. 1927 Calcutta 425

CHATTERJEA, AG. C. J., AND DUVAL, J.

*Ray Satindra Nath Choudhury*—Defendant 2—Appellant.

v.

*Ray Jatindra Nath Choudhury* and *others*—Plaintiffs—Respondents.

Appeals Nos. 151 and 152 of 1924, Decided on 18th August 1925, from the Original Decrees of the Addl. Sub-J., 24 Parganas, D/- 22nd May 1924.

(a) *Transfer of Property Act, S. 60—One of the mortgagees cannot ordinarily enforce the mortgage for his share only except in a case of severance of his interest with mortgagor's consent.*

The mortgage debt is one and indivisible and ordinarily one of the mortgagees cannot enforce the mortgage for his share of the debt except in a case where there is a severance with the consent of the mortgagor of the interest of the mortgagees. [P 426 C 2 ; P 427 C 1]

* (b) *Transfer of Property Act, S. 68—Several joint mortgagees—Payment to one is not valid as against other mortgagees and does not operate as discharge as to all but operates as a discharge as to the share of the payee only.*

Where there are several joint mortgagees, payment of the mortgage money by the mortgagor to one mortgagee only is not a good and valid payment as against the other mortgagee or mortgagees and does not operate as a discharge as to all but discharge by one mortgagee as to the whole debt is valid only as regards his share of the debt. (*Case Law fully considered*).

[P 429 C 1, 2]

*Mitter, S. C. Mukherji* and *Indu Bhusan Mukerji*—for Appellant.

*Basak* with *Gopendra Nath Das*—for Respondents.

**Judgment.**—These two appeals arise out of two suits upon mortgages. It appears that one Khagendra mortgaged the eastern part of the house (the property mortgaged) to the plaintiff Jatindra and his brother Satindra for Rs. 20,000 on the 7th January 1918. On the 30th September 1918 Surendra mortgaged the western part to both Jatindra and Satindra for Rs. 20,000.

On the 18th March 1921 there was a deed of partition between the two brothers and their mother. The material portion so far as the present case is concerned runs as follows:

> Whenever any money on account of ijmali (joint) moneylending business or decree be realised, the same being at the same time divided in two equal parts, the second party and third party (i. e., the two brothers) will get it in equal shares.

On the 27th April 1922, both Surendra and Khagendra sold the equity of redemption in the house to Satindra alone for Rs. 94,000 out of which Rs. 54,000 was due on the mortgages, the balance Rs. 40,000 being paid in cash. On the 13th May 1922 Satindra gave notice to Jatindra through a solicitor that he holds the sum of Rs. 54,000 on the joint account of himself and Jatindra and that the same would be taken into account at the time of the adjustment of accounts of the joint estate. Jatindra did not give any reply to the notice, but Jatindra instituted these two suits on the 2nd June 1922 one against the mortgagor for recovery of Rs. 13,305, being the principal and interest, and the other against the mortgagor Khagendra for recovery of Rs. 13,962-8-0 (the principal and interest) due to him in his moiety share, Satindra being made the Defendant No. 2 (pro forma) in each of the two suits.

The defence of the mortgagor defendant in each suit inter alia was that the whole of the mortgage debt had been paid off and there was full discharge of the mortgage debt. The Defendant No. 2 also pleaded that the whole mortgage bond had been fully paid off, that he was competent to give a valid discharge in respect of the entire mortgage debt, that the deed of partition had affirmed such right, that the plaintiff had realised the full amounts due from money-debtors of the joint estate, that the suit was not maintainable in its present form and that the plaintiff could not recover anything from the Defendant No. 2 until there was an adjustment of accounts. There was a prayer for set-off of a sum of Rs. 36,500 representing the half share of certain sums alleged to have been taken by the plaintiff from the joint funds, but the Defendant No. 2 having failed to pay Court-fee on the amount claimed by way of set-off, the prayer was rejected.

The Court below decreed the suit, and the Defendant No. 2 has appealed to this Court.

The first question for consideration is whether the suit by the plaintff alone for recovery of his one-half share of the mortgage debt is maintainable. Reliance is placed upon the case of *Sunití Bala Debi* v. *Dhara Sundari* (1), where it was held that upon a mortgage to two mortgagees to secure two separate sums the whole mortgaged property being conveyed to the mortgagees as tenants in common and there being no covenant to repay to each separately, if one mortgagee desires re-payment, his co-mortgagee not consenting to proceedings, his proper course is to sue for a mortgage decree in respect of the whole sum secured, joining his co-mortgagee as a defendant. We do not think that the above case has any bearing upon the present one. No doubt the mortgage debt is one and indivisible and ordinarily one of the mortgagees cannot enforce the mortgage for his share of the debt. But, as stated above, the Defendant No. 2 before the suit had informed the plaintiff through his solicitor that the entire mortgage debt had been realised by him from the mortgagors (whether that was a valid discharge in respect of the plaintiff's share or not will be considered presently), but the receipt of the debt certainly operated as a discharge of the share of the Defendant No. 2 and in the face of that admission of the Defendant No. 2, the plaintiff could not sue for the entire mortgage debt. The plaintiff in his plaint stated that

> If according to the decision of the Court it is considered proper that Court-fees should be paid on the whole amount due to the plaintiff and the Defendant No. 2 on the basis of the mortgage deed then the plaintiff reserves prayer for

(1) [1920] 47 Cal. 175=53 I. C. 131=46 I. A. 272 (P. C.).

amending the plaint and paying the deficit Court-fees hereafter.

The Defendant No. 2 did not raise any objection on the ground that the suit could not be maintained for one-half of the mortgage debt nor was any issue on that specific point raised, In these circumstances we do not think that the contention of the appellant in this Court, that the suit cannot be maintained for the plaintiff's share of the debt has any force.

We may in this connexion refer to the case of *Jauhari Singh* v. *Ganga Sahai* (2). In that case certain property was mortgaged by K to B and J. Then other property was mortgaged by G (K's brother) also to B and J. Subsequently K and G made a usufructuary mortgage of both properties in favour of B alone ostensibly in lieu of the former mortgages and B purported to give the mortgagors a discharge of those mortgages. The learned Judges observed that B could no longer put forward any claim against the mortgagors and so far as his interests were concerned there had been a severance of interests of the mortgagees and this had been effected with the consent of the mortgagors. They held that although the mortgagors consented to obtain a full discharge from B, the legal effect of that discharge was that it operated in respect of B's own share only, so that in law the acts of the mortgagors and B amounted to a severance with the consent of the mortgagors of the interest of the mortgagees, and that in these circumstances, it was competent to J to sue the mortgagors for the recovery of his share in the mortgage debts in respect of the two earlier mortgages.

The next and the more important question is whether a payment to one of several mortgagees operate as a valid discharge of the whole debt. Reliance is placed on behalf of the appellant upon S. 38 of the Contract Act, *Wallace* v. *Kelsal* (3) and certain decisions of the Indian Courts.

Section 38 of the Contract Act provides that an offer to one of several joint promisees has the same legal consequences as an offer to all of them. That, however, we think, deals with the questions of an unaccepted offer, and merely states that the same legal consequences will ensue on an offer made to one of several joint promisees as an offer to all of them. We agree with the observations made by White, C. J., in his dissentient judgment in the Full Bench case of *Annapuranamma* v. *Akkaya* (4):

> It (S. 38) provides in effect that all the joint promisees get the benefit of the legal consequences, whatever those consequences may be, of an offer, or a tender to one of them. The section does not deal with the legal consequences of an accepted tender, or of an accepted offer of performance, but with the legal consequences where a tender or offer has been made and the tender or offer has not been accepted. No doubt the last paragraph of the section is general and is not restricted to an offer which has not been accepted, but apparently the legislature were not contemplating the legal consequences of an offer which had been accepted but the legal consequences of an offer which has been refused. I do not think we can infer from this enactment that the legislature intended to lay down by implication that the aceeptance of payment by one of several promisees operated as a discharge of the claims of the others.

The offer of a money debt does not operate to discharge the debt. S. 45 of the Act which deals with the right of joint promisees to performance lays down that the right to claim performance of a promisee by a person to two or more persons jointly rests, as between him and them, with them during their joint lives.

In *Wallace* v. *Kelsall* (3) an action was brought by three plaintiffs for a joint demand; the defendant pleaded an accord and satisfaction with one of the plaintiffs by a part payment in cash and a set-off of a debt due from that one to the defendant, and it was held that the plea was good. In the case of *Steeds* v. *Steeds* (5), however, to an action by two obligees of a common money bond the defendant pleaded accord and satisfaction by delivery of stock and goods to one of the plaintiffs. Wills, J., observed (page 541):

> The reason why the defence is a good one at law is that the two creditors are treated as having a joint interest in the debt, with its incident of survivorship, and the satisfaction to one of the parties of a joint demand due to himself and others puts an end to the joint demand, and

(2) [1919] 41 All. 631=51 I. C. 107=17 A. L. J. 731.
(3) [1840] 7 M. & W. 264=10 L. J. Ex. 12=8 D. P. C. 841=4 Jur. 1064.
(4) [1913] 36 Mad. 544=(1913) M.W.N. 328=19 I. C. 12=24 M. L. J. 333 (F. B.).
(5) [1889] 22 Q. B. D. 537=58 L. J.Q.B. 302=37 W. R. 378=60 L. T. 318.

he cannot afterwards, by joining the other parties with him as plaintiffs, recover the debt; nor can a right of action be supposed to exist which, if it existed, might survive to the very person who had already received full value; *Wallace* v. *Kelsall* (3).

In equity, however, it would appear as if the general rule with regard to money lent by two persons to a third was that they will prima facie be regarded as tenants in common, and not as joint tenants, both of the debt and of any security held for it; *Petti* v. *Styward* (6), *Rigden* v. *Vallier* (7) cited in the notes to *Lake* v. *Craddock* (8). 'Though they take a joint security,' says Lord Alvanley, M. R., 'each means to lend his own money and to take back his own,' *Morley* v. *Bird* (9). Where a mortgage debt has been paid to one of the mortgagees accordingly, it was held that the land was not discharged, and that the concurrence of the other mortgagees was necessary to make a good title; *Matson* v. *Dennis* (10). This is on the ground that the debt is held by the two in common and not jointly, and the principle seems to us equally applicable whether the debt is secured by a mortgage or is merely the subject of a personal contract. The principal right of a mortgagee is to the money, the estate in the land is only an accessory to that right. It is obvious, however, that this proposition cannot be put higher than a presumption capable of being rebutted.

*In Barber Maran* v. *Ramana Goundan* (11) the sum due upon a mortgage was paid to one of the two mortgagees and he gave acquittance without the knowledge of the other mortgagee who brought a suit upon the mortgage. It appeared that there was no fraud on the part of the mortgagors and that the mortgagee who received payment was the agent of the plaintiff on that behalf. The learned Judges held with reference to the provisions of S. 38 of the Contract Act, which were "consistent with the common law case of *Wallace* v. *Kelsall* (3),' that the mortgage has been discharged and that the plaintiff was not entitled to sue. The learned Judges did not follow *Steeds* v. *Steeds* (5), where it was held that the statement of defence (payment to one of the creditors satisfied the debt) was good only as regards the plaintiff who had been satisfied and as regards his share of the debt. But the authority of *Wallace* v. *Kelsall* (3) has been considerably shaken by the latter decision in *Powell* v. *Brodhurst* (12). In that case it was held that where mortgagees have advanced money on a joint account, payment to one of them during the other's lifetime. though a good discharge of the debt at law, only discharges the security to the extent of the payee's beneficial interest (if any), even though the payee ultimately becomes the survivor in the joint account.

So far as Indian Courts are concerned we have been referred to *Barber Maran* v. *Ramana Goundan* (11), where a payment to a joint mortgagee was held to operate as a discharge of the entire mortgage. The correctness of the decision, however, was doubted in several cases in that Court: see *Ahinsa Bibi* v. *Abdul Kadar Saheb* (13), *Veeraswamy* v. *Ibramsa Rowther* (14), *Ramaswamy* v. *Murniyan* (15) and *Sheik Ibrahim* v. *Rama Aiyar* (16). But in the case of *Annapurnamma* v. *Akkaya* (4), it was held by the Full Bench of that Court, Sankaran Nair and Sadasiva Ayyar, JJ. (White, C. J., dissenting) that one of several payees of a negotiable instrument can give a valid discharge of the entire debt without the concurrence of the other payees. White, C. J., in his dissentient judgment after dealing with S. 38 of the Contract Act (see passage quoted above) observed

> If we are unable to find an answer to the question within the four corners of the Contract Act, we have to look to the general law, and to see whether the rule of law as laid down in *Wallace* v. *Kelsall* (3) applies or whether the rule or rather the presumption of equity on which *Steeds* v. *Steeds* (5) was decided is to prevail. I think the equitable presumption applies, and I do not think this presumption is negatived by the provisions of the Contract Act.

The Allahabad High Court in *Bhup Singh* v. *Zainul Abdin* (17) took a view similar to that taken in *Barber Maran* v. *Ramana* (11). The learned Judges observed:

> According to the terms of the instrument of the 3rd May 1872, it is clear that the rights of the two obligees were joint and indivisible, and it cannot be denied that, in the absence of fraud had the obligers or either of them, paid the whole debt in cash to either of the obligees, such payment would have satisfied the bond, and could have been successfully pleaded in answer to any suit brought upon it.

(6) Eq. Ca. Abr. 290.
(7) 2 Ves. Son. 258.
(8) [1732] 1 Whit. & Tudor, 5th Ed. 208.
(9) [1798] 3 Ves, 631.
(10) [1864] 10 Jur. (N. S.) 461=12 W. R. 926=4 De. G. J. & S. 345=10 L. T. 391.
(11) [1897] 20 Mad. 461=7 M. L. J. 269.
(12) [1901] 2 Ch. 160=70 L. J. Ch. 587=49 W. R. 532=84 L. T. 620=17 T. L. R. 501.
(13) [1901] 25 Mad. 26.
(14) [1909] 19 M. L. J. 221=1 I. C. 200=5 M. L. T. 209.
(15) [1910] 20 M. L. J. 709=5 I. C. 343=(1910) M. W. N. 550.
(16) [1911] 35 Mad. 685=21 M. L. J. 508=10 I. C. 874=(1911) 1 M. W. N. 442.
(17) [1886] 9 All. 205=(1886) A. W. N. 279.

In a later case in that Court, *Jauhari Singh* v. *Ganga Sahai* (2) refered to above, however, the Court held that the legal effect of a discharge by one of the mortgagees was that it operated only in respect of the share of the mortgagee who gave it. So far as this Court is concerned, it has never followed the principle enunciated in *Barber Maran* v. *Ramana* (11). In *Harihar Pershad* v. *Bholi Pershad* (18) ( a case of tort), it was pointed out that when a claim is on a money bond to two or more obligees, the presumption at equity is that the obligees are tenants in common, and not joint tenants of the debt, with the consequence that the discharge by one obligee cannot be set up as a defence as against the other obligee suing for his share of the debt. In the case of *Hossainara Begam* v. *Rahimannessa Begam* (19) the learned Judges observed that

> payment to one of two joint mortgagees does not necessarily operate as a discharge of the debt in so far as the other mortgagee is concerned. Equity presumes that several persons together making an advance upon the security of a mortgage have separate interests in the money and accordingly withholds relief from the mortgagor when .in disregard of the terms of the proviso for redemption he has made a payment to one mortgagee and not to both *Matson* v. *Dennis* (10). *Vickers* v. *Cowell* (20), *Smith* v. *Sibthorpe* (21) and *Powell* v. *Brodhurst* (12), which must be taken to have considerably shaken the authority of *Wallace* v. *Kelsall* (3). In the case before us we must apply the doctrine stated by Wills. J., in *Steeds* v. *Steeds* (5) citing from Lord Alvanley, M. R., in *Morley* v. *Bird* (9), that although the mortgagees take a joint security each means to lend his own money and to take back his own. There is nothing to indicate that the intention of the parties was that each of the persons, in whose favour the mortgage obligation was created was a creditor for the whole. Consequently, it cannot be presumed that the payment to one would liberate the debtor against all the creditors ; on the other hand the presumption is that each was a creditor for his own share and could not give a discharge for the whole obligation ; *Sitaram* v. *Shirdhar* (22) and *Tamman Singh* v. *Lachhmin Kunwari* (23). On principle as well as on authority, therefore, we must hold that in the case before us the appointment of one of the mortgagees as administrator to the estate of the mortgagor did not extinguish the right of action of the mortgagee other than the one who was so appointed administrator and had assets in his hands sufficient to satisfy his share of the mortgage debt.

Following the above decision it was held in *Umes Chandra* v. *Dinabandhu* (24) that a payment made by a mortgagor to one of two joint mortgagees is not a good payment as against the other mortgagee. The learned Judges declined to follow the contrary opinion in *Barber* v. *Ramana* (11) adopted by the majority of the Judges in *Annapurnamma* v. *Akkaya* (4) and observed that the dissent by White, C. J., enunciated the contract rule on the subject. Lastly, in the case of *Shaikh Hakim* v. *Adwaita Chandra Das Dalal* (25), it was held that payment to one of several joint creditors does not necessarily operate as a discharge of the debt in so far as the other creditors are concerned, and that in the absence of any evidence or circumstances which would justify a contrary inference, it will be presumed notwithstanding the form of the obligation that a debt due to a member of joint creditors is due to them in severalty.

A similar view has been taken in the Patna High Court ( see *Syed Abbas Ali* v. *Misri Lal* (26) and *Banamali Satpathi* v. *Talna Ramhari Patra* (27), a case of one of the heirs of a mortgagee ), though a contrary view was taken in the earlier case of *Purbhu Ram* v. *Jhalu Kuer* (28). In the Bombay High Court also the correctness of the decision in *Barber* v. *Ramanna* (11) was doubted ; see *Sitaram* v. *Shridhar* (23), a case of several heirs of a mortgagee. In *Shrinivasdas* v. *Meherbai* (29) the question was whether a vendor had made out " a marketable title free from all reasonable doubts " which he had contracted to do by a written agreement, dated 18th October 1913, to sell certain land in Bombay. There had been a mortgage effected on the property on 26th April 1892 in favour of his joint mortgagees by an agreement of charge duly registered, and the deposit of the title deeds of the property with the mortgagees. To deduce a good title it became necessary to prove that the mortgage

(18) [1907) 6 C. L. J. 383.
(19) [1910] 38 Cal. 342=8 I. C. 837=13 C. L. J. 8.
(20) [1839] 1 Beav. 529=3 Jur. 864.
(21) [1887] 34 Ch. D. 732=56 L. J. Ch. 593=35 W. R. 646=56 L. T. 562.
(22) [1903] 27 Bom. 292=5 Bom. L. R. 91.
(23) [1904] 26 All. 318.
(24) [1913] 21 C. L. J. 570=29 I. C. 966.
(25) [1918] 22 C. W. N. 1021=49 I. C. 63.
(26) [1920] 5 Pat. L. J. 376=56 I. C. 403.
(27) [1920] 5 Pat. L. J. 151=55 I. C. 841= 1 Pat. L. W. 102.
(28) [1917] 2 Pat. L. J. 520=(1917) P. H. C. C. 258=42 I. C. 408=4 Pat. L. W. 57.
(29) [1916] 41 Bom. 300=39 I. C. 627=44 I. A. 36 (P. C.).

had been discharged. As proof of that fact the vendor produced a certified copy of a release, dated 30th September 1902, which had been executed by only one of the joint mortgagees but which recited the death of the other mortgagee, the facts that his co-mortgagor was his sole heir and the redemption of the property from the equitable charge created by the agreement of 26th April 1892, it was held (reversing the decisions of the Courts in India) that the recitals in the release were not evidence against the joint mortgagee and that the title contended for had not been deduced. It is to be noticed that if release by one of the mortgagees operated as a valid discharge it would not be necessary to go into the question whether the release was evidence against the other mortgagee.

The weight of authority in the Indian Courts is against the appellant.

It is contended, however, that whatever view the subsequent English decisions might have taken, the Indian Contract Act in enacting S. 38 adopted the view taken in *Wallace* v. *Kelsall* (3). But as pointed out by White, C. J., that section does not deal with the case of discharge of a debt and unless the section compels us to adopt the view contended for by the appellant, we think we should follow the equitable rule stated by Wills, J., in *Steeds* v. *Steeds* (5) citing from Lord Alvenley, M. R., *Morley* v. *Bird* (9) that although the mortgagees take a joint security, each means to lend his own money and to take back his own.

The mortgage bond (in the original) makes it quite clear that the money was borrowed from both and the mortgagors agreed to pay both of them. The learned Subordinate Judge finds that the plea of payment in good faith cannot be entertained. He points out that the mortgagors could not but have been fully aware of the great tension of feeling between the plaintiff and the Defendant No. 2 at the time when they executed the kobala in favour of the latter, that in the kobala itself there are recitals clearly indicating that the mortgagors were fully aware of the severance of interest between the two brothers and it was at their own peril that they made payment of the mortgage debt to the Defendant No. 2 alone without any reference to the plaintiff. There was a stipulation that if the mortgagors were in future made liable, the Defendant No. 2 would be liable to compensate them. The mortgage bonds were not produced. In all these circumstances, we think that no question of payment in good faith can arise even if it is material.

It is contended that whatever the original intention might have been at the time the mortgage deed was executed, each of the brothers was authorized to realize debts from debtors under the deed of partition. The 8th paragraph which deals with the money-lending business runs as follows:

> That a duplicate list being prepared of the ijmali (joint) money-lending business and decrees excluding the personal money-lending transaction of the parties, in the month of Chaitra 1327 B. S., one shall be kept with the second party and the other with the third party, the ijmali (joint) deeds relating to the ijmali (joint) money-lending businesses shall be kept in an ijmali (joint) safe in the custody of two amlas (officers), one authorised by the second party and another authorised by the third party; and the safe being kept under duplicate keys, one of the keys will be entrusted with the second party's authorised amla (officer) and the other key with the third party's authorised amla (officer). Whenever any money on account of ijmali (joint) money-lending business or decree be realised, the same being at the same time divided in two equal parts, the second party and third party will get it in equal shares.

We do not see any indication in the deed of partition of any authority to either brother to realise debts separately.

Duplicate lists were to be prepared of the joint money-lending business, one being kept with each brother the joint deeds relating to the joint money-lending business to be kept in the custody of two amlas (officers), one authorised by each brother, under duplicate keys one to be kept with the officer of each brother. These provisions are inconsistent with the idea of each brother being authorised to realise debts without reference to the other. And lastly the provision that:

> whenever any money on account of the joint money-lending business or decree be realised, the same being at the same time divided in two equal parts, the two brothers would get it in equal shares,

contemplates realisation of debts jointly by the two brothers, as the money is to be divided forthwith.

Having regard to the provisions of the mortgage bond and the deed of partition we think that there is nothing to indicate that it was intended that each of the mortgagees was a creditor for the whole. It cannot, therefore, be presumed that the

payment to one would liberate the debtor against all the creditors; on the other hand, the presumption is that each was a creditor for his own share and could not give a discharge for the whole obligation.

Lastly, it is contended that the plaintiff has realised some moneys due to the two brothers jointly, and the defendant claimed a set-off of Rs. 36,500. But he failed to pay the Court-fee upon the set-off claimed and no issue was accordingly raised upon the point. Any amount however, which might have been realised by the Defendant No. 2 would be taken into account at the time of adjustment of accounts between the two brothers. But there is no reason why the plaintiff should be driven to a suit for adjustment of accounts when he is entitled to his share of the mortgage debt.

For all these reasons we think that the decision of the Court below is right, and these appeals must be dismissed with costs. The time for redemption is extended by three months from to-day.

R.D. *Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 431

MUKERJI AND GRAHAM, JJ.

*Khetra Mohan Saha Sardar* and *others* —Appellants.

v.

*Akhil Chandra Das Bhowmik* and *others*—Respondents.

Appeal No. 120 of 1925, Decided on 2nd December 1926, from a decree of the Offg. Sub-J., 1st Court, Tipperah, D/- 20th May 1924.

*Bengal Tenancy Act, S. 149 (3)—Decision under, does not decide finally substantial rights of parties—Incidental decision on question of title does not operate as res judicata—Civil P. C., S. 11.*

Sub-S. (3) of S. 149 contemplates a suit which culminates not in a decree but in an order of a limited kind, an order restraining payment out of the money, and it is therefore an order not finally decisive of the substantial rights of the parties but providing a machinary for the purpose of carrying out the scheme whereby it is sought to relieve a tenant from harassment. If in a suit of this sort the Court incidentally goes into the question of title in order to determine a question but the decision does not operate as res judicata in subsequent suit on the question of title. [P 432 C 1, 2]

*Chandra Sekhar Sen*—for Appellant.

**Mukerji, J.**—The first party defendants are the appellants in this appeal.

The appeal arises out of a suit which purports to have been instituted as one under S. 149, sub-S. (3) of the Bengal Tenancy Act. A suit was instituted by the appellants, the first party defendants against the second party defendants for recovery of arrears of rent. The latter denied relationship of landlord and tenant in that suit and contended that the money payable by them was payable not to the first party defendants but to a third party, namely, the plaintiffs, and they deposited the money under the provision of S. 149, sub-S. (1) of the Bengal Tenancy Act. Notice of such deposit was served upon the plaintiffs and the latter then instituted the present suit out of which this appeal has arisen.

The suit has been decreed by both the Courts below and the substantial ground upon which the dscisions of the said Courts have been challenged before us is that if the suit be treated as one under S. 149, sub-S. (3) of the Bengal Tenancy Act the reliefs asked for in the plaint in the suit as well as those granted by the Court below to the plaintiffs therein go far beyond the scope of the said suit and if the suit is treated as one for declaration of title of land then the subject-matter of the suit exceeds the pecuniary jurisdiction of the Court by which it was tried. The suit is under S. 149, sub-S. (3) of the Bengal Tenancy Act and the circumstances under which the suit was instituted are also circumstances which contemplated under that sub-section.

The reliefs sought for in the plaint were a declaration of title to Rs. 28-1-0 which was in deposit in Court in favour of the plaintiffs, a declaration that the first party defendants were not entitled to the said amount, an order that the said amount should not be paid out to the first party defendants and a direction that if the first party defendants had withdrawn the said amount then a decree might be passed in favour of the plaintiffs for recovery of the same from them. The reliefs that were granted by the Court of first instance and were confirmed by the lower appellate Court are substantially those that were claimed in the suit. Having regard to the prayers in the plaint and the decree that has been passed in favour of the plaintiffs it is quite clear that the reliefs go far

beyond the scope of a suit which legitimately falls within the purview of sub-S. (3) of S. 149 of the Bengal Tenancy Act. As has been pointed out by this Court in the case of *Tirthabasi Singh Rai* v. *Purna Chandra Nag* (1), Sub-S. (3) contemplates a suit which culminates not in a decree but in an order of a limited kind, an order restraining payment out of the money and it is, therefore, an order not finally decisive of the substantial rights of the parties but providing a machinery for the purpose of carrying out of the scheme whereby it is sought to relieve a tenant from harassment.

The Courts below have proceeded on the view that the suit was one which fell legitimately within the purview of this sub-section. The appellants, in my opinion, are perfectly right in the contention which they put forward that the view which the Courts below have taken of this matter is erroneous. The question then is whether we should set aside the decree which has been passed in this suit and order a fresh trial thereof. From a perusal of the allegations contained in the plaint, the prayers which the plaintiffs sought for therein and the reliefs that have been granted to them it is clear to my mind that the suit may very well be regarded as one for declaration of title to Rs. 28-1-0 and for certain consequential reliefs. It does not necessarily mean that the suit was for declaration of title to the land in respect of which the money was deposited in Court. If it was a suit for declaration of title to the land itself it would certainly not have been within the jurisdiction of the Court in which it was instituted. But if as I have said, the suit is regarded as one for declaration of title to the money and for consequential reliefs, and, in my opinion it may be properly regarded as such, the reliefs which the plaintiffs have obtained therein are pertinent to the allegations that were made in the suit. There was no want of jurisdiction in the Courts as far as I have been able to see, in having treated the suit as one of the nature referred to above and the decree passed therein need not, therefore, be touched.

An objection has been raised on behalf of the appellants to the effect that if it is regarded as a suit for declaration of title to the money the observations and findings at which the Courts below have arrived may in any future proceeding that may arise between the parties be regarded as having finally determined the question of title to the land as between the parties. This objection is a grave one and needs serious consideration. I have, therefore, carefully examined the findings at which the learned Subordinate Judge has arrived and I am clearly of opinion that although the learned Subordinate Judge incidentally went into the question of title as regards the land he has made it clear in his judgment that he was not deciding any question of title to the land itself and he has expressly stated in several passages in his judgment that the suit was not one for declaration of title to the land and towards the end of his judgment he has also said that the declaration with regard to the money was made by him on a determination of the question as to who was in possession of the land by receiving rent from the second party defendants. The findings and observations in the judgment of the learned Subordinate Judge, therefore, cannot by any stretch of imagination operate as res judicata on the question of title as between the parties in any future litigation.

The appeal, therefore, in my opinion, fails and must be dismissed. There is no appearance on behalf of the respondents and there will be no order as to costs.

**Graham, J.**—I agree.

G.B. *Appeal dismissed.*

(1) [1912] 16 C. W. N. 558=14 I. C. 230=15 C. L. J. 501.

---

## * * A I. R. 1927 Calcutta 432

*(Full Bench)*

C. C. GHOSE, BUCKLAND, SUHRAWARDY PANTON, AND MUKERJI, JJ.

*King-Emperor*

v.

*Rajah Probhat Chandra Baruah*

Full Bench Reference No. 1 of 1926, Decided 14th March 1927, made by the Cammissioner of Income Tax, Assam, in Reference No, 1 of 1926.

(a) *Bengal Permanent Settlement Regulation* (1 *of* 1793)—*Estates were not relieved from aiding subsequent necessities of the Government nor are they exempt from general tax like income tax—Income Tax Act* (1922) *S.* 9.

*C. C. Ghose, J.—Buckland and Panton, JJ. concurring.* The clear purport of the declaration

made in Regulation I of 1793 is that the re-assessment of the estates dealt with therein was for ever barred. In other words the land assessment then formed was to be considered the permanent and unalterable revenue of the territorial possessions of the East India Company in Bengal so that no discretion might be exercised by the Company's servants in any case of introducing alteration whatsoever. The Regulation of 1793 was so framed as to operate as an ample and complete guarantee that no resettlement of the estates referred to therein should ever take effect. But no guarantee was ever given that the proprietors of those estates should never, at any time, be called upon to aid in the relief of the future necessities of the Government of the land and there was no promise or engagement of any description whatsoever by which the Government of the day surrendered their right to levy a 'general' tax upon incomes of all persons irrespective of the fact whether they are zemindars with whom the Permanent Settlement was concluded or not. A 'general' tax is no doubt a public demand but it is one which is levied upon a wholly different principle and in respect of a wholly different kind of liability ; such a 'public demand' is no doubt a demand made upon zemindars with whom the Permanent Settlement was concluded, but it is made upon them in company with other classes of the community and with no exclusive reference to the source from which their incomes are derived. [P 440 C 2; P 441 C 1 2]

*Mukerji, J., and Suhrawardy, J., concurring*— The public assessment could be augmented in any way, so long as the method adopted did not mean to take away a portion of this income or profits qua such income or profits. Although by the permanent settlement right to taxation generally was not given up the income or profits derivable from the lands was not to be taxed as such. Whether a portion is taken as revenue and another under the head of Income tax, both are demands of the State, and when in assessing the revenue, a guarantee was given of its fixity and a declaration was made that the balance will not be altered at any time, to impose a further tax on the income or profits, does away with that fixity and alters that which was guaranteed to be unalterable. The object of the Settlement in exempting from further burden income which has already paid toll to the State in the shape of land revenue was primarily to protect and improve agriculture, as that then was the chief source of income, and the exemption of agricultural income from the operation of the Income-tax Act perhaps indicates a continuity of policy on the part of the legislature in that respect. The words of the Settlement, however, are clear enough as indicating an intention to leave untouched for all times to come the surplus that the landholder will be able to derive as income or profits from the lands of his estate.

[P 451 C 1 2; P 458 C 1]

✲ (*b*) *Income Tax Act* (1922), *S.* 9—*Income from profits of land is assessable.* (*Ghose, J.*)

It is abundantly clear that the Legislature has deliberately included income from profits of land wherever situate, be the area permanently settled or non-permanently settled, as being assessable to income-tax. [P 442 C 2]

✲✲ (*c*) *Interpretation of Statutes—General and special—Subsequent general statute may not repeal a prior special Act—Subsequent Act making no reference to 'earlier—Two should be construed together—Each should be construed according to its own terms.* (*Ghose, J.*)

Where two Acts are inconsistent or repugnant, the latest expression of the will of the Legislature must prevail, provided the Court is satisfied that the repeal of the prior enactment must flow from necessary implication. From this rule, it follows that if one statute enacts something in general terms, and afterwards another statute is passed on the same subject. the subsequent statute will usually be considered as repealing by implication the former statute. In certain cases again special Acts have been held impliedly to repeal a prior general Act. But in each case it depends on the particular terms of the statute in question. Again prior statutes are not to be held to be repealed by implication by subsequent statute if the two are repugnant in cases where the prior enactment is special and the subsequent enactment is general but the guiding rule is that each enactment must be construed according to its own subject matter and its own terms. A general statute may repeal a particular statute if the subject matter of two legislations is one and the same. But where the Legislature passes a later Act without reference to an earlier Act and that earlier Act is one which has been in force for a long time and is therefore well known the two Acts should be construed consistently if it is possible to do so.

[P 443 C 1 2]

(*d*) *Income-tax Act* (1922)—*Bengal Permanent Settlement Regulation* (1 of 1793)—*Two deal with different subjects.* (*C. C. Ghose, J., Buckland, and Panton, JJ., concurring*).

The subject matter of the two legislations Bengal Regulation (1 of 1793) and Income Tax Act are different ; the later statute is on a subject which is financially and economically different from that dealt with in the statute of 1793 ; one deals with revenue assessed on lands the other is a tax on profits. [P 443 C 2]

(*Mukerji, J., and Suhrawardy, J., concurring*) —It may not perhaps be right as a matter or method of construction in order to construe the Income-Tax Act (11 of 1922) to put it side by side with Regulation 1 of 1793 without taking into account the events that have have happened during and the changes that have been wrought by the long years that separate the two enactments. If the Income Tax was sought to be levied upon Permanent Settlement zemindars while Regulation 1 of 1793 was yet in sight it would perhaps have been understood as having taken away from the fixity of the State demand and altered the income and profits the unalterable character of which the Regulation had assured. The two enactments are not necessarily inconsistent or repugnant to each other and the Permanent Settlement Regulation 1 of 1793 may very well stand as an exceptional proviso under the Income Tax Act 11 of 1922.

[P 453 C 1; P 456 C 2]

✲✲ (*e*) *Income-tax Act* (1922) *S.* 9—*Income from land even in permanently settled estates, is assessable, subject to exemptions in Income-tax Act—Bengal Permanent Settlement Regula-*

*tion* (1 *of* 1793) :**53 Cal. 524=A. I. R. 1926 Cal. 819=95 I.C. 539, overruled.**

*C. C. Ghose, J.* — *Buckland and Panton, JJ., concurring.*—Income from land subject to the exemption in the Income Tax Act is liable to be assessed to Income-Tax and therefore even having regard to the terms of the Permanent Settlement Regulation, income derived from land such as Jalkar, ground rent for potteries and brickfields, fees for tying boats, storing crops and cart stands yearly nazar and nazar on petitions, ground rent in Bazar and stall fees in permanently settled estates subject to the exemption provided by the legislature is liable to assessment to Income tax. *Mukerji and Suhawardy, JJ., contra. A. I. R.* 1924 *Cal.* 668, *affirmed* : **53 Cal. 524=A. I. R. 1926 Cal. 819=95 I. C. 539, overruled.**

[P 433 C 2, P 446 C 2]

(*f*) *Bengal Permanent Settlement Regulation* (1793)—*Effect* (*Mukerji and Suhrawardy, JJ., concurring*).

The effect of the permanent settlement was that the Government limited its own demand upon the zemindar in so far as that demand related to the income that was derivable from the land. [P 450 C 2]

(*g*) *Income Tax Act*, 1922 — *Construction* (*Mukerji, J.*).

The Income-Tax Act like other statutes must be read according to the ordinary and natural construction of the words with only such aid as is afforded from within the four corners of the Statute itself read as a whole. [P 457 C 1, 2]

*B. C. Mitter* and *Surendra Nath Guha* —for the Crown.

*N. N. Sirkar* and *Jatindra Mohan Chowdhury*—for Assessee.

## Order of Reference

**Sanderson, C. J.**—This is a letter of reference from the Commissioner of Income-tax, Assam, dated the 12th of March 1926, and the following questions are referred for the decision of the High Court under S. 66 (2) of the Indian Income-Tax Act of 1922 (1) " Whether the following sources of income are agricultural and therefore exempted from assessment to income-tax under S. 4 (3) (viii) of the Act." Then there are set out ten items.

The learned vakil. who appeared for the assessee, stated that he did not intend to argue that the income from any of the items could be said to be agricultural except items (v), (vii) and (viii) namely " fees received from land used for storing purchases of crops (paiali) " " Punyaha Nazar or Nazar paid by tenants of agricultural holdings at the beginning of the zemindari year " and " Nazar, for petitions presented to the zemindar, dealing with questions of succession, settlement and partition."

The second question is as follows : " Whether income derived from such of the above sources as were not taken into consideration at the time of fixing the jama at the Permanent Settlement is assessable for income-tax purposes " and the third question is : " Whether having regard to the terms of the Permanent Settlement Regulation income derived from the above sources in permanently settled estates is liable to assessment to income-tax."

It appears that the point which is raised in the third question was considered by a Division Court consisting of my learned brother Mr. Justice Rankin and Mr. Justice Page in the case of *Emperor* v. *Probhat Chandra Barua* (1). My learned brother Mr. Justice Rankin decided that income derived from fisheries and from sthaljat (i. e., land used for stacking timber) is not " agricultural income or income derived from land which is used for agricultural purposes within the meaning of Ss. 2 and 4 of the Income-Tax Act," and that " such income is liable to income tax notwithstanding the Permanent Settlement Regulations of 1793." My learned brother Mr. Justice Page did not agree with him in that judgment and the result was, asstated by the learned Judges in their judgment of the 8th of January 1924, that Cl. 36 of the Letters Patent applied to that matter and that consequently the judgment of my learned brother Mr. Justice Rankin, who was the Senior Judge, prevailed.

It has been agreed by the learned vakils, who appeared in this case for the respective parties, that the judgment of my learned brother Mr. Justice Rankin must be regarded as the judgment of a Division Court. I agree with the opinion, which was expressed by the learned vakils.

The point which is involved in the abovementioned question arose in another case which is entitled *King Emperor* v. *Indu Bhusan Sarkar* (2).

My learned brothers Mr. Justice Cuming and Mr. Justice Page in that case decided that

where income from fisheries lying within an estate was included in the assets upon which land revenue was assessed under the Permanent Settlement Regulation (1 of 1793), incomes from such fisheries are not further liable to assessment under the Income-Tax Act.

(1) A. I. R. 1924 Cal. 668=51 Cal. 504.
(2) A. I. R. 1926 Cal. 819=53 Cal. 524.

It is clear that that decision was contrary to the decision of my learned brother Mr. Justice Rankin in the case, to which I have referred.

The result is that there are conflicting decisions of two Division Courts with regard to the point which is raised in the third question and it would be impossible for this Court to agree with both of them, and this Court would be compelled to differ from one of these Division Courts upon a point of law.

The result is that, in my judgment, this Court is compelled to refer the question for the decision of a Full Bench.

The rule, which refers to this matter, is R. 1 of Chap. 7 of the rules of the Appellate Side and is as follows :

> Whenever one Division Court shall differ from any other Division Court upon a point of law or usage having the force of law, the case shall be referred for decision by a Full Bench.

Both the learned vakils are of opinion that this case should be referred to a Full Bench and I agree with that opinion.

Therefore, one question, which we refer to the Full Bench, is that which is contained in the third question submitted by the Commissioner of Income-Tax.

It remains to be considered whether the point involved in the second question also, should be referred to a Full Bench.

I am of opinion that it should be. The point involved in the second question, is clearly covered by my learned brother Mr. Justice Rankin's judgment and although the decision of my learned brothers Mr. Justice Cuming and Mr. Justice Page was with reference to income, which was included in the assets upon which land revenue was assessed under the Permanent Settlement Regulation, the judgment, in my opinion, is wide enough to include the point which is involved in the second question in this case. The principle, on which the decision was given, was in direct contradiction to the conclusion at which my learned brother Mr. Justice Rankin arrived in the abovementioned case.

The result is that, in my opinion, both the questions II and III should be referred for decision of the Full Bench.

In my opinion, it would not be reasonable for this Court to embark at the present moment upon a consideration of the items in the first question, to which the learned vakil for the assessee referred, namely items (v), (vii) and (viii) because it must be obvious that, if the points arising in questions II and III are decided by the Full Bench in one way, the matters arising in respect of question I will not require consideration.

**Rankin, J.**—I agree.

## Opinion

**C. C. Ghose, J.**—On the 12th March 1926 the Commissioner of Income-Tax, Assam, referred to this Court for decision under S. 66 (2) of the Indian Income-Tax Act of 1922, the following questions :

I. Whether the following sources of income are agricultural and therefore exempted from assessment to income-tax under S. 4 (3) (viii) of the Act.

(i) Jalkar or rents received from fisheries.

(ii) Ground-rent from land used for potteries.

(iii) Ground rent from land used as brick-fields.

(iv) Fees received from the tying up of boats against the assessee's land.

(v) Fees received from land used for storing purchase of crops (paiali).

(vi) Fees received from cart stands.

(vii) Punyaha nazar or nazar paid by tenants of agricultural holdings at the beginning of the zemindari year.

(viii) Nazar for petitions presented to the zemindar dealing with questions of succession, settlement and partition.

(ix) Ground-rent for permanent shops at hats and bazars.

(x) Stall fees paid by temporary (daily) sellers at hats and bazars.

II. Whether income derived from such of the above sources as were not taken into consideration at the time of fixing the Jama at the Permanent Settlement is assessable for Income-tax purposes.

III. Whether having regard to the terms of the Permanent Settlement Regulation income derived from the above sources in permanently settled estates is liable to assessment to Income-tax.

This Reference came on for hearing before the late Chief Justice and Mr. Justice Rankin, as he then was, on the 21st May 1926, when the attention of the learned Judges having been drawn to the conflict of opinion, as disclosed in the judgments in the cases of *Emperor* v.

*Raja Probhat Chandra Barooah* (1), and *Emperor* v. *Indu Bhusan Sarkar* (2) questions II and III were referred by the learned Judges to a Full Bench for decision. The case of *Emperor* v. *Rajah Probhat Chandra Barooah* (1) was before a Division Bench, consisting of Mr. Justice Rankin and Mr. Justice Page. Mr. Justice Rankin held that income derived from fisheries and from *Sthaljat* (i. e., land used for stacking timber) was not 'agricultural income' or income derived from land which is used for agricultural purposes, within the meaning of Ss. 2 and 4 of the Income Tax Act, and that such income was liable to income tax, notwithstanding the Permanent Settlement Regulations of 1793. Mr. Justice Page held that such income was not assessable to income-tax by reason of the Permanent Settlement Regulations. There being this difference of opinion between the two learned Judges, the opinion of the senior Judge Mr. Justice Rankin, prevailed under S. 36 of the Letters Patent.

The case of *King-Emperor* v. *Indu Bhusan Sarkar* (2) was before a Division Bench, consisting of Mr. Justice Cuming and Mr. Justice Page, and it was there decided that where income from fisheries lying within an estate was included in the assets upon which land revenue was assessed under the Permanent Settlement Regulations, incomes from such fisheries were not further liable to assessment under the Indian Income Tax Act.

The two questions referred to us are of very great importance, and we have had the advantage of hearing thereon Mr. Sircar, on behalf of the assessee, and Sir Binode Mitter, on behalf of the Crown, at length. We desire to express our acknowledgments to them for the great assistance which they have rendered to us. Question 1 is not before the Full Bench but Mr. Sircar mentioned that his client contended that Items (v), (vii) and (viii) came within the definition of agricultural income in the Income Tax Act and were therefore exempted from assessment to Income Tax under S. 4 (3) (viii) of the Act. This matter is not before us and it will have to be considered hereafter.

The case comes from the District of Goalpara in Assam which, including the Daro Hills but excluding the Eastern Guars, was originally part of the Extensive Collectorate of Rungpore and as such formed part of the province of Bengal which by the Moghul Emperor's Firman of the 12th August 1765, was transferred to the East India Company. From 1765 to 1822 the old thanahs of Goalpara, Dhubri and Karaibari formed part of the Rungpore District, known as the Rangamati District. Under the provisions of Regulation X of 1822 these thanahs were cut off from Rungpore and formed into a separate district with headquarters at Goalpara (See Sir Edward Gait's History of Assam, Second Edition, p. 298; Baden-Powell's Land Systems of British India, Vol. III, p. 430; Sir William Ward's Introduction to the Land Revenue Manual, Assam, 1905). It is not and cannot be disputed that the assessee's estates, in respect of which the present question has arisen, were settled under the Permanent Regulation of 1793. (See Sir William Ward's Introduction referred to above, p. liv; McNeil's Revenue Administration of the Lower Provinces of Bengal, page 44). On behalf of the assessee the case is put in this way: it is argued that it is clear that according to the engagement entered into at the time of the Permanent Settlement, the "Jama" then fixed cannot be altered. It was declared by the Governor-General-in-Council that the zemindars and other proprietors of land and their heirs would be allowed to hold their estates at such assessment for ever (See Regulation I of 1793, S. 4), and that the order fixing the amount of the assessment were to be considered irrevocable and not liable to alteration by any persons whom the Court of Directors might appoint to the administration of the affairs of the East India Company (S. 7). At the conclusion of the Permanent Settlement, the Governor-General-in-Council expressed his confidence that the proprietors of land, sensible of the benefits conferred upon them by the public assessment being fixed for ever, would exert themselves in the cultivation of their lands under the certainty that they would enjoy exclusively the fruits of their own good management aud industry and that no demand would ever be made upon them for the augmentation of the public assessment in consequence of the improvement of their respective estates. It is pointed out that until the proclamation of the 22nd March 1793, relative to the limita-

tion of the public demand upon the lands in Bengal, Behar and Orissa, it i. e., the public demand upon each estate was liable to annual or frequent variation at the discretion of the Government. The amount of it was fixed upon an estimate formed by the public officers of the aggregate of the rents payable by the ryots or tenants for each bigha of land in cultivation of which, after deducting the expenses of collection, ten-elevenths were usually considered as the right of the public and the remainder the share of ths landholder. Refusal to pay the sum required of him was followed by his removal from the management of his lands and the public dues were either let in farm or collected by an officer of Government and the above-mentioned share of the landholder or such sum, as special custom or the orders of Government might have fixed, was paid to him by the farmer or from the public treasury (See Preamble to Regulation 2 of 1793).

When the country came under British administration, two fundamental measures essential to the attainment of increase and improvements in agriculture and consequently of the increase in the wealth of the country were decided upon namely, that the property in the soil was declared to be vested in the landholders and the revenue payable to Government from each estate was fixed for ever (See Preamble to Regulation 2 of 1793). The object, therefore, of the Permanent Settlement of 1793 being to limit the public demand upon lands in the Provinces of Bengal, Behar and Orissa, the tax under the Indian Income Tax Act, call it by whatever name you like, is, it is argued an additional public demand upon the lands which were settled under the Permanent Settlement of 1793, and is, therefore, a violation of a positive statutory engagement made with the zemindars at the time of the Permanent Settlement. In other words, it is suggested that it is a breach of a promise made by Lord Cornwallis when the latter had exhausted the resources ol language to assure the zemindars that the rate then assessed on their lands was irrevocably fixed for ever and that they should, in all future time, be "free from any further demand for rent, tribute or any arbitrary exaction whatsoever." It is further argued that the provisions of the Permanent Settlement of Bengal have in no way been repealed expressly or impliedly by the Indian Income-Tax Act of 1922, and that, therefore, the generalitly of the words used in the charging sections of the Income-Tax Act is inapplicable to zemindars whose lands lie in permanently settled estates, and with whom a binding engagement wes entered into by the State in 1793. It is not suggested that zemindars as a body are immune from all taxation, but the contention is that they cannot be made to pay taxes on profits derived from lands in permanently settled estates, because such taxes are in reality additions to the burdens on land which were fixed in 1793 and which were to remain unalterable for ever. It is urged that the Permanent Settlement Regulation of 1793 being an earlier statute on a special subject and the Indian Income-Tax Act of 1922 being a subsequent enactment of a general nature, the Court will not hold that the earlier and special legislation has been indirectly repealed, altered or derogated from merely by force of general words used in the subsequent legislation, without any indication of a particular intention to do so. [See *Seward* v. *Vera Cruz* (3)].

On all these grounds the assessee has contended before us that the answer to the third question referred to us should be in the negative, the question being slightly altered in manner following, namely whether having regard to the terms of the Permanent Settlement Regulation, income derived from land in permanently settled estates subject to the exemption provided by the Legislature is liable to assessment to Income-Tax. The assessee has suggested the slight alteration indicated above in the third question, because his argument is that whether any particular items of income were or were not taken into consideration at the time of fixing the Jama at the Permanent Settlement, income derived from land in permanently settled estates subject as stated above is not and cannot be made liable to assessment to Income-Tax.

On behalf of the Crown it has been strenuously contended before us by Sir Binode Mitter that there was no such promise made to the actual proprietors

(3) [1884] 10 A. C. 59=52 L. T. 474=33 W. R. 477=54 L. J. P. 9=5 Asp. M. C. 386=49 J. P. 324.

of lands which were settled at the time of the Permanent Settlement of Bengal, Behar and Orissa as alleged on behalf of the assessee ; that there are no words in Regulation 1 of 1793 or in the other Regulations promulgated in the same year from which the inference can be legitimately drawn that there is a statutory obligation not to impose on holders of such lands any other tax whatsoever, that all that was decided in 1793 was that the Jama or revenue on lands should be treated as fixed for ever and, therefore, could not be enhanced or altered ; that the legislature is competent to assess the income derived from land in permanently settled estates, subject to exemptions provided for by the legislature itself, to Income-Tax ; that the words used in the charging sections of the Indian Income-Tax Act, 1922, are very wide and that they must include income from land in permanently settled estates, subject to the said exemptions; that the rule about a subsequent enactment of a general nature not being held to affect in any manner an earlier statute on a special subject cannot be pushed too far, inasmuch as the subject-matter of taxation under the later statute is different from the subject-matter of taxation under Regulation I of 1793, i. e., the subject-matters of taxation under Regulation I of 1793 and the Indian Income-Tax Act, 1922, are financially and economically different, and that having regard to the express specification of certain exemptions only, the present assessee's claim must fail.

These being the respective contentions of the parties the first question that arises is what was the nature and effect of the Permanent Settlement of lands under Regulation I of 1793 under which roughly speaking about 120,000 out of the whole area of 140,000 square miles of the Lower Provinces of Bengal were settled. Was it a settlement merely of the revenue derivable from land which was declared to be fixed and unalterable for ever, or was it, in addition to this a general absolution to holders of land under the Permanent Settlement, declaring their immunity from all further taxation in respect of profits derived from land ? The answers to these questions must depend primarily and principally upon the language used in Regulation I of 1793 and in the connected Regulations; but to understand the nature of the transaction embodied in the Permanent Settlement of Bengal, Behar and Orissa it may be useful and indeed desirable to refer briefly to certain antecedent transactions which are matters of history. From the period of the East India Company's accession to the financial administration of Bengal, Behar and Orissa by the Dewany Grant of 1765, one settlement of land revenue only, that of 1772, was concluded by Warren Hastings for a term of five years; and this was made chiefly with farmers, to the exclusion of the hereditary landholders. With this exception the settlements of revenue, mal and sayer, were in general adjusted from year to year, in some instances with the landholders and in others with farmers, e. g., the settlements for 1777, 1778, 1779 and 1780. When the zemindars or landholders declined to enter into engagements in respect of the revenue demanded from them, the rents payable by the under-tenants were collected immediately from them under what was known as khas management by the officers of Government, an allowance usually 1-10th of the actual receipts from the lands, when held khas, being given to the dispossessed zemindar or landholder. It was a system which was described by the Court of Directors as inimical to the general prosperity of the country and a striking provision in Pitt's India Act of 1784 (24 Geo. III, C. XXV) declared that :

> And whereas complaints have prevailed, that divers rajas, zemindars and other native landholders have been unjustly deprived of their lands, jurisdictions, and privileges, or that the tribute, rents, and services required to be by them paid or performed for their possessions to the Company, are become grievous and oppressive ; and whereas the principles of justice and the honour of this country require that such complaints should be forthwith enquired into and fully investigated and if founded in truth effectually redressed : Be it therefore enacted, that the Court of Directors shall forthwith take the said matters into their serious consideration, and adopt such methods for enquiring into the truth of the complaints as they shall think best adopted for that purpose; and thereupon give orders to the several Governments and Presidencies in India, for effectually redressing, in such manner as shall be consistent with justice and the laws and customs of the country, all injuries and wrongs which the rajas, zemindars and other native landholders may have sustained, and for the settling, upon principles of moderation, and justice according to the laws and constitution of India, the permanent rules by which their tributes, rents and services shall be in future rendered and paid to the Company.

Thereafter enquiries and investigations followed, and in 1790-91 a complete code of regulations for the conclusion of a new settlement of the land revenue for Bengal, Behar and Orissa was promulgated by Lord Cornwallis. The Decennial Settlement of 1790-1791 was made permanent by Regulation I of 1793.

The settlement embraced, roughly speaking, the tracts of the country now comprised in the divisions of Burdwan, the Presidency, Rajshahi, Dacca, Chittagong, Patna and Bhagulpur, exclusive of part of the Santal Pargannas. It also extended to Hazaribagh and Manbhum districts in the Chota Nagpur Division and to Jalpaiguri and Goalpara then forming part of the Rungpur Collectorate. Whether this arrangement was the one best adopted to obtain the greatest income with the least pressure and whether a temporary instead of a permanent settlement would not have been more advantageous to all parties are questions which have given rise to much discussion; but they lie outside our province and are not germane to the present enquiry.

Prior to the Decennial Settlement the zemindar was in reality merely a head-receiver or collector of the Government land revenue from the under-tenants. He was never at any time the absolute proprietor of the estates held by him. There was no fixed principle governing the rate of rent, or the mode of its recovery from the under-tenants. This want of settled rules and practice led to extortion, fraud and concealment; and to remedy this unsatisfactory state of land management the Decennial Settlement was determined on and was as stated above eventually made perpetual. On the zemindars was thrown the onus of paying the revenue they being considered persons of substance. The punctuality of payment from the zemindars was enforced by the penalty of confiscation of their estates in case of delay but powers were given to the zemindars to collect from the ryots.

These being the circumstances leading to the Permanent Settlement of Bengal, Behar and Orissa, let us now turn to the language used in Regulation I of 1793 and examine whether there is any foundation for the contention that having regard to the bargain made at the time of the Permanent Settlement income derived from land in permanently settled areas is not assessable to income-tax. It is, therefore, necessary to find out at the outset what was the precise language used by Lord Cornwallis in Regulation I of 1793 taken as a whole. The material provisions are as follows:

I. The following articles of the Proclamation *relative to the limitation of the public demand* upon the lands, addressed by the Governor-General-in-Council to the zemindars, independent talukdars, and other actual proprietors of land paying revenue to Government in the provinces of Bengal, Behar and Orissa, are hereby enacted into a Regulation, which is to have force and effect from the 22nd March 1793, the date of the Proclamation.

II. Art. 1. In the original Regulations for the decennial settlement of the public revenues of Bengal, Behar and Orissa, passed for those provinces respectively on the 18th September 1789, the 25th November 1789, and the 10th February 1790, it was notified to the proprietors of land, with or on behalf of whom a settlement might be concluded, that the *jama assessed upon their lands under those Regulations would be continued after the expiration of ten years, and remain unalterable for ever*, provided such continuance should meet with the approbation of the Honourable Court of Directors for the affairs of the East India Company, and not otherwise.

III. Art. II. The Marquis Cornwallis, Knight of the most noble Order of the Garter, Governor-General-in-Council, now notifies to all zemindars, independent talukdars and other actual proprietors of land paying revenue to Government, in the provinces of Bengal, Behar and Orissa, *that he has been empowered by the Honourable Court of Directors for the affairs of the East India Company to declare the jama, which has been or may be assessed upon their lands under the Regulation above mentioned, fixd for ever.*

IV. Art. III. The Governor-General-in-Council accordingly declares to the zemindars, independent talukdars and other actual proprietors of land with or on behalf of, whom a settlement has been concluded under the Regulations above mentioned, that at the expiration of the term of the settlement *no alteration will be made in the assessment which they have respectively engaged to pay, but that they, and their heirs and lawful successors will be allowed to hold their estates at such assessment for ever.*

V. Art. IV. The lands of some zemindars, independent talukdars and other actual proprietors of land having been held khas, or let in farm in consequence of their refusing to pay the assessment required of them under the Regulations above mentioned, the Governor-General-in-Council now notified to the zemindars, independent talukdars and other actual proprietors of land whose lands are held khas, that they shall be restored to the management of their lands upon their agreeing to the payment of the assessment which has been or may be required of them, in conformity to the Regulations above mentioned, and that *no alteration shall afterwards be made in that assessment, but that they and their heirs and lawful successors* shall be permitted to hold their respective estates at such assessment for ever: and he declares to the zemindars, independent talukdars and other actual proprietors of land, whose lands have

been let in farm, that they shall not regain possession of their lands before the expiration of the pericd for which they have been farmed (unless the farmers shall voluntarily consent to make over to them the remaining term of their lease, and the Governor-General-in-Council shall approve of the transfer), but that at the expiration of that period, upon their agreeing to the payment of the assessment which may be required of them, they *shall be reinstated, and that no alteration shall afterwards be made in that assessment*, but that they and their heirs *lawful successors shall be allowed to hold their respective estate at such assessment for ever.*

VI. Art. V. In the event of the proprietory right in lands that are, or may become, the property of Government being transferred to individuals such individuals and their heirs and lawful successors shall be permitted to hold the lands at the assessment at which they may be transferred for ever.

VII. Art. VI. It is well known to the zemindars, independent talookdars, and other actual proprietors of land, as well as to the inhabitants of Bengal, Behar and Orissa in general, that, from the earliest times until the present period, the public assessment upon the lands has never been fixed, but that, according to established usage and custom, the rulers of these provinces have from time to time demanded an increase of assessment from the proprietors of land; and that, for the purpose of obtaining this increase, not only frequent investigations have been made to ascertain the actual produce of their estates but that it has been the practice to deprive them of the management of their lands, and either to let them in farm, or to appoint officers on the part of Government to collect the assessment immediately from the ryots. The Honourable Court of Directors, considering these usages and measures to be detrimental to the prosperity of the country, have, with a view to promote the future ease and happiness of the people, authorized the foregoing declarations; and the zemindars, independent talookdars, and other actual proprietors of land, with or on behalf of whom a settlement has been or may be concluded, are to *consider these orders fixing the amount of the assessment as irrevocable, and not liable to alteration by any persons whom the Court of Directors may hereafter appoint to the administration of their affairs in this country.*

The Governor-General-in-Council trusts, that the proprietors of land, sensible of the benefits conferred upon them by the public assessment being fixed for ever, will exert themselves in the cultivation of their lands, under the certainty that *they will enjoy exclusively the fruits of their own good management and industry, and that no demand will ever be made upon them, or their heirs or successors, by the present or any future Government, for an augmentation of the public assessment in consequence of the improvement of their respective estates.*

The words "public assessment being fixed, under the certainty that they would enjoy exclusively" and "that no demand would ever be made upon them for an augmentation of the assessment" were stressed by learned counsel on behalf of the assessee and it was argued that the same principle which prevented an augmentation of the assessment ought equally to preclude the taxation of the landholders in respect of the rent or produce of their estates because such taxation must necessarily prevent them from enjoying exclusively the fruits of their own good management and industry. No doubt, the words used by Lord Cornwallis in Regulation I of 1793. taken by themselves and apart from what has been called their historical setting, may lend a certain amount of colour to the contention put forward on behalf of the assessee; but in my view the settlement made in 1790-91 by Lord Cornwallis commonly called the 'Decennial Settlement' differed in no respect from an ordinary settlement of land except that it was made for 10 years in place of being annual, as was then the practice. The Court of Directors approved in 1792 that it should be made permanent and Lord Cornwallis issued a Proclamation fixing the 10 years' settlement for ever. The clear purport of the declaration made in Regulation I of 1793 is, in my judgment, nothing more than this, viz., that the reassessment of the estates in question was for ever barred. In other words the land assessment then formed was to be considered the permanent and unalterable revenue of the territorial possessions of the East India Company in Bengal so that no discretion might be exercised by the Company's servants in any case of introducing any alteration whatsoever. By Regulation XIX of 1793 it was stated that

> by the ancient law of the country, the ruling power is entitled to a certain proportion of the produce of every bigha of land (demandable in money or kind according to local custom), unless he transfers his right thereto for a term or in perpetuity, or limits the public demand upon the whole of the lands belonging to an individual, leaving him to appropriate to his own use the difference between the value of such proportion of the produce and the sum payable to the public, whilst he continues to discharge the latter.

As I read these words and the words used in Regulation I of 1793 along with the words used in Regulation VIII of 1793 which provided that the assessment should be so regulated as to leave to the proprietors a provision for themselves and families equal to about 10 per cent. on the amount of their contribution to Government, the conclusion, to my mind, is irresistible that what was levied in 1793

was by virtue of a substantive and paramount title vested in the estate. The Regulation of 1793, therefore, was so framed as to operate as an ample and complete guarantee that no resettlement of the estates referred to therein should ever take effect. But it seems to me that no guarantee was ever given that the proprietors of those estates should never, at any time, be called upon to aid in the relief of the future necessities of the Government of the land : see in this connexion the significant words used by Lord Cornwallis in the second clause of Art. VII of Regulation I of 1793. The conclusion I have come to is, in my opinion, amply supported by the terms of Regulation XIX of 1793 which be it noted was passed on the same date, namely, the 1st May 1793, and which laid down the rules by which rent-free tenures should be held valid. In the case of a valid rent-free tenure Regulation XIX provides that no revenue at all should be demanded, just as Regulation I of 1793 provided that in the case of a permanently settled estate no additional revenue should at any time be assessed.

Both these Regulations treated the same subject-matter, viz., revenue ; and they treated in the same way namely by barring future assessment. Would it be or could it be contended that the proprietors or valid rent-free tenures held under Regulation XIX of 1793 were and are absolutely exempted from liability to contribute to the general taxation of the country. The answer to that question must, in my judgment, be in the negative in the clearest manner possible. When Lord Cornwallis spoke of the 'public demand' being fixed and made permanent and being limited for ever, what is it that he meant? Lord Cornwallis held the view as is clear from the Regulations, that the true wealth of a Government lay in the growing wealth of its people and the fiscal system, which must encourage the accumulation and enjoyment of capital in private hands, must in the long run be the one most profitable to the State. In this connexion I desire to adopt if, I may, as part of my judgment, a few words from the Despatch of the Secretary of State for India in Council dated the 12th May 1870, being the same Despatch from which my brother Page quoted a few extracts in his judgment in the case of *Emperor* v. *Rajah Probhat Chandra Barooah* (1). The Duke of Argyll then observed as follows :

> The great object and purpose of that settlement (the Permanent Settlement of Bengal, as clearly defined and described in Art. VI, must govern our interpretation of its terms. That object, as this Article explains at length, was to be an end for ever to the practice of all former Governments of altering and raising the land taxes from time to time, so that the landholder was never sure for any definite period what proportion of the total produce of the soil might be exacted by the State. This uncertainty was to be set at rest for ever. The 'public demand' was to be fixed and permanent.

Such was the promise and its scope and object were clearly explained in the concluding exhortation addressed to the landholders that :

> they exert themselves in the cultivation of their lands under the certainty that they would enjoy exclusively the fruits of their own good management and that no demand would ever be made upon them or their heirs and successors by the present or any future Government for an augmentation of the public assessment in consequence of the improvement of their respective estates.

These last words quoted by the Duke of Argyll, I repeat, illustrate the whole force of the argument ; there is to be no increase of the "public demand" levied upon the zemindars in consequence of the improvement of their estates. The implication, further, is (although the Legislature is all powerful) that there cannot be without being guilty of a singular and signal breach of faith a "special tax" on zemindars with whom the Permanent Settlement was concluded, which would operate as an increase of the 'public demand' levied upon zemindars in consequence of the improvement of their estates ; but, in my judgment, there was no promise or engagement of any description whatsoever by which the Government of the day surrendered their right to levy a 'general' tax upon incomes of all persons irrespective of the fact whether they are zemindars with whom the Permanent Settlement was concluded or not. A 'general' tax is no doubt a 'public demand,' but it is one which is levied upon a wholly different principle and in respect of a wholly different kind of liability ; such a 'public demand' is no doubt a demand made upon zemindars with whom the Permanent Settlement was concluded, but it is made upon them in company with other classes of the community and with no exclusive reference to the source from

which their incomes are derived. On these grounds I am of opinion that the first contention urged before us on behalf of the assessee must fail, and it is accordingly negatived.

But assume that I am wrong in the conclusion to which I have come; it is then necessary to examine whether the words used in the charging sections of the Indian Income Tax Act, 1922, subject to the exemptions provided for by the Legislature itself, are sufficiently wide in support of the contention that income from the profits of land in permanently settled estates, subject to the said exemptions, is liable to be assessed to income-tax. To start with, it is, in my opinion, unreasonable to hold that the Legislature in enacting the Indian Income-Tax Act 1922 had not had its attention directed to the terms of Regulation I, 1793. The Permanent Settlement of Bengal, Behar and Orissa has been the subject of acute controversy ever since the days of Lord Dalhousie and the question of the immunity of zemindars in permanently settled area from taxation has been canvassed so often and at such length that to suggest that the Legislature, in enacting the Indian Income-Tax Act, 1922, was unmindful of the Permanent Settlement, is to state a proposition which carries its own refutation. The position, therefore, is that the Legislature, with the full knowledge of the existence of the Permanent Settlement and with the further knowledge, with which it must be credited, that the precise point now raised had been raised in the past, had deliberately chosen, subject to the exemption of 'agricultural income' (the other exemptions need not be considered in this case) to say that the Indian Income-Tax Act 1922 shall apply to all income, profits or gain as described or comprised in S. 6 from whatever source derived, accruing or arising or received in British India or deemed under the provisions of this Act to accrue, or to arise, or to be received in British India. In S. 6 it is provided that:

> Save as otherwise provided by this Act the following heads of income, profits and gains shall be chargeable to income-tax in the manner hereinafter appearing, viz., (i) Salaries, (ii) Interest on Securities, (iii) Property, (iv) Business, (v) Professional earnings, (vi) Other sources.

Sections 7, 8, 9, 10 and 11 define the heads of income referred to above other than 'Other sources.' S. 12 defines the expression 'Other sources,' and it runs as follows:

> The tax shall be payable by an assessee under the head 'Other sources' in respect of income, profits and gains of every kind and from every source to which this Act applies (if not included under any of the preceding heads).

As I read these provisions, it is abundantly clear that the Legislature, notwithstanding the solemn covenant, which, it is alleged, Lord Cornwallis entered into with zemindars in permanently settled areas, has deliberately included income from profits of land wherever situate, be the area permanently settled or non-permanently settled as being assessable to income-tax. It may be that the Legislature has not said in the direct manner sugggested by the assessee in the course of the argument that to the extent to which income from profits of land in permanently settled areas is assessable to income-tax, the Permanent Settlement is repealed or abrogated or derogated from; but on looking at the matter purely as a question of construction of the charging sections in the Indian Income-Tax Act 1922 taking along with the exemptions, I am of opinion that the Legislature has said in the most direct manner possible and in clear and unambiguous language that the profits of land in India (by which expression I must include land in permanently settled areas) are, subject to statutory exemptions, assessable to income-tax. But even if it be held that the Legislature has not directly said so, there is no escape from the conclusion that, by necessary implication, the Legislature has said that.

But it is said that the repeal or abrogation of the Permanent Settlement should have been in so many words and that the rule is that in the absence of such words the Court will not hold that the earlier legislation on a special subject has been in any way affected by the subsequent enactment of a general nature. Now, it is particularly important when one examines the nature of the contention herein put forward to keep in mind the subject-matters of the legislation in 1793 and in 1922. As I have already said, what Regulation I of 1793 did was to fix the Jumma which

had been assessed on the lands of zemindars and other actual proprietors for ever. The word "taxation" was not used or referred to in any way. The Indian Income-Tax Act of 1922 has in no way increased the Jumma which was fixed in 1793. As has been said, the financial policy of 1793 was not and could not have been the same as the financial policy of 1922, and in these circumstances it is difficult to see how the rule referred to above can possibly apply in the present case.

The general rule, no doubt, is that where two Acts are inconsistent or repugnant, the latest expression of the will of the Legislature must prevail, provided the Court is satisfied that the repeal of the prior enactment must flow frow necessary implication. From this rule, it follows that if one statute enacts something in general terms, and afterwards another statute is passed on the same subject, the subsequent statute will usually be considered as repealing by implication the former statute. In certain cases again "special" Acts have been held impliedly to repeal a prior general Act. But in each case it depends on the particular terms of the statute in question. There is again the further rule that prior statutes are not to be held to be repealed by implication by subsequent statute if the two are repugnant in cases where the prior enactment is special and the subsequent enactment is general. In support of this last-mentioned proposition learned counsel on behalf of the assessee has quoted the well-known case of *Seward* v. *Vera Cruz* (3), where Lord Selborne observed as follows :

> Where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words without any indication of a particular intention to do so.

There are numerous authorities laying down the same proposition in similar words and the guiding rule is that each enactment must be construed according to its own subject matter and its own terms. There is, however, a further proposition which has been recognized in several cases that the rule referred to above namely the rule in *Seward's* case (3) must not be passed too far and that a general statute may repeal a particular statute if the subject matter of the two legislations is one and the same. The test also is : Are the provisions of a later Act so inconsistent with or repugnant to the provisions of an earlier Act that the two cannot stand together ? In which cases, the maxim *leges posteriores priores contrarias abrogant* must apply. But where the Legislature passes a later Act without reference to an earlier Act and that earlier Act is one which has been in force for a long time and is therefore well known it seems reasonable and proper that we should try to construe the two Acts consistently if it is possible to do so. In this case, as I have already said, the subject matters of the two legislations are different ; the later statute is on a subject which is financially and economically different from that dealt with in the statute of 1793 ; one deals with revenue assessed on lands, the other is a tax on profits ; therefore in terms there is no contradiction (see in this connexion *Nova Scotia Steel and Coal Co.*, v. *Minister of Finance & Customs* (4). It is not therefore right and reasonable to allow the two enactments to stand side by side as not being inconsistent ?

In my opinion it is not only desirable but necessary to see how the legislature has interpreted or observed the fixity of public demand referred to or promised in 1793. I am not unmindful of the contentions which have been advanced by learned counsel on behalf of the assessee in this connexion, namely, that in most of the previous statutes such as the Cess Acts referred to in the judgment of Mr. Justice Mullick in the case of *Maharajadhiraj Bahadur of Durbhanga* v. *The Commissioner of Income-tax* (5) there was a direct reference to land in permanently settled areas but I have in my mind at the present moment the various Income-tax Acts imposed in India since 1860. The Income-tax Act of 1860, which was for a period of five years only and which imposed a 3 per cent. tax made no distinction between agricultural income and non-agricultural income and it included income derived from land in India wherever situate. Such income

(4) [1922] A. C. 176.
(5) A. I. R. 1924 Patna 474=3 Pat. 470.

was taxed directly. The Act of 1860, as I have said, ceased to operate in 1865. In 1867 it was again brought into operation and this time the Act excluded agricultural income. In 1869 what was known as the Certificate Tax Act was converted into a general Income-tax Act and it included agricultural income. Thereafter it appears that for some time there was no tax on incomes. In 1872 an Act was passed for imposing duties on incomes arising from offices, properties, professions and trades, to be in force for one year only. Section 21 of this Act is important. By that section it was provided that owners of lands or houses occupying the same should be chargeable in respect of the annual value thereof at 9-10ths of the full rent at which such lands or houses were worth to be let for the year. It was further provided that the local Governments may with the sanction of the Governor General in Council prescribe for the whole or any part of the territories, subject to such local Government special rules for the assessment of income derived from land at an amount bearing a fixed proportion to the revenue assessed thereon. Then came in 1886 the Income-tax Act of that year and taxes on income were made permanent. The Act of 1886 ( the legislature bearing no doubt in mind the fact that land from which agricultural income was derived was already subject to the payment of cesses under Act 10 of 1871) excluded agricultural income. It was described as an Act for imposing a tax on income derived from sources other than agriculture. It dealt with the question of land by way of exemption in S. 5, but subject to the exemptions prescribed in that Act, income from land wherever situate was assessed to income tax. Then followed the Act of 1918 and this with a slight alteration was followed by the present Act of 1922.

It is argued that the main question now before us is whether having regard to the language of the Act of 1922 there is or is not an exemption of all income derived from permanently settled estates. I agree that that is the question to be solved ; but in arriving at a solution of the question it is in my opinion permissible to us to consider how the legislature has hitherto regard the validity or otherwise to the contention put forward by the assessee. The point has been so exhaustively dealt with by Mr. Justice Rankin and by Mr. Justice Mullick in the two cases, one in this Court and the other in the Patna High Court and their conclusions have been laid down so clearly that I think it will be a work of supererogation if I elaborate it further. I will content myself by quoting one passage only from the judgment of Mr. Justice Rankin with which I respectfully agree. His Lordship observed :

> An express exemption which is large enough to cover all permanently settled estates and which covers them to the full extent of agricultural purposes if not somewhat further cannot readily be taken as applying only to estates not permanently settled or as an addition to an implied exemption of all permanently settled estates for all purposes whatever.

The matter really comes back to this, viz., has the legislature in enacting the Indian Income-tax Act 1922, sufficiently expressed itself in declaring that income from land (by which expression I include revenue-free as well as revenue-paying lands ) is assessable to income-tax. In my view the legislature has so expressed itself and it has expressed itself in a manner as to leave no room for doubt. Our attention has been drawn to the case of the *Chief Commissioner of Income-tax of Madras* v. *The Zamindar of Singamputti* (6) where their Lordships had to consider the effect of the Income-tax Act, 1918, upon the Madras Regulation 25 of 1802 which declared :

> that no alteration would be made in the assessment which the proprietors have engaged to pay but they and their heirs and lawful successors would be allowed to hold their estates at such assessment for ever.

The Madras High Court held that there was no express modification or repeal of the exemption existing under the Madras Regulations in the Indian Income Tax Act of 1918 ( the Income-Tax Act of 1922 is substantially similar in terms to that of 1918 for the purposes of the present argument ). It was further held that it was impossible to treat as a legal and effective abrogation of the exemption by the words of S. 3 of the Income Tax Act 1918. Their Lordships referred to the case of the *Associated Newspapers Limited* v. *City of London Corporation* (7). What happened in that case was this. By Statute VII, Geo. III, Ch. 37 certain lands in the City of London

(6) A. I. R. 1922 Mad. 325=45 Mad. 518(F.B.).
(7) [1916] 2 A. C. 429=85 L. J. K. B. 1786=14 L. G. R. 1027=80 J. P. 393=115 L. T. 419=60 S. J. 694=32 T. L. R. 700.

reclaimed from the river Thames were declared to vest in the owners free from all taxes and assessments whatsoever. In 1848, i. e., about 80 years later, the City of London Sewers Act was passed, which imposed a new rate upon every occupier of a house or building within or partly within the City of London, whether such person shall be now liable in respect of such house or building to be assessed to the relief of the poor or be not liable in respect thereof by reason of such house or building being situate in any precinct or extra parochial place or otherwise. The House of Lords held that these words did not take away the express exemption granted by the earlier Statute.

This case has been discussed in the case of *Pole-Carew* v. *Craddock* (8). There the facts were as follows. A ferry was established by and maintained under an Act of 1790, which was to be deemed to be a public Act and which contained a provision that the then proprietors or their respective heirs or assigns shall not be rated or assessed for or towards the payment of any tax, rate or assessment whatsoever, parliamentary or parochial, for or in respect of the said ferry. The question arose whether the exemption granted by the Statute extended to parliamentary taxes in existence at the date of the Act and whether it included income-tax which was first imposed subsequently to the passing of the Act of 1790. It was held that the exemption extended to parliamentary taxes whether in existence at the date of the Act or not and therefore it included income-tax. Lord Sterndale in his judgment observed as follows:

> I think it is laid down quite clearly that where there is an exemption from all rates, taxes and assessments, or all rates, taxes and assessments, whatsoever or whatever, if there is any difference, that exemption has to be looked at in connexion with the subject matter of the Act in which it is contained, and also in connexion with the context in which it occurs. It may be that when so looked at it may become necessary to limit the very wide terms in which the exemption is framed. An instance of that is to be found in the cases which have been decided upon the Act of Parliament which has been often under discussion, the Act of 7, Geo. 3, C. 37, which gave exemption to certain persons who reclaimed land from the river Thames for the purpose of the building of Blackfriars Bridge. The words of that exemption were 'free from all taxes and assessment.' It has been quite clearly laid down with regard to that exemption that it applies only to local taxation and in a great measure upon this ground, that the Act was in the nature of what has been sometimes called a bargain. It came into existence in these circumstances. The Corporation of London, who promoted the Bill, were anxious to get this land reclaimed, and they offered the persons who would do it, in the Act of Parliament. Looking at those circumstances and also at the context in which the words occurred, it was held that the Corporation could only have been offering an exemption from taxes which they had the power to impose, and that inasmuch as they had no power to impose what is called Imperial taxation or general taxation the exemption could not refer to such taxation. That is an instance on the one side.
>
> To take an instance on the other side: in *Duke of Argyll* v. *Commissioners of Inland Revenue* (9), where the exemption was from all taxes, it was held that that included all taxes of all descriptions, and from the subject matter it is difficult to see how the decision could have been otherwise. We start therefore with this: that in construing the exemption you have to look to a certain extent to the subject matter of the Act in which it is contained and to the context in which it occurs. But of course there is in this Act a very important difference in the language, and while you have to look at the circumstances and the context you must not omit to look also at the language. The language of the Act of 1790 is not 'all rates, taxes and assessments' simply, but any tax, rate of assessment whatsoever, parliamentary or parochial, for or in respect of the said ferry, etc.' * * * It seems to me it is quite clear that the words payment of any tax, rate or assessment whatsoever, parliamentary or parochial' mean what they say, that the exemption is not to be confined to parochial taxation or parochial rating but extends to general parliamentary taxation such as is defined in the cases to which I have referred, and such general parliamentary taxation includes the income-tax.

His Lordship then referred to the case of the *Associated Newspapers Ltd.* v. *The City of London Corporation* (7) and stated that as he understood the decision in that case, it did away entirely with the meaning which had been attached to the earlier cases, namely, the meaning that unless altered by express words, an exemption from taxation related only to present and not to future taxation. In the view I have taken of the words used in the Permanent Settlement Regulations of 1793, the two cases last cited have really no bearing. The language used in 1793 is very different from the language used in the old English Statutes referred to in the cases before the House of Lords and before the King's Bench Division. I desire to repeat again that before effect is given to contentions founded on the cases just

(8) [1920] 3 K. B. 109=123 L. T. 309=89 L. J. K. B. 507=36 T. L. R. 447.

(9) [1913] 100 L. T. 893=30 T. L. R. 48.

referred to, it is very important that the exemption claimed should be looked at in connexion with the subject matter of the Act in which it is contained and also in connexion with the context in which it occurred. Indeed this has been emphasized by Lord Sterndale, and if the matter is looked at from this point of view, the present case would rather seem to be within the line of cases of which the case of *Nova Scotia Steel & Coal Co. Ltd.* v. *Minister of Finance and Customs* (4) is an example.

The language used in Regulation I of 1793 may not inaptly be compared with the language used in S. 4 of 23, Geo. II, C. 16, which ran as follows:

> And it is hereby enacted by the authority aforesaid that all and every contributor and contributors upon this Act duly paying the consideration or purchase money at the rate aforesaid at or before the respective days or times in this Act before limited in that behalf for such annuity or annuities as aforesaid or such as he, she or they may appoint his, her or their respective executors, administrators, successors or assigns, shall have, received and enjoyed and be entitled by virtue of this Act to have received and enjoyed their respective annuity and annuities so to be purchased out of the moneys by this Act appropriated or appointed for payment thereof as aforesaid and shall have good and sure estates and interests therein for ever, subject only to the proviso or condition of redemption in this Act afterwards contained concerning the same; and that all the said annuities to be purchased on this Act and the principal moneys paid for the same and every of them during the continuance thereof shall be free from all taxes, charges and impositions whatsoever.

Now, the first English Income-Tax Act was Mr. Pitt's Act in 1798, 5 years after Lord Cornwallis's proclamation, (incidentally it may be remarked that in 1793 Income-Tax was not thought of anywhere in the British Empire not merely in India but not even in the British Islands), but nobody has ever contended that notwithstanding the provisions of the Loan Act referred to above, by which the English national debt was contracted, that in a general tax upon income the exemption referred to above was at all applicable. The case of the assessee is nowhere near so strong. In one sense evey form of taxation is income from land of whatever character it is or may be; but if it is indirect taxation of land, it is certainly not within the pledge which was given in 1793, assuming that on the words used the inference may be legitimately drawn that a pledge such as the assessee argues was given.

On all these grounds I am of opinion that income from land, subject to the exemptions in the Income-Tax Act is liable to be assessed to income-tax and that the answer to the third question subject to the said exemption is in the affirmative. The answer to the second question subject as stated above is also in the affirmative.

**Buckland, J.**—I concur.

**Suhrawardy, J.**—I have had the advantage of reading the judgment to be just delivered by my learned brother Mukerji, J., and I agree with him in his reasonings and conclusions.

**Panton, J.**—I agree in the judgment delivered by my learned brother Mr. Justice Ghose.

**Mukerji, J.**—The two questions referred to the Full Bench are:

> II. Whether income derived from such of the above sources as were not taken into consideration at the time of fixing the Jama at the time of the Permanent Settlement is assessable for income-tax purposes.
>
> III. Whether having regard to the terms of the Permanent Settlement Regulation income derived from the above sources in permanently settled estates, is liable to assessment to income-tax.

The "above sources" referred to in these questions are: (i) Jalkar or rents received from fisheries, (ii) Ground-rent from land used for potteries, (iii) Ground-rent from land used as brickfields, (iv) Fees received from the tying up of boats against the assessee's land, (v) Fees received from land used for storing purchases of crops (*paiali*), (vi) Fees received from cart stands, (vii) *Punyaha nazar* or *nazar* paid by tenants of agricultural holdings at the beginning of the zemindari year, (viii) *Nazar* for petitions presented to the zamindar, dealing with questions of succession, settlement and partition, (ix) Ground-rent for permanent shops at hats and bazars and (x) Stall-fees paid by temporary (daily) sellers at hats and bazars.

To answer these questions it is necessary to appreciate the true nature and effect of the settlement that was meant by the Permanent Settlement. This, no doubt, has to be gathered primarily from the Regulation dealing with it, viz., Regulation I of 1793, but there are expressions used in that Regulation, to realize the exact import and significance of which reference must be made to some

of the other Regulations that were passed at the same time and a brief survey also of the history of events that led up to them is more than necessary ; e. g., such expressions as the following : ". the limitation of public demand upon the land" (S. 1);

the jama assessed upon their lands under the Regulations would be continued after the expiration of ten years and remain unalterable for ever (S. 2, Art. 1) ;

to declare the jama which has been or may be assessed upon their lands under the Regulations abovementioned, fixed for ever (S. 3, Art. 2) ;

at the expiration of the term of the Settlement, no alteration will be made in the assessment which they have respectively engaged to pay but that they and their heirs and lawful successors will be allowed to hold their estates at such assessment for ever : (S. 4, Art. 3);

they and their heirs and lawful successors shall be allowed to hold their respective estates at such assessment for ever" (S. 5, Art. 4.)

Such individuals and their and lawful successors shall be permitted to hold the lands at the assessment at which they may be transferred for ever (S. 6, Art. 5);

from the earliest times the public assessment upon the lands has never been fixed and the zemindars, independent talukdars or other actual proprietors of land, with or on behalf of whom a settlement has been or may be concluded, are to consider these orders fixing the amount of the assessment as irrevocable and not liable to alteration by any persons whom the Court of Directors may hereafter appoint to the administration of their affairs in this country. (S. 7, Art. 9);

for the limitation of the public demand upon the lands the net income and consequently the value (independent of any increase of rent obtainable by improvement) of any landed property ..... will always be ascertainable by a comparison of the amount of the fixed jama assessed upon it (S. 10, Art. 9)

Up to 1793 no general code of law had been enacted for India ; rules and orders were passed from time to time, but no systematic code was framed. Regulation I of 1793 was passed on the 1st May 1793 and on the same day 47 other Regulations were passed. The Regulation consisted of the proclamation of Lord Cornwallis of the 22nd March 1793 and was made law from that date. The proclamation was addressed to the

zemindars, independant talookdars and other actual proprietors of land paying revenue to Government in the provinces of Bengal, Behar and Orissa.

The opening words of Regulations XIX and XXXVII of 1793 and the first paragraph of Regulation II of 1793 explain the basis of the Permanent Settlement :

By the ancient law (*Custom* perhaps would have been a better word) of the country the ruling power is entitled to a certain proportion of the produce of every bigha of land (demandable in money or kind according to local custom). Unless it transfers its right thereto for a term or in perpetuity, or limits the public demand upon the whole of the lands belonging to an individual, leaving him to appropriate to his own use the difference between the value of such proportion of the produce and the sum payable to the public whilst he continues to discharge the latter

(Regulation XIX of 1793) S. 1 ; see also preamble to Regulation XXXVII of 1793) and

As being the two fundamental measures essential to the attainment of it the soil has been declared to be vested in the landholder ; and the revenue payable to Government from each estate has been fixed for ever

(Regulation II of 1793, S. 1). What is this 'public demand' or 'revenue' that was intended to be limited or fixed for ever, and what was the 'jama' or 'assessment' that was so fixed ?

When by virtue of the grant of the Diwani in 1765 the task of administering the land and the revenue devolved upon the Company's servants they found it too difficult for them to perform They had been previously occupied solely in pursuit of trade and had very little opportunities of acquiring the requisite knowledge and experience, and accordingly they were placed in an extraordinary position. They followed for some time with little or no change the system of administration which had obtained before. It would be tedious to set out the changes that were introduced as regards the machinery of collection or the supervision that was to be exercised in that behalf, between then and the time of the the Permanent Settlement, and this need not be done for our present purposes. It is noteworthy that in 1769 a letter of instruction was issued to the Supervisors who were just then appointed to superintend the Indian Officers employed throughout the country in collecting the revenue and administering justice,—a memorable document setting forth with remarkable perspicuity and scrupulous care the duties that they had to discharge, chief amongst which was to hold some elaborate enquiries. The two main objects of these enquiries, so far as land-revenue was concerned, were to fix the amount of what the zemindar received from the ryot as his income or emolu-

ment, and to secure to the ryot, after he had supplied the legal dues of the Government the enjoyment of the remainder. The task was too much for those by whom it was to be performed and the enquiries were looked upon with suspicion by those for whose benefit they were meant. Accordingly the directions were countermanded and minute scrutinies were prohibited. The condition of the country was as unhappy as ever, and notwithstanding the Great Famine of 1770 and the consequent mortality and the decrease of cultivation, the standard of collection of revenue was maintained; nay it rather improved in consequence of violence and oppression and imposition of assessment on existing ryots to cover the loss that had been sustained by reason of the death or absconsion of others. In 1771 the Court of Directors sent out instructions to stand forth as the Dewan and by the Agency of the Company's servants to take upon themselves the entire care and management of the revenues. From 1765 to 1771, with the exception of the 24 Pergannas, Burdwan, Midnapore and Chittagong, the other districts were left under Indian management. Behar had been settled for a term of years, but the settlement for the revenue, mal and sayer in Bengal and Orissa had up to this time been from year to year. These settlements were made in some instances with landholders; in others with farmers; or when the former declined to engage for the revenue and no adequate proposal was made by the latter the rents payable by the under-tenants used to be collected by the officers of Government under khas management. This fluctuating system was impolitic and fraught with evil. The old assessment at which revenue was collected was found to be too much for the country to bear and accordingly in 1772 measures were adopted with a view to make a quinquennial settlement of Bengal and Orissa. This settlement was made for the most part with farmers, as it was thought that the real value of the country could be better ascertained by letting it out in farm for a term of years to the highest bidder. Speculators, having no idea of the real capabilities of the country and incited by hopes of making the same large profits as could be reaped under the old system which was not particularly keen about punishing extortion or oppression, intervened and readily agreed for sums which eventually they were unable to pay. Experience thus showed the quinquennial settlement to be a mistake. In 1776 the Governor-General in Council submitted to the Court of Directors for approval a scheme for making up settlements with the zemindars but it was not approved for certain "weighty reasons." In 1777 and thereafter annual settlements were again made under the orders of the Court of Directors, preference being now given to zemindars, whenever they were willing to a reasonable assessment.

In 1784 Statute 24, Geo. III, C. 25, was passed by the British Parliament, S. 39 of which required to give orders

> for settling and establishing upon principles of moderation and justice, according to the laws and constitution of India the permanent rules by which the tributes, rents and services of the rajas, zemindars, polygars, talookdars and other native holders should be in future rendered and paid to the United Company.

In obedience to those requirements orders were transmitted two years later to the Government of India for making inquiry into the condition of the landholders and other inhabitants residing under their authority and for the establishment of permanent rules for the settlement and collection of the revenue and administration of justice founded on the ancient laws and usages of the country, so as

> to fix a permanent revenue on a review of the collections of former years, and that the settlement should in every practicable instance, be made with the zemindars, rules being at the same time made for maintaining the rights of other classes according to the usages of the country,

and they sent orders for a decennial settlement in the first instance with a view to be made permanent on their approval. On receipt of these orders most careful local enquiries were again made in order to obtain all possible and available information as to the past and present state of the country. The nature, extent and scope of these enquiries and the nature of the settlement that was made by the Decennial Settlement may best be gathered from what Mr. Harrington says about them in his Analysis of the Bengal Regulations, Vol. II, pp. 174 to 177. He says thus:

> On receipt of these instructions the most particular local enquiries were set on foot, to obtain all possible information of the former and present state of the several districts; the condition

of the landholders and tenants of every description; their rights under the Moghul Government before its decline; the laws and usages which had since prevailed in settling the rents payable by the ryots, dependent talukdars, and other under-tenants, to the zamindars, independent talookdars, and other superior landholders; what new impositions and exactions had been introduced under the Company's administration; what rules were required for securing the inferior occupants and immediate cultivators of the soil against oppression and extortion; and generally, what measures should be adopted to remedy existing defects and abuses in the adjustment and collection of the land rents; as well as in the gunge, haut, bazar, and other duties levied under the general denomination of Sayer. Detailed accounts of the assessment, and actual collections, in past years were also procured; with every other document which appeared material for determining a standard revenue for future years, such as the orders of the Court of Directors prescribed, and the landholders might be able to pay without distressing their tenants; and the voluminous reports of the Collectors, Board of Revenue, and other public officers, upon the inquiries made by them, were abridged and brought forward in a collective view, by a Member of the Government eminently distinguished for his talents, knowledge and experience; whose minute on the settlement of Bengal, recorded the 18th June 1789, was subsequently noticed by the Court of Directors as a comprehensive and masterly dissertation, which not only exhibited and methodized the most material parts of the reports from the Collectors of the Bengal province, but afforded new and important communications from himself; supplying, in various respects, what they wanted; delineating with great clearness the past financial system and history of Bengal; examining with candour those points in it which have been subjects of controversy; investigating with patient judgment the best system for the country; the difficulties which may attend it; the means of obviating them; and in fine, proposing from the whole a set of regulations for carrying into execution the orders of the Court respecting the decennial settlement so as to secure justice both to the Government and to the subject; and to prevent, in future, those abuses, which either exist or may be apprehended, in the detail of the collection.' On consideration of this document, with the papers which accompanied it, and a further minute from the same Member of Government, on the settlement of Behar recorded 18th September 1789, the Governor-General in Council passed the rules, afterwards incorporated with amendments . . . in Regulation VIII of 1793 . . . The primary rule directs that 'a new settlement of the land revenue shall be concluded for a period of ten years to commence with the Fussily, Villaity, and Bengal year 1197, for Behar, Orissa, and Bengal respectively.' And by the succeeding rule it is at the same time, notified to the proprietors of land, with whom the settlement may be concluded, that the assessment fixed by the decennial settlement will be continued after the expiration of the ten years and remain unalterable for ever; provided such continuance shall meet with the approbation of the Honourable Court of Directors, but not otherwise.

Then followed that memorable controversy between Lord Cornwallis and the Members of his Government in which he put forward cogent arguments for fixing "the Government demand" as the first measure necessary to be adopted to afford an opportunity to the landholder "of increasing his profits by the improvement of his lands." He was of opinion that the potta regulations and a general reservation of the right of the Government to interfere for the protection of the ryots and the prohibition of new *abwabs* and such other small remedial measures would sufficiently protect the ryots and that the views of his opponents did not warrant the postponement of a measure which he deemed

best calculated to promote the substantial interest of the Company and of the British nation as well as the happiness and prosperity of the natives of India.

The Court of Directors, on examining the materials placed before them were strongly in favour of a Permanent Settlement and signified their approval of Decennial Settlement being made permanent. They wrote back to that effect, expressing their intention in these words:

It being our intention in the whole of this measure, effectually to limit our own demands, but not to depart from our inherent right, as Sovereigns, of being the guardians and protectors of every class of persons living under Government etc.

The Decennial Settlement was thereupon made permanent by the proclamation dated the 22nd March 1793, and subsequently enacted into Regulation I of 1793, as already stated. As regards the effect of the Permanent Settlement, in so far as its broad features are concerned as affecting the relations between the State, the zamindar and the ryot, two radically distinct views are sometimes taken. The advocates of one view say that before the Permanent Settlement there was a declaration by Government that it was necessary to secure the ryots in the perpetual and undisturbed possession of their lands, that of the three parties concerned, viz., the State, the zamindars and the ryot, the ryot's was the dominant right, that is to say he was proprietor and the demand upon him was that of the State for a gross amount limited by custom and this was specifically limited by the Regulation of 1793, out of which the State remunerated the zamindar; that the State was

not the proprietor of the soil, its rights were limited by custom to the money value of a specific proportion of the produce of the land, and the authors of the Permanent Settlement limited it further by enactments which, if carried out according to the intention of the legislature, would have given the same immunity to the ryot as is enjoyed by the zamindars, against enhancement of rent from a rise of prices; and that the so-called proprietary right of the zamindars was a very limited one, and it was so greatly restricted that it was not *dominium* but *servitue*—a rent charge or strictly speaking a revenue charge upon property which belonged to another and which the zamindars had no power of turning to any use without buying it from the other who was the proprietor. The advocates of the other view maintain that there was no well-defined customary law, no known or settled rates of rent in existence in 1793; that the legislation of 1793 left the right of the cultivator of the soil as indefinite and undefined as they were before; that the Government deliberately refrained trom undertaking the difficult task of defining these rights and contented themselves with reserving a general power of interference in case of oppression; that the property in the soil which had never before been formally declared to be vested in the landholder was declared to be vested in them; and that the revenue payable to Government from each estate was fixed for ever.

The rights and duties of the zemindars in so far as they were declared by the Permanent Regulations may be matters of doubt. Whether when the English Settlement was originally established in India they were owners of the soil subject only to a tribute to Government [as was the opinion of the Lord Chancellor in *Freeman* v. *Fairlie* (10)] or whether they had only certain restricted proprietary rights in the revenue which may fairly be considered rights in the produces of the soil and so in the soil itself, may be a matter of controversy. Whether by the mere description and enumeration of the classes to be settled with and by the recital of such settlement (e. g. the Regulations of the 23rd November 1792, Reg. II of 1793, and Reg. VIII of 1793) it was intended to take away the rights of the actual cultivators and possessors of the soil and vest them in the zemindars may be a debatable question, though it seems to be now settled that a settlement with a person for the purposes of revenue does not establish any proprietary right in the land in favour of the person settled with, if he did not already possess that right, but is made with Government only as to their claim to their revenue [*Juggut Mohini Dassee* v. *Mt. Sakheemoney Dassee* (11).] Whether the rights of the cultivators of the soil were left as uncertain or unsettled as before or whether they were sufficiently protected in accordance with the original intention of the Court of Directors or of Lord Cornwallis himself are matters on which there may be two opinions. Opinion is also divided on the question of the justice, expediency or equities of the measure. The fact, however, that the Government limited its own demand upon the zemindar in so far as that demand related to the income that was derivable from the lands is a matter which can scarcely be doubted or disputed. The true view of this fixity of assessment is this: In the time of the Moghul and Mahomedan Governments the share of the State was uncertain, and so was the share of the zemindar; the Permanent Settlement fixed and made certain the former, but left the latter as uncertain as ever. The zemindars thus came to know to a penny what they had to pay to the State at all future times. The second part of S. VII, Art. VI of Reg. I of 1793, runs in these words:

> The Governor-General in Council trusts that the proprietors of lands sensible of the benefits conferred upon them by the public assessment being fixed for ever will exert themselves in the cultivation of their lands, under the certainty that they will enjoy exclusively the fruits of their own good management and industry and that no demand will ever be made upon them or their heirs or successors by the present or any future Government, for an augmentation of the public assessment in consequence of the improvement of their respectives estates.

No words can be clearer; no promise more definite. If language has any meaning, the declaration means that whatever may be the income or profits of the zemindar by reason of his having

(10) [1828] 1 M. I. A. 305=1 Sar. 123 (P. C.).

(11) [1871] 14 M. I. A. 289=10 B. L. R. 19=17 W. R. 41=2 Suther. 512=3 Sar. 23 (P. C.).

improved his estate the same will not be further touched or taxed.

But was the public assessment not to be augmented in any way in future? The answer must be sought for in the declaration itself and the declaration answers it in this way: It could be augmented in any way, so long as the method adopted did not mean to take away a portion of this income or profits qua such income or profits. Indeed there are the clearest possible indications within the Regulations themselves to the effect that nothing was further from the minds of the authors of the Permanent Settlement than to forgo for ever the right to impose taxes or cesses for ever. It is necessary therefore to examine the sources from which this augmentation was contemplated.

The right of establishing Sayer or internal duties was expressly reserved by S. VIII, Art VII, Clause (2) of Reg. I of 1793 and it was expressly stated that one of the consequences which the Government expected from retaining the privilege in its own hands was a future opportunity of augmenting the revenue in that way.

The Regulations upon this subject were re-enacted in Regulation XXVII of 1793. This Regulation purported to re-enact with alterations and modifications the rules passed by the Governor-General in Council on the 11th June and on subsequent dates, for the resumption and abolition of the Sayer, or internal duties and taxes throughout Bengal, Behar and Orissa, and for adjusting and paying the deductions and compensations directed to be granted to the proprietors and farmers of estates paying revenue to Government and the holders of property exempt from the payment of revenue to Government on account of the duties and taxes abolished. The Rules for the resumption of the Sayer passed on the 11th June 1790 were re-enacted in S. 2 of this Regulation. By these Rules the right of the zemindars to collect the Sayer was taken away, compensation being given for the loss thus caused to them, and the revenue derived from these collections was consequently excluded in assessing the jama at the time of the Decennial and Permanent Settlements. The Rules for the abolition of the Sayer passed on the 28th July 1790 were enacted in S. 4 of this Regulation. This section enacted:

> The privilege of imposing and collecting internal duties has been resumed from the landholders, and taken exclusively into the hands of Government for the purpose of reforming abuses in these collections, and thereby affording benefit to the commerce of the country, as well as general ease to its inhabitants. For the more effectual attainment of these objects the Governor-General in Council has now resolved that all duties, taxes and other collections coming under the denomination of Sayer (with the exception of the Government and Calcutta customs, the duties levied on pilgrims at Gaya and other places of pilgrimage, the abkari or tax on spirituous liquors which is to be collected agreeably to former orders, the collections made in the gunges, bazars and hauts situated within the limits of Calcutta, and such collections as are confirmed to the landholders, and the holders of gunges, bazars and hauts, by the published resolutions of the 11th June 1790, namely rent paid for the use of land or for houses, shops or other buildings erected thereon, or for orchards, pasture ground or fisheries, sometimes included in the Sayer under the denomination of phulkar, bunkar and jalkar) whether made by Europeans or natives either on their own or the public account, in the gunges, bazars hauts or other places within the provinces, be forthwith abolished, and that the compensation to be made in consequence be regulated by an average of the net produce stated in the past accounts, for as many years as they can be procured not exceeding ten (excluding therefrom such collections as have been prohibited by Government) and be adjusted, with regard to the collections in malguzarri and lakheraj lands respectively, according to the principles already laid down in the resolution of the 11th June 1790.

It was thus made clear that rent paid for the use of land, or for houses, shops or other buildings erected thereon or for orchards, pasture ground or fisheries, sometimes, included in the Sayer, under the denomination of phulkar, bunkur or jalkar was not Sayer within the meaning of the Regulations.

That the right to a taxation generally was not given up is amply clear upon other materials, but it is equally clear that the income or profits derivable from the lands was not to be taxed as such.

Lord Cornwallis' minute of the 3rd February 1790 which was sent in circulation on the 7th and recorded on the 12th also shows beyond the shadow of a doubt that the Government of 1789-1793 contemplated and expected that the improved condition of all classes would enable the expenses and requirements of Government to be provided by other forms of taxation. He said:

> There is this further advantage to be expected from a fixed assessment in a country subject to

draught and inundation that it affords a strong inducement to the landholders to exert himself to repair as speedily as possible the damages which his lands may have sustained from these calamities ; for it is to be expected that when the public demand upon his lands is limited to a particular sum he will employ every means in his favour to render them capable of again paying that sum and as large a surplus for his own use" . . . . "The maxim that equality in taxation is an object of the greatest importance, and that in justice all the subjects of a State should contribute as nearly as possible, in proportion to the income which they enjoy under its protection does not prove the expediency of varying the demand of Government upon the lands ; on the contrary, we shall find that, in countries in which this maxim is one of the leading principles in the imposition of taxes, the valuation of the land on which they are levied is never varied. In raising a revenue to answer the public exigencies, we ought to be careful to interfere as little as possible in those sources from which the wealth of the subject is derived.

Agriculture is the principal source of the riches of Bengal ; the cultivator of the soil furnishes most of the materials for its numerous manufactures. In proportion as agriculture declines, the quantity of these materials must diminish, and the value of them increase, and consequently the manufactures must become dearer, and the demand for them be gradually lessened. Improvement in agriculture will produce the opposite effects. The attention of Government ought therefore to be directed to render the assessment upon the lands as little burdensome as possible : this is to be accomplished only by fixing it. The proprietor will then have some inducement to improve his lands ; and as his profits will increase in proportion to his exertions, he will gradually become better able to discharge the public revenue. By reserving the collection of the internal duties on Commerce, Government may at all times appropriate to itself, a share of the accumulating wealth of its subjects, without their being sensible of it. The burden will also be more equally distributed ; at present, the whole weight rests upon the landholders and cultivators of the soil.

Almost contemporaneously with the Permanent Settlement on the 6th March 1793 Lord Cornwallis wrote to the Court of Directors :

We think this a proper opportunity to observe, that if, at any future period the public exigencies should require an addition to your resources, *you must look for this addition in the increase of the general wealth and commerce of the country* ; *and not in the augmentation of the tax upon the land*. Although agriculture and commerce promote each other, yet in this country, more than in any other, agriculture must flourish, before commerce can become extensive. The materials for all the most valuable manufactures are the produce of its own lands. It follows therefore that the extent of its commerce must depend upon the encouragement given to agriculture ; and that whatever tends to impede the latter, destroys the two great sources of its wealth. At present almost the whole of your revenue is raised upon the lands ; and any attempt to participate with the landholders in the produce of the waste lands would (as we have said) operate to discourage their being brought into cultivation ; and consequently prevent the augmentation of articles for manufacture or export. The increase of cultivation (which nothing but permitting the landholders to reap the benefit of it can affect) will be productive of the opposite consequences. To what extent the trade and manufactures of this country may increase under the very liberal measures which have been adopted for enabling British subjects to convey their goods to Europe at a moderate freight, we can form no conjecture. We are satisfied, however, that it will far exceed general expectation ; and the *duties on the import and export trade (exclusive for any internal duties which it may in future be thought advisable to import) that may hereafter be levied, will afford an ample increase to your resources* without burdening the people or affecting in any shape the industry of the country.

In 1811 the Court of Directors said :

It was indeed imagined at the period of the establishment of the Bengal Settlement that in proportion as the effects naturally to be expected from an enlarged and liberal policy were developed, in proportion as the land was improved, activity given to commerce and as the people were enriched, our Government would be able, *by means of taxation on the necessaries or luxuries of life* not only to idemnify itself for the sacrifices it had made, and for any contingent loss which it might sustain from the depreciation of money but that our revenue might be made to advance in equal proportion with the prosperity of the country and that both would go on flourishing in rapid progression.

Thus at the time and within 20 years of the Permanent Settlement the source of such fresh taxation was clearly indicated. The italics in the extracts given in the above three paragraphs are mine.

A reservation of a right to impose further tax on the income or profits of the land which was given to the zemindar as the fruits of his own labour cannot be gleaned from any quarter. Whether a portion is taken as revenue and another under the head of Income-tax, both are demands of the State, and when, in assessing the revenue, a guarantee was given of its fixity and a declaration was made that the balance will not be altered at any time, to impose a further tax on the income or profits, does away with that fixity and alters that which was guaranteed to be unalterable. The question whether the income or profits now made was then taken into account or the sources from which they are now made were in those days unknown or not in existence does not affect the matter, in view of the preamble to Regulation II of 1819 and the preamble as well as S. 31 Cl. (2) of Regulation VIII of 1819.

The argument that it was only the revenue payable by the lands and not the entire demand of the State for all income or profits referable to the estates was fixed by the Permanent Settlement loses sight of the fact that income or profits from fisheries were taken into account. The object of the Settlement in exempting from further burden income which had already paid toll to the State in the shape of land revenue was primarily to protect and improve agriculture, as that then was the chief source of income, and the exemption of agricultural income from the operation of the Income-tax Act perhaps indicates a continuity of policy on the part of the legislature in that respect. This, to my mind, is the inwardness of the doubt expressed by the learned Judges who constituted the Full Bench in the case of the *Chief Commissioner of Income-tax, Madras* v. *Zamindar of Singampatti* (6) as to the meaning of 'agricultural income.' The words of the Settlement however are clear enough as indicating an intention to leave untouched for all times to come the surplus that the landholder will be able to derive as income or profits from the lands of his estate.

It may not perhaps be right as a matter or method of construction in order to construe the Income-Tax Act 11 of 1922 to put it side by side with Regulation I of 1793 without taking into account the events that have happened during and the changes that have been wrought by the long years that separate the two enactments, but such a comparison is not altogether without its purpose. If the Income-tax was sought to be levied upon permanent settlement zemindars, while Regulation I of 1793 was yet in sight would it not have been understood as having taken away from the fixity of the State demand and altered the income and profits the unalterable character of which the Regulation had assured.

The above, in my opinion, is the relation between the two enactments, but we are yet on the threshold of the enquiry. It is not disputed that the legislature has absolute right to abrogate, modify or destroy any right or privilege, even if it be of its own creation. What we have then to consider is whether the legislature has done so, expressly or by necessary implication, in this particular case,

As a guide to the construction of this Act, to argue on the basis of other Acts e.g., the Zemindari Dak Cess Act, the Road Cess Acts, the Public Works Cess Act, the Embankments Act the Drainage Act, the Bengal Municipal Act, the Court of Wards Act, the Village Choukidari Act, the Court-fees Act, the Stamp Act, the Bengal Settled Estates Act, the Probate Act and the like—enactments relating to what is said to be direct or indirect taxation is, I say with all respect, to argue on the strength of a palpably false analogy; so long as the absolute privilege of the legislature to which I have referred is not disputed. These legislations, most if not all of them, may be justified as imposing taxes in return for services rendered, facilities offered or benefits conferred. In some of them reference is made to "land" or the income or profits arising or derivable therefrom as affording a basis for calculating the amount of the imposition. In others the imposition is, no doubt, an additional burden on the lands, or viewed in another way forms a deduction from the income or profits of the lands, but the language that is used leaves no doubt as to the intention that the imposition should operate as such. If justly or unjustly these enactments have been passed and the intention to interfere with the zemindar's income or profits from the lands permanently settled with him is clear, what help does it afford us in construing Act 11 of 1922? In my opinion it is of very little consequence if the legislature has put a different meaning on "the fixity of public demand" from what it obviously bears or chose to violate the fixity more than half a century after, if it be established that it has done so.

A consideration of the earlier enactments relating to income-tax is perhaps more profitable. To turn then to the earlier enactments. In Act 32 of 1860, S. 1 provided that

> there shall be collected and paid.....for and in respect of the property and profits mentioned in the several schedules.

Schedule I ran in these words:

> For and in respect of the property in and profits arising from, all lands and houses in India.

Schedule 2 ran thus:

> For and in respect of the annual profits arising to any person residing in India from any kind of property whatever whether situate in India or elsewhere.....

The Rules applicable to Schedule 1 are contained in Part VII and they expressly refer to lands permanently settled (vide Rr. 1 and 4). This Act remained in force from the 1st of July 1860 to the 1st of August 1865. There can be no question that this Act referred to "All lands and houses in India" "any kind of property .....in India," and the rules provided for computing the assessment on permanently settled lands. The next important Act to which reference need be made is Act 8 of 1872. The Preamble says :

For the purpose of imposing duties on income, arising from offices, property, professions or trade.

The mode of assessment is differently provided for as regards "Duties on offices"—(Part II) "Duties on profits of Companies" (Part III), Duties on interest on Government Securities (Part IV). while Part V deals with "All other income." S. 16 says :

A yearly duty of two pies for every rupee shall be levied upon all incomes of one thousand rupees per annum or upwards, not chargeable under Part II, Part III or Part IV of this Act.

Section 21 says :

Owners of land or houses occupying the same shall be chargeable in respect of the annual value thereof at nine-tenths of the full rent at which such lands or houses are worth to be let for the year.

Then follows a provision for making special rules for calculating the assessment, when the income is derived from land-paying revenue. This Act made all incomes including those derived from lands assessable to tax and there is no reason to suppose that it intended to exclude permanently settled lands. This Act remained in force for one year only. To take Act 2 of 1886 next. In this Act a marked departure is noticeable ; the Preamble states :

Whereas it is exepdient to impose a tax on income derived from sources other than agriculture.

The charging section is S. 4. The exceptions are mentioned in S. 5 in which 'land' is mentioned by way of exception and it points to the sources of income as specified in the first column of the Second Schedule. This schedule is divided into four parts. Part I relates to Salaries and Pensions ; Part II, profits of companies, Part III, interest on securities and Part IV, other sources of income not included in Part I. Part II, or Part III, of the schedule," The provisions of the Act relatiug to mode of assessment and collection say nothing as to revenue whether temporarily or permanently settled. The word "lands" does not come in at all as a source of income unless it comes under "any source" in Part IV.

The language of Act 7 of 1918 need not be separately considered as it is repeated with but slight alteration in Act 11 of 1922. The structure of this Act again is radically different from the Acts of 1860 and 1872 and there are also points of difference between it and the Act of 1886. The Preamble is neutral. It states, "whereas it is expedient to consolidate and amend the law relating to Income-Tax and Super Tax" and the schedule of enactments repealed refers to the Act of 1918, and the amending Acts of 1919 and 1920. "Total income" is defined in S. 2 (15) as meaning total amount of income, profits and gains from all sources, to which the Act applies computed in the manner laid down in S. 16. If one looks for the sources to which the Act applies one finds a negative in the eight classes of income specified in S. 4, sub-S. (3) as being the income to which the Act does not apply. The affirmative is found in the charging section which is S. 4. That section says :

Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in S. 6 from whatever source derived, accruing, arising or received in British India or deemed under the provisions of this Act to accrue or arise or to be received in British India.

The section therefore refers only to S. 6 which instead of definitely exhausting all the sources of income, merely says :

Save as otherwise provided by this Act, the following heads of income, profits and gains, shall be chargeable to income-tax in the manner hereinafter appearing : (i) Salaries, (ii) Interest on securities, (iii) Property, (iv) Business, (v) Professional earnings, (vi) other sources.

Ordinarily one should have expected profits from lands to come under the head of property but S. 9 which provides for the mode of assessment of property clearly limits it to buildings or lands appurtenant thereto. Income or profit from lands, permanently or temporarily settled therefore must come, if at all under the head of "other sources." Why then should not "other sources" include only those sources as are taxable, and why should the expression be taken as comprising the income or profits of all lands irrespective of whether they are

taxable or not. The policy of the short-lived measures of 1860 and 1872 need not necessarily have been continued in 1886 and for the matter of that there is nothing to indicate a continuity of policy from even1886 to 1922. We are not permitted to speculate as regards the policy or the intention of the legislature. What we find for certain is that the Act of 1922 does not make all persons taxable, nor all lands taxable, nor all income taxable nor again all sources or all other sources taxable.

To this view two objections are possible. One is the difficulty created by the definition of "agricultural income" as contained in S. 2 sub-S. (1) which includes such income from permanently as well as non-permanently settled estates. This difficulty, however, is more apparent than real because if income or profits from permanently settled estates were meant to be kept outside the purview of the Act the definition will cover only such land as is assessed to land revenue and is not permanently settled. The other difficulty is as regards income from Lakheraj or revenue-free lands. But is this a difficulty? A review of the law relating to Lakheraj grants of which the foundation is Reg. 19 of 1793 is to be found in the case of *Hurryhur Mookhopadhya* v. *Madub Chunder Baboo* (12). If these lands have been exempted from revenue for ever the Act will not apply to them, that is all. There is no equity about the tax and no equitable consideration can come in on the question of construction of a taxing statute.

Canons of construction laid down in authoritative decisions to which our attention has been drawn are very difficult of application in particular cases, they depend upon so many considerations; but it is just as well to refer to some of them here.

One of the cases upon which reliance has been placed on behalf of the assessee is *Associated News Paper Ltd.* v. *Corporation of the City of London* (7). In that case what happened was this. S. 51 of 7 Geo. III C 37 vested the lands reclaimed from the river Thames under the provisions of the statute in the owners of the adjoining lands and wharves, free from all taxes and assessments whatsoever. S. 169 of the City of London Sewers Act, 1848 enacted that every Sewer rate and consolidated rate should be levied upon every occupier of any house or building in the city,

> Whether such person shall be now liable in respect of such house or building to be assessed to the relief of the poor or be not liable to be assessed to the relief of the poor in respect thereof by reason of such house or building being situate in any precinct or extra parochial place or otherwise.

The House of Lords held that the exemption granted by 7 Geo. III, C. 37, though limited by the context to local as distinguished from Imperial taxes extended to all local taxes and assessments whether present or future except so far as any Act imposing a new tax qualified or repealed the exemption. It was held that the words "free from all taxes and assessments whatsoever" were not repealed by the words of the Act of 1848. It was observed that in *London Corporation* v. *Netherlands Steamboat Co.* (13), the same statute was construed as not repealing the exemption contained in some statutes of 1812 and 1813. It was thus held that it is competent to the legislature to withdraw or modify such an exemption by a subsequent enactment, but that it could only be done expressly and not in general terms or by implication. The cases of *Kutner* v; *Phillips* (14); *Thorpe* v. *Adams* (15) *Attorney-General* v, *Horner* (16); *Barker* v. *Edger* (17) have been cited in support of the maxim *Generalia Specialibus non derogant* and as illustrative of the principle that a repeal by implication is only effected when the provisions of the later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together in which case the maxim *Leges posteriores contrarias abrogant* applies, and unless the two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied. Reference has been made to *In Re Smith's Estate, Clements*

(12) [1871] 14 M. I. A. 152=8 B. L. R. 066=20 W. R. 459=2 Suther 484=2 Sar. 713 (P. C.)

(13) [1906] A. C. 263=75 L. J. K. B. 771=3 L. G. R. 1087=69 J. P. 443=93 L. T. 566.

(14) [1891] 2 Q. B. 267=64 L. T. 628=60 L. J. Q. B. 505=39 W. R. 526=56 J. P. 54.

(15) [1871] 6 C. P. 125=23 L. T. 810=19 W. R. 352=40 L. J. M. C. 52.

(16) [1884] 14 Q. B. D. 254=33 W. R. 93=54 L. J. Q. B. 227=49 J. P. 326.

(17) [1898] A. C. 748=79 L. T. 151=67 L. J. P. C. 115.

v. *Ward* (18) and *Fitzgerald* v. *Champneys* (19) in the latter of which cases Sir W. Page Wood, V. C. observed :

> In passing the special Act the Legislatures had their attention directed to the special case which the Act was meant to meet and considered and provided all the circumstances of that special case ; and having done so they are not to be considered by a general enactment passed subsequently and making no mention of any such intention, to have intended to derograte from that which by their own special Act, they had thus supervised and regulated.

The words of Lord Coke in *Foster's* case (20) have been referred to :

> It must be known that for as much as Acts of Parliament are established with such gravity, wisdom and consent of the whole realm, for the advancement of the common wealth they ought not by any constrained construction out of the general and ambiguous words of a subsequent Act, to be abrogated.

There are two other cases upon which the assessee specially relies. One is *Garnett* v. *Bradley* (21) in which Lord Blackburn said :

> There is another rule which has been laid down, which I think is a good rule if it is properly applied namely that where there has been a particular rule established either by custom or by statute, where there is some particular law standing, and a subsequent enactment has general words which would repeal that particular custom, if they were taken in all their generality, yet nevertheless the first particular law is not to be repealed unless there is a sufficient indication of intention to repeal it. It is not to be repealed by mere general words ; the two may stand together ; the first the particular law standing as an exceptional proviso under the general law.

The other case is *Pole Carew* v. *Craddock* (8). In this case a ferry was established by and maintained under an Act of 1790 (30 Geo. III C. 61) which was deemed to be a public Act and contained a provision that the then proprietors or their respective heirs or assigns

> Shall not be rated or assessed for or toward the payment of any tax rate or assessment whatsoever, parliamentary or parochial for or in respect of the said ferry.

It was held that the principle of *Associated Newspapers Limited* v. *City of London* (7) applied to Imperial taxes and that the exemption granted by the Statute extended to Parliamentary taxes whether in existence at the date of the Act or not, and therefore included Income Tax, although that tax was first imposed subsequently to the passing of the Act of 1790.

On behalf of the Crown the most important of the cases cited is *Nova Scotia Steel & Coal Co. Ltd.* v. *Minister of Finance and Customs* (4). In this case under an agreement with the Government confirmed by a Statute of 1910 the Company paid a tax on each ton of ore exported by them and were exempt from paying any further charge or tax " upon or in respect of the said ore ". By the Business Profits Act 1917 annual tax was imposed on the net profits of businesses. On the question of exemption by reason of the agreement of 1910, it was held that the tax upon the profits was not a tax upon or in respect of the ore exported. It was pointed out that in general a tax on profits and an export tax on commodities are different imposts, financially and economically and cannot be identified even by the indefinite expression "in respect of." *Mersey Docks* v. *Cameron, Jones* v. *Mersey Docks* (22), has been referred to but there is hardly any room for the application of that principle here. The case of *Attorney General* v. *Exeter Corporation* (23), has also been referred to but Hamilton J., while referring to *Foster's* case (20) and the other cases in support of the maxim *Generalia specilibus non derogant* held that the maxim was inapplicable to the case before him.

On a consideration of the authorities referred to above the conclusion I have come to is that there is a clear distinction between *Nova Scotia Steel & Coal Co. Ltd.* v. *Minister of Finance and Custom* (4) and the case here. The immunity in that case extended only up to the exportation of the ore and by the general words "in respect of" could not extend further that is to say to such profits as would be derived by business on it. This is pointed out in the decision itself. In the present case all income or profits that the zemindar derived from his permanently settled estate was exempted from further taxation as such income or profits for ever. The two enactments, in my judgment, are not necessarily inconsistent or repugnant to each other

(18) [1887] 35 Ch. D. 589=56 L. T. 850=56 L. J. Ch. 726=35 W. R. 514=51 J. P. 692.
(19) [1861] 2 J. & H. 31=7 Jur. (N. S.) 1006=9 W. R. 850=30 L. J. Ch. 777.
(20) [1615] 11 Co. Rep. 566.
(21) [1877] 3 A. C. 944=39 L. T. 261=26 W. R. 698=48 L. J. Ex. 186.
(22) [1864] 11 H. L. C. 443=35 L. J. M. C. 1=13 W. R. 1069=11 Jur. (N S.) 746=20 C. B. (N. S.) 56.
(23) [1911] 1 K. B. 1092=80 L. J. K. B. 636=27 T. L. R. 249=5 Tax. Cas. 629=104 L. T. 212=75 J. P. 280.

and in the words of Lord Blackburn I venture to think that the Permanent Settlement Regulation 1 of 1793 may very well stand as an exceptional proviso under the Income Tax Act 11 of 1922.

The effect of this conclusion, it has been pointed out, will have far reaching consequences as it will follow that royalty on mineral permanently settled tracts will not be taxable. I am not so sure that this will necessarily follow: the royalty may be viewed in quite a different light and in any case the zemindar's right to the minerals under the Permanent Settlement has yet to be authoritatively decided [See *Secretary of State* v. *Jyoti Prashad Singh* (24)].

There is a further consideration which has weighed with me in arriving at the opinion that I have formed. The case of *Chief Commissioner of Income-Tax, Madras* v. *Zamindar of Singampatti* (6), was decided by a Full Bench of the Madras High Court so far back as February 1922. I do not think it makes any difference that there was a Sanad in that case as the Sanad did not profess to go beyond the Regulation, viz. 25 of 1802. The law so far as that Presidency is concerned must be taken to have been settled then. In January 1924 the law so far as the province of Behar and Orissa is concerned was settled much in the same way. The Income-Tax Act which is an all India enactment has been amended so recently as in 1926 (Act. 24 of 1926) and yet no attempt has been made to get rid of those decisions. It is said that a provision for an appeal has now been made; but does that meet the point? It is hardly reasonable to suppose that a fiscal enactment has been left neglected in that way.

For the reasons given above I regret I am unable to share in the view taken by my learned brother C. C. Ghose, J. I would, though not without a good deal of hesitation, answer question 3 in the negative in respect of all the ten items which in my opinion are income or profits derivable from or referable to the lands. In view of this answer to question 3, question 2 does not arise.

One word more I desire to add. The Income-Tax Act, like other statutes, must be read according to the ordinary and natural construction of the words with only such aid as is afforded from within the four corners of the Statute itself read as a whole, and my conclusions are based on the Statute itself, though to test their correctness, I have been guilty of digression somewhat unpardonable.

D.D. *Reference answered in affirmative.*

(24) A. I. R. 1925 P. C. 41=53 Cal. 533—53 I. A. 100.

---

## A. I. R. 1927 Calcutta 457

SHURAWARDY AND CAMMIADE, JJ.

*Mayeuddi* and *others*—Defendants 20 and 21—Appellants.

v.

*Mahammad Razzab Ali* and *others*—Plaintiffs and remaining defendants—Respondents.

Appeal No. 1181 of 1924, Decided on 1st December 1926, from the appellate decree of the 1st Addl. Dist. J., Backergunj, D/- 17th March 1924.

*(a) Co-sharer — Property possessed through a co-sharer—Dispossession of such co-sharer is also dispossession of the other.*

Where property is held by a person through his co-sharer, the dispossession of his co-sharers in due course of law is such person's dispossession as well, though he is not specifically made a party to proceedings of dispossession. [P 458 C 1]

*(b) Record of rights—Thak maps are not conclusive.*

Thak maps are not conclusive and may be shown to be wrong: 30 *Cal.* 291 *Foll.* [P 458 C 2]

*(c) Civil P. C., S.* 100 — *Record of rights — Permanent Settlement of* 1793 — *Question if lands are included in Permanent Settlement is one of fact.*

In every case the question what lands are included in the Permanent Settlement of 1793 is a question of fact and not of law. 30 *Cal.* 291, *Foll.* [P 458 C 2]

*Rajendra Chandra Guha* — for Appellants.

*Suresh Chandra Taluqdar* and *Surendra Nath Das Gupta*—for Respondents.

**Judgment.**—The plaintiffs who are the lessees from one Kiran Babu, the purchaser of an estate at a revenue sale, brought the present suit for recovery of possession of the lands in suit on the ground that they formed parts of the estate. The defence was that the lands were not part of the estate purchased by Kiran Babu, namely, Estate No. 3842 of the Backergunj Collectorate but of the 'Remainder' as shown in the thak map. They also pleaded limitation. There were various other points raised which need not be considered in this appeal as

they have not been pressed. It appears that the estate was sold in 1888. In 1899 Kiran Babu sued the Defendants Nos. 1 to 19 and others for khas possession and took delivery of possession through Court on the 9th April 1907. It has been found by the learned District Judge that Kiran Babu remained in possession thereafter for a period of 15 days and was then dispossessed by all the defendants in this suit.

This suit was brought on the 10-4-1919, and it is, therefore, in time. But it is argued by the learned vakil appearing for the appellants that so far as Defendants Nos. 20 and 21 are concerned the plaintiffs' suit is barred against them. These defendants are the co-sharers of the other defendants and they had an interest in the howla as well having inherited it from their common ancestor. In the suit Kiran Babu brought in 1899 these defendants were not made parties and, therefore, it is submitted that it must be presumed that they were in possession in 1907 when Kiran Babu took possession of the land and so the plaintiffs or their lessors were not in possession of the lands in suit as against them within 12 years. The finding of the Court below, however, does not support this contention. The learned District Judge found that Defendants Nos. 20 and 21 were not in actual possession at the time when the suit of 1899 was brought and that they came for the first time on the lands when Kiran Babu was dispossessed 15 days after he had obtained possession.

But it is contended that the Defendants Nos. 20 & 21 might not have been in actual possession in 1907 but they were in possession through the other defendants, their brothers, and since the decree was not obtained against them it must be presumed that their possession continued up to the date of the institution of this suit. This argument appears to us to be fallacious. If the Defendants Nos. 20 and 21 were in possession of the land in suit through their brothers, the dispossession of their brothers must be their dispossession as well. It cannot, therefore, be said that while their brothers were dispossessed they remained in possession. The finding of the learned District Judge, however, that they came for the first time to this land at the dispossession of Kiran Babu does away with the theory about these defendants being in possession at the time of the suit of 1899. The decision with regard to the question of limitation, therefore, must be upheld on the finding arrived at by the Court below.

Then with regard to the question of title. The learned District Judge has found that the thak map which shows that the lands in suit were not included in Estate No. 3842 but were part of the 'Remainder' is not in the circumstances of the present case correct. Both the Courts have relied upon the record of rights and the documents put in by the defendants themselves showing that the lands in suit were included in Estate No. 3842 and also upon the admission by the defendants that since the thak map the proprietor of Estate No. 3842 was in possession of all the disputed lands as part of that estate. On a consideration of the entire evidence the Courts below are of opinion that the thak map cannot be considered to be correct in the face of the other evidence on the record. The procedure and the law adopted by them in considering the value of the thak map are quite consistent with those laid down in the case of *Jagadindra Nath Roy* v. *Secretary of State* (1) where their Lordships of the Judicial Committee say that thak maps are not conclusive and may be shown to be wrong. Their Lordships further observed that in every case the question what lands are included in the Permanent Settlement of 1793 is a question of fact and not of law. The Courts below as Courts of fact are entitled from the evidence on the record to draw the inference that these lands form part of the Estate No. 3842 at the time of the Permanent Settlement. This is a finding of fact with which we cannot interfere.

This appeal accordingly fails and is dismissed with costs.

J.V. *Appeal dismissed.*

(1) [1903] 30 Cal. 291=30 I. A. 44=7 C. W. N. 193 (P. C.).

---

## A. I. R. 1927 Calcutta 458

DUVAL AND MALLIK, JJ.

*Raja Sati Prasad Garga Bahadur*—Defendant—Appellant.

v.

*Broja Gopal Dalapati* and *others*—Plaintiffs—Respondents.

Appeal No. 2064 of 1924, Decided on 4th January 1927.

*(a) Record of rights—Civil suit for wrong entry in, is maintainable but the decree in such suit will only be declaratory and will not force the revenue authorities to alter the entry.*

Apart from the Bengal Tenancy Act the person aggrieved by an entry in Record of Rights, and who has failed to avail himself of the means given him to correct the wrong entry under that Act, cannot be denied his right to bring an ordinary civil suit. But the power to bring an ordinary civil suit instead of availing oneself of the remedy given him in Chap. 10 of the Act would result in a declaration only. It will not force the revenue authorities to alter their fianlly published record of rights. [P 459, C 2]

*(b) Record of rights—Suit by raiyats for correcting wrong entry as to their status—No proceedings in revenue Court or under Bengal Tenancy Act taken—Suit is only ordinary civil suit—B. T. Act, S. 50.*

Where a suit was brought by certain raiyats for correcting an entry as to their status in the record of rights, without any proceedings being taken before the revenue Court or the special Judge or under Chap. 10, Bengal Tenancy Act.

*Held*: that the suit can only be treated as an ordinary civil suit and that no presumption under S. 50 can arise. [P 460, C 1]

*(c) Record of rights—No proceedings to correct entry in record of rights taken either in revenue Court or under Bengal Tenancy Act—Record of rights are final.*

Where there has been a finally published record of rights and no proceedings are taken to alter a wrong entry either before the revenue Court or before the special Judge or in any other way provided for in Chap. 10 of the Bengal Tenancy Act, the record of rights must be treated to be finally settled. [P 460, C 1]

*Amarendra Nath Bose* and *Probodh Ch. Chatterji*—for Appellant.

*Sarat Chandra Bose* and *Apurba Charan Mukerji*—for Respondents.

**Duval, J.**—This appeal arises out of a suit brought by the plaintiffs for a declaration that the entry in the record-of-rights declaring them as occupancy raiyats was wrong and that they should be recorded as mokarari mourasi raiyats or raiyats at fixed rates. The area of the holding is 14 bighas at a rental of Rs. 56-9-0. The record-of-rights was finally published on the 9th April 1917 and this suit was brought on the 22nd December 1922. The learned Munsif dismissed the suit holding that as there had been a record-of-rights finally published, S. 115 of the Bengal Tenancy Act applies and that, therefore, there was no presumption under S. 50 and that as the plaintiffs had failed to prove uniform payment of rent back to the time of the Permanent Settlement, they were not entitled to have a decree.

In appeal the learned District Judge held that the suit was one under S. 111A of the Bengal Tenancy Act, which could correct any entry in a finally published record-of-rights and so S. 115 of that Act was no bar because the record-of-rights was not finally settled until after the suit had been determined in respect of this entry. He further held that the presumption under S. 50, sub-S. (2) could apply and decreed the suit. Apart from the Bengal Tenancy Act the person aggrieved by an entry and who has failed to avail himself of the means given him to correct the wrong entry under that Act cannot be denied his right to bring an ordinary civil suit. But the power to bring an ordinary civil suit instead of availing oneself of the remedy given him in Chap. 10 of the Bengal Tenancy Act would result in a declaration only. It will not force the revenue authorities to alter their finally published record-of-rights. Now S. 111A forbids the bringing of such suits under the Bengal Tenancy Act except in the case of where there has been a settlement of land revenue under S. 101, sub-S. (2). There was no settlement of land revenue in this case and therefore I am unable to agree with the learned District Judge in holding that this suit can be treated as one under the Bengal Tenancy Act and not merely as an ordinary civil suit.

The Judge has referred to the case of *Secy. of State* v. *Kazimuddi* (1) which laid down that the provision contained in S. 115 of the Bengal Tenancy Act against the presumption as to fixed rent under S. 50, sub-S. (2) of the Act has no application in a suit brought by a tenant for the purpose of contesting the correctness of the decision of the revenue authorities in regard to the entry as to the status of a raiyat in a record-of-rights. This decision, however, was passed in the first place before S. 111A had found its place in Chap. 10 and also dealt with khas mahal tenancies where the land revenue is not permanently fixed but is settled at each settlement. The case too has ever since the decision of the Full Bench in the case of *Pirthi Chand Lal* v. *Basarat Ali* (2) not been followed. In that case the Full Bench stated as follows:

(1) [1899] 26 Cal. 617.
(2) [1909] 37 Cal. 30=13 C.W.N. 1149=3 I.C. 449=10 C. L. J. 343 (F. B.).

The case of *Secretary of State* v. *Kazimuddi* (1) is a case of a tenant claiming the benefit of the presumption under S. 50 in a suit to contest the correctness of an entry in a record-of-rights and has no direct appllcation to the facts of this case except so far as it rests on the view that 'S. 115 seems to contemplate a case in which a raiyat is seeking to get the benefit of the presumption for a period subsequent to the time when the record-of-rights was framed.'

With this view I am unable to agree, for, in my opinion, it disregards the plain terms of the section which are general in expression and contain nothing to justify the limited construction that has been placed on them. Now S. 115 says:

> When the particulars mentioned in S. 102, Cl. (*b*) have been recorded under this chapter in respect of any tenancy, the presumption under S. 50 shall not thereafter apply to that tenancy.

Here there has been a finally published record-of-rights. No proceedings were taken to alter the entry either before the revenue Court or before the special Judge or in any other way provided for in Chap. 10 and S. 111A distinctly forbids interfering with the record-of-rights in any other way except as provided for in the chapter and in that section. It appears to me, therefore, that it cannot be said for a moment that the record-of-rights and this entry had not been finally and properly determined some years before this present suit was brought. This suit is merely a civil suit and, therefore, the presumption under S. 50 cannot arise. It is not seriously denied that if there is no presumption the tenant is unable to prove his contention.

The appeal is, therefore, decreed and the suit dismissed with costs in all Courts.

No order is necessary on the application as the party has already been added.

**Mullik, J.**—I agree.

R.D. *Appeal decreed.*

---

## A. I. R. 1927 Calcutta 460

CUMING AND GREGORY, J.

*E. St. C. Moss* and *others*—Accused—Appellants.

v.

*Emperor*—Opposite Party.

Criminal Appeal No. 503 of 1926, Decied on 18th November 1926, from the judgment of the Addl. S. J., Dacca.

*(a) Criminal P. C., S. 297—Charge should contain not only the heads but also the law as explained to the jury.*

Although the law requires that the Judge should record only the heads of the charge, still he must put down sufficient in the charge for the appellate Court to ascertain whether he did or did not correctly explain the law to the jury: *A. I. R.* 1922 *Cal.* 192 *Foll.* . . [P 461 C 2]

*(b) Criminal P. C., S. 297—Person suspected to be an accomplice—Charge must direct jury to consider and find on the point.*

In any jury trial where the facts and circumstances of the case raised a sufficient suspicion that a certain person had something to do with the transaction concerning the offence, it is necessary for the Judge to have it put to the jury to consider whether such person is or is not an accomplice. [P 461 C 2]

*Pugh* and *Bhupendra Chandra Guha*—for Appellants.

*A. K. Basu*—for the Crown.

**Cuming, J.**—This is an appeal by five persons, Jumman Bepari, Tasaddak. Hossain alias Bachu Mia, Mahammad Kurbān Hossain, Tilla Mahmud Khan and E. St. C. Moss who have been convicted by the learned Additional Sessions Judge of Dacca sitting with a jury under S. 46 of the Bengal Excise Act read with S. 120B Indian Penal Code, and sentenced to various terms of imprisonment and fine.

The case for the prosecution briefly is that the accused Moss who was a Sergeant in the Railway Police at Dacca went down to Calcutta ostensibly because his wife was ill but substantially in order to arrange for smuggling cocaine from Calcutta to Dacca and for that purpose he engaged in a conspiracy with the four other accused Bachu Mia, Kurban Hossain, Tilla Mahmud Khan and Jumman Bepari. In pursuance of this conspiracy one Kalu Mia who was a servant of the accused Moss set out for Dacca from Calcutta with a box which contained a quantity of cocaine. Bachu Mia who is one of the appellants went with him in the same train. When they arrived at a station called Tezgaon which is at a short distance from Dacca on the order of Bachu Mia, Kalu got down from the train. Their movements were observed by one Azizar Rahaman, who is an Excise Sub-Inspector. The box at Tezgaon was made over to one Jumman to be taken in a ghary. Jumman in whose possession the box was, was arrested at Tezgaon and the box was taken to the Station Master's room. There it was searched and a packet of cocaine was found in it which

was placed on a table in the room. While the Excise Sub-Inspector proceeded to write the names of the witnesses a man snatched up the packet of cocaine and ran away. On these facts the accused were charged with committing an offence under S. 46 of the Bengal Excise Act read with S. 120B, I. P. C. and were convicted as stated before.

Mr. Pugh who appears for the appellants has raised a number of objections to the charge of the learned Additional Sessions Judge to the Jury. It is unnecessary to deal with all the points which Mr. Pugh has raised because two of them are fatal to the trial. Mr. Pugh's first argument is that the Judge has not explained the law to the jury or rather that he has not set out in his charge how he has explained the law and, therefore, this Court is not in a position to say whether he has or has not correctly explained the law to the jury. In dealing with this point the learned Judge observed as follows: "S. 46, Excise Act, and S. 120B, Indian Penal Code, read and explained to the jury." This is all. Obviously it is impossible for this Court to determine from these words whether the law was or was not correctly explained. Mr. Pugh further contends that it is obvious that the law has not been properly explained because the learned Judge does not even know how to correctly draw up a charge under S. 120B and that he could not have convicted the accused of an offence under S. 46 of the Bengal Excise Act read with S. 120B, Indian Penal Code.

Mr. Bose who appears for the Crown argues that the law both of conspiracy and also in S. 46 of Ben. Excise Act is so simple that it would be sufficient for the judge to read out the sections to the jury and that it does not require an exaplantion. I am prepared to admit that possibly S. 46 does not require much eloborate explanation. The Judge would have to explain to the Jury what an excisable article was and beyond this the section does not require much explanation. But I am not prepared to say that S. 120B is such a simple section that it would be sufficient to read out the section to the jury without any further explanation. As has been pointed out in the case of *Abdul Gafur Khan* v. *Emperor* (1) by my learned brother Walmsley, J., the law, no doubt, requires that the Judge should record only the heads of charge, but the learned Judge points out, as has been often explained in this Court, that the Judge must put down sufficient in the charge for this Court to ascertain whether he did or did not correctly explain the law to the jury. This omission would of itself be sufficient to render a re-trial of the case necessary in the present case. It is quite impossible to say whether the Judge did or did not correctly explain the law to the jury.

Mr. Pugh has raised a further objection that the man Kalu is nothing better than an accomplice and that if so, the learned Judge should have directed the jury to consider whether or not Kalu was an accomplice and that if they considered Kalu to be an accomplice then it would be for the jury to apply to his evidence the ordinary rules that are applied to the evidence of an accomplice, The jury should have been warned that the evidence of an accomplice is unworthy of belief unless corroborated in material particulars and it should have been pointed out to them that although it was open to them to convict an accused upon an uncorroborated evidence of an accomplice it was, as a general rule, unsafe to do so. Looking on all the facts and circumstances of the case I think this point should have been put before the jury, namely, whether Kalu was or was not an accomplice. The cocaine was alleged to have been found with Kalu. Kalu was the man who brought the cocaine from Calcutta He admits that he was told by his master Moss, to keep his mouth shut. And further when there was any difficulty about the box Kalu immediately made himself scarce. These facts would go to show that he had something do with the transaction. I am not prepared to say that these facts must necessarily show that Kalu was an accomplice. But they must raise sufficient suspicion, I think, to render it necessary for the Judge to have put it to the jury to consider whether Kalu was or was not an accomplice.

In the view of these circumstances it cannot be said that the jury has been properly directed in the case. It is not necessary to deal now with the further points raised by Mr. Pugh, namely, that the charge although apparently covered

(1) A. I. R. 1922 Cal. 192.

two distinct offences is included in the single head of charge.

The conviction and sentences of the appellants must be set aside and they are ordered to be re-tried.

Such of the appellants as are already on bail will continue to remain on the same bail pending their re-trial.

**Gregory, J.**—I agree.

J.V. *Conviction set aside.*

---

## A. I. R. 1927 Calcutta 462

MUKERJI AND GRAHAM, JJ.

*Nabadwip Chandra Chakravarti* and *others*—Defendants—Appellants.

v.

*Bhagaban Chandra Choudhry*—Plaintiff—Respondent.

Appeal No. 2332 of 1924, Decided on 7th December 1926, from the appellate decree of the 3rd Sub-J., Tipperah, D/- 26th May 1924.

*Co-sharer—Whether exclusive possession amounts to ouster depends upon the facts of each case—Where it does not amount to ouster, other co-sharers are not entitled to joint possession.*

As a general proposition one co-sharer has no right to take exclusive possession of a joint property, but the question whether such exclusive possession amounts to an ouster or not depends upon the circumstances of each particular case; and in a case where there is no ouster it should not be right to refuse the defendant who is in possession the benefit of the equitable principle that the mere fact of sole occupation by one co-sharer does not necessarily constitute an ouster of other co-sharers nor does it entitle the latter to a decree for joint possession: 18 *C. W. N.* 328, *Foll.* [P. 463, C. 2; P. 464, C. 1]

*Prafulla Chandra Chakravarti*—for Appellants.

*Upendra Kumar Roy*—for Respondent.

**Mukerji, J.**—The Defendants Nos. 1 to 4 are the appellants in this appeal. The appeal arises out of a suit instituted by the plaintiff for joint possession of the lands in suit with the Defendants Nos. 1 to 4 to the extent of the plaintiff's share. The suit was dismissed by the Court of first instance, but on an appeal preferred by the Plaintiff the Subordinate Judge has reversed that decision and decreed the suit. The facts shortly stated are there: The plaintiff alleges that there is a niskar named Amar Prasad Choudhury and Jai Narayan Choudhury in which he was a malik to the extent of 3 annas 15 gandas share. The owners of the other shares are the pro forma defendants Nos. 7 to 29. Another pro forma defendant in the suit, namely, one Aisali, had, under this niskar, a non-transferable occupancy holding which consisted of the land in suit. On the 5th Magh 1324 Aisali transferred the holding to the Defendant No. 4. On the 18th Bhadra 1328 the Defendant No. 1 purchased a share in the maliki right in respect of this niskar and became a co-sharer of the plaintiff. Thereafter, on the 11th Aswin 1328 the Defendant No. 1 purchased the disputed holding from the Defendant No. 4 who, as I have already stated, had purchased it from Aisali on the 5th Magh 1324.

Thereafter, the plaintiff instituted the present suit. His case was that the Defendants Nos. 1 to 4 who were in possession of the lands under the aforesaid purchases had no right to remain there as the holding was non-transferable. The learned Munsif found that the plaintiff as well as the co-sharers of the niskar, with the exception of the Defendant No. 1, each possessed some nal lands exclusively, that the plaintiff himself is in khas possession of 5 kanis of niskar lands, that neither the plaintiff nor his co-sharers pay rent for these khamar lands to the other co-sharers, to whom such rent is due, that the plaintiff's wife is in possession of some lands of the raiyats in the niskar and pays no rent for those lands, that the disputed land is at some distance from the plaintiff's bari and that although the defendants are in possession of the disputed lands they never denied the plaintiff's title and in fact are willing to pay rent to the plaintiff. On these findings he came to the conclusion that the plaintiff and his co-sharers were in possession of different plots of land in this joint niskar according to their convenience. He was of opinion that under the circumstances of the case and having regard to the findings to which I have referred the principle laid down in the case of *Basanta Kumari Dassya* v. *Mohesh Chandra Shaha* (1) was applicable and in that view of the matter he dismissed the plaintiff's suit holding that the plaintiff may bring a suit for partition on which the rights of the parties to such plots of land as they may be exclu-

(1) [1913] 18 C. W. N. 328=21 I. C. 621.

sively entitled to, on such partition, will be determined.

The Subordinate Judge was of opinion that the case on the authority of which the Munsif proceeded was not applicable and the point of difference which appeared to him as most prominent was that whereas in the case of *Basanta Kumari Dassya* v. *Mohesh Chandra Shaha* (1), the point of time at which the cause of action arose to the plaintiff was one posterior to the point of time when the plaintiff and the defendants had become co-sharers, in the present case the purchase made by the Defendant No. 4 on the 5th Magh 1324, was really a purchase on behalf of all the defendants and the sale by the Defendant No. 4 to the Defendant No. 1 on the 11th Aswin 1328 was a colourable one and was effected merely for the purpose of showing that it was after the purchase of the maliki right by the Defendant No. 1 on the 18th Bhadra 1328, that the defendants came to be in exclusive possession of those lands. In my opinion, this distinction, that exists between the facts of the two cases, is not one which may be said to be at all material and in any event it is proper that on a question as to whether the equitable principle laid down in the case of *Basanta Kumari Dassya* v. *Mohesh Chandra Shaha* (1), should be applied or not, one has got to see the state of facts as they existed at the time when the suit was instituted. Whether the Defendant No. 1 or the other defendants are holding the land in suit under a title which may be said to be good as against the plaintiff or not is not really the question which we have got to determine.

The position is that the plaintiff now asks to have joint possession with the defendants under the following circumstances: That he and the defendants are co-sharers of the taluk with the exception of the Defendant No. 1, and each of them has been holding exclusively possession of separate plots of land without payment of rents due therefor, and that the Defendant No. 1, who is also a co-sharer, is holding this particular plot of land and is willing to pay rent to the plaintiff. The real question, in my opinion, is whether it can be said that there has been an ouster of the plaintiff by reason of any adverse title set up on behalf of the defendants. In the case of *Basanta Kumari Dassya* v. *Mohesh Chandra Shaha* (1) an attempt has been made to define "ouster" and it has been said there that the mere fact of sole occupation by one co-oharer does not necessarily constitute an ouster of other co-sharers nor does it entitle the latter to a decree for joint possession, and "ouster" means

> dispossession of one co-sharer by another where a hostile title is set up by the latter and when the occupation of the latter is not consistent with joint ownership.

In the case before us there is nothing to indicate that the defendant has ever denied the plaintiff's title by receiving rent in respect of the share which belonged to him or in any other way

On behalf of the respondents reliance has been placed upon two decisions of this Court—one in the case of *Kumud Lal Roy* v. *Jogendra Mohan Roy* (2) and the other in the case of *Surendra Narain Sinha* v. *Hari Mohan Miser* (3). In the former of these two cases it was found as a fact that there was an ouster. That appears from the judgment of Mr. Justice Richardson as well as of Mr. Justice Carnduff; and Mr. Justice Carnduff in his judgment stated that the appellants at once proceeded to take entire possession by settling tenants upon the land and recovering from them the whole rent. That amounts to a denial of the plaintiff's title to receive rents in respect of the lands. The latter of these two cases is distinguishable on the ground that from the facts of that case it appears that the lands were in possession of two tenants who held under all the co-sharers and were not waste or derelict lands when the defendants took exclusive possession, that exclusive possession of the defendants was resisted from the very outset, and indeed there was violent opposition on the part of the plaintiff by proceedings taken in Court, for instance, by the institution of a suit restraining the defendants from taking possession as well as by armed resistance.

It is true that as a general proposition one co-sharer has no right to take exclusive possession of a joint property, but the question whether such exclusive possession amounts to an ouster or not depends upon the circumstances of each particular case; and in a case where

(2) [1913] 18 C. W. N. 609=22 I. C. 683.
(3) [1906] 33 Cal 1201.

we are unable to hold that there was an ouster it should not be right to refuse the defendant who is in possession the benefit of the equitable principle which is to be found in the case of *Basanta Kumari Dassya* v. *Mohesh Chandra Shaha* (1). It may be remarked also that the plaintiff waited for several years after possession was taken by the defendants, and then instituted the present suit.

I am clearly of opinion that the judgment of the learned Subordinate Judge was wrong and that it should be set aside. We accordingly set it aside and restore the judgment of the learned Munsif. The appeal is thus allowed with costs in this Court as well as in the lower appellate Court.

In conclusion, I desire to state that I sincerely hope that the result of this appeal will not dissuade the defendant from paying such rents as may be reasonable to the plaintiff, as it appears upon the proceedings that he is willing to do, nor the plaintiff from accepting such rents from the defendant as he thinks fair and reasonable, if he feels inclined to do so.

**Graham, J.**—I agree.

R.D. *Appeal allowed.*

---

## A. I. R. 1927 Calcutta 464

MUKERJI AND GRAHAM, JJ.

*Noni Krishna Bosak* — Defendant — Petitioner.

v.

*Nabamonjuri Dassi*—Plaintiff—Opposite Party.

Civil Rule No. 903 of 1926, Decided on 6th December 1926, against the order of the Munsif, 2nd Court, Sealdah, (24-Parganas) in Pauper Suit No. 1 of 1926.

*Civil P. C., O. 33, Rr. 6 and 7—Court disposing of pauper application without notice to opposite party and Government Pleader and without taking evidence adduced in disproof of pauperism—Court acts without jurisdiction and revision lies—Civil P. C., S. 115.*

**Where a Munsif disposed of an application for leave to sue as a pauper, without taking such evidence as the opposite party had offered before the Court, and without notice to the opposite party and the Government,**

*Held* : the Court acted without jurisdiction in dealing with the pauper application and a revision lay. [P. 464, C. 2]

*Krishna Lal Banerjee*—for Petitioner.

*Phanindra Nath Das*—for Opposite Party.

**Judgment.**—The petitioner alleges in para. 3 of his petition that on the 10th July 1926, the day on which the order complained of was passed his witnesses were in attendance and his vakil, though not called on, insisted on the evidence of those witnesses being taken, but that the Court refused to take that evidence and disposed of the application of the opposite party for leave to sue as pauper upon the basis that there was no opposition by the Government to such application. This statement is supported by an affidavit and is not contradicted before us. On the other hand, there is on the record a list of witnesses present which was filed on that day and in which the names of three witnesses appeared as having been present on the occasion. It is clear, therefore, that the Munsif disposed of the matter without taking such evidence as the petitioner had offered before the Court. Having regard to R. 6 and R. 7 of O. 33, the former of which requires a notice to be given to the opposite party and the Government for receiving any evidence which may be adduced in proof of the pauperism and for hearing any evidence which may be adduced in disproof and the latter provides that the Court should examine the witness, if any, produced by either party, there can be no doubt that the learned Munsif acted without jurisdiction in dealing with the case in the way that he did.

We accordingly set aside the order passed by him on the 10th July 1926, the order complained of in this Rule, and direct that an enquiry into the question of pauperism or otherwise of the opposite party will be held afresh and in the presence of the petitioner giving the petitioner such opportunity as may be reasonable for adducing evidence in support of his contention.

The rule is thus made absolute but we make no order as to costs.

J.V. *Rule made absolute.*

## A. I. R. 1927 Calcutta 465

CHATTERJEA, Ag. C. J., AND PANTON, J.

*Mohamed Ebrahim Molla*— Defendant —Appellant.

v.

*Commissioners for the Port of Chittagong*—Plaintiffs—Respondents.

Appeal No. 263 of 1924, Decided on 9th August 1926, from the Original Decree of the Sub-J., Chittagong, D/- 18th August 1924.

(a) *Chittagong Port Act (Bengal 5 of 1914), S. 38 (g)—Scope.*

The words used in S. 38 (g) are wide and it is not ultra vires of the Commissioners to let out a steam tug for operations outside the Chittagong river. [P. 468, C. 2]

(b) *Chittagong Port Act, S. 29—Non-compliance with.*

Non-compliance with the provisions of S. 29 renders the agreement not binding upon the Commissioners; *Case Law discussed.* [P. 471, C. 2]

*Pugh* and *Narendra Kumar Das*—for Appellant.

*B. L. Mitter* and *Surendra Nath Guha* —for Respondents.

**Judgment.**—This appeal arises out of a suit by the Port Commissioners of Chittagong to recover Rs. 27,768-12-0 as hire of a steam tug, from the defendant, under the following circumstances:

It appears that the defendant purchased a steamer, War Puffin, which had been stranded on a reef, and engaged one Mr. Aiken and another person for salvage operations. Mr. Aiken, on the 2nd April 1920, wired to the Port Officer, Chittagong:

Can you send powerful tug-boat to the mouth of Moulmein river to tow steamer War Puffin to Rangoon? If so, state terms. Tug required as soon as possible before the 10th April. Reply urgent.

The Port Officer, Chittagong, on the 3rd April replied:

Terms Rs. 1,500 per day from date tug leaves Chittagong till date she returns Chittagong. The additional cost of insurance of tug for voyage, also all pilotage fees and port dues at Moulmein and Rangoon.

After some correspondence about the terms, the defendant's attorney, Mr. Aiken, on the 8th April wired to the Port Officer:

Your telegram 3rd instant. Terms accepted. Tug required here 13th instant morning. Confirming by letter also through the Port Officer, Moulmein, on your behalf who will telegraph you.

On the same day the Port Officer, Rangoon, wired to the Port Officer, Chittagong:

Agent War Puffin request me to sign agreement on your behalf for services of tug Gekko in accordance with terms stated in your wire to them dated 3rd. Will do so if you approve and forward agreement to you.

The Port Officer, Chittagong, replied:

Please sign agreement. Gekko sails noon today and should arrive Moulmein 12th. Inform War Puffin.

An agreement was accordingly executed by Lieutenant-Commander Gordon, the Port Officer, Moulmein, on behalf of the Port Officer, Chittagong, and the defendant, Mohamed Ebrahim Molla, by his attorney, Mr. Aiken, on the 9th April 1920. The agreement runs as follows:

To all to whom these presents come greeting: Whereas Mahomed Ebrahim Molla, Esq., Merchant, Rangoon, Burma, is desirous of obtaining the services of a sea-going tug to assist in the salvage operations on the SS. War Puffin now lying stranded on the Longstone's Reef at Amherst, Lower Burma and whereas the Port Officer Chittagong, by a telegram dated at Chittagong on the third day of April 1920, has agreed to hire the tug Gekko being the property of the Port of Chittagong and under his jurisdiction, for the sum of Rupees fifteen hundred per diem from the date the said Gekko leaves the port of Chittagong until the date of her return to the said port and whereas the said Port Officer requires that the cost of the insurance during the period of the tug's absence from the Port of Chittagong, together with the cost of all port dues and pilotage incurred during the said absence shall be defrayed by the hirer, now it is hereby agreed as follows:

(1) The said Mohamed Ebrahim Molla, hereinafter known as the hirer, by his lawful attorney, J. W. Donaldson Aiken, of Rangoon, agrees to hire the said sea-going the Gekko on the terms and conditions as above specified from the said Port Officer, Chittagong, together with all her proper equipment, towing gear, etc., for a period sufficient to perform the salvage works above mentioned.

(2) The Port Officer, Chittagong, hereinafter known as the lessor will use his utmost endeavours to ensure that the said Gekko will arrive at the scene of the above-mentioned salvage operations on or before Tuesday, the thirteenth day of April 1920, at Amherst, Lower Burma, together with all necessary equipment, towing gear, fuel, lubricating oil, crew, etc., and the said Gekko will be thereafter at the disposal of and under the instructions of the said attorney saving and excepting such instructions as the officer in command of the said Gekko may consider as calculated to endeavour the safety of the said tug.

(3) The hirer agrees by his attorney to pay to the less or the rates and commitments hereinbefore specified and undertakes to exercise all reasonable care to ensure the safety of the vessel aforementioned, and the lessor on his part agrees to render all possible help and assistance of which the said Gekko is capable without unduly endangering the safety of the vessel.

In witness whereof the said Mohamed Ebrahim Molla, by his attorney, and the said Port Officer, Chittagong, by his proxy, Commander B. Gordon R. I. M. Port Officer, Moulmein, have hereunto set their hands on this the ninth day of April in the year nineteen hundred and twenty at Moulmein, Lower Burma.

J. W. Donaldson Aiken.
*Attorney for Mohamed Ebrahim Molla*
B. Gordon.
*Lieutenant-Commander, R. I. M. Port Officer.*

It is to be observed that although the original understanding, as evidenced by the telegrams, was that the tug was to tow the War Puffin, by the agreement actually executed by the Port Officer, Moulmein, on behalf of the plaintiffs, it was to

assist in the salvage operation on the SS. War Puffin now lying stranded on the Longstones Reef at Amherst.

The plaintiffs, however, acquiesced in the agreement executed, and nothing turns upon the variation.

The tug Gekko sailed from Chittagong under the charge of Captain Jackson on the 9th April and arrived off Amherst on the 12th April. On the next day, Captain Jackson reported his arrival to the Port Officer and received a wire from Aiken: Imperative "Gekko at Amherst tomorrow morning at the latest." The Gekko arrived at Amherst on the 13th April at 3-20 p. m.; but Aiken informed Jackson that he could not come that day as he was unwell. On the next morning (14th April) Aiken boarded the tug.

The plaintiffs' case is that Aiken then told Captain Jackson that he would make an attempt to float War Puffin on the 17th April, the tide of that day being the highest and consequently most suitable for attempt at salvage, and that in the meantime the Captain with the permission of Aiken went to Moulmein to arrange for coal for his return journey but informed him that he would come down to Amherst daily to see if his services were required. On the 17th April Captain Jackson began the work of salvage; after several unsuccessful attempts wire from the tug was connected to War Puffin. At 1-30 p. m. under orders from Aiken, Captain Jackson picked up the anchor of the steam-tug Gekko and commenced towing War Puffin. The towing was continued until it was discovered that, notwithstanding every effort, the vessel would not float clear of the reef and further towing was useless. Mr. Aiken at 2-15 p. m., asked Jackson to stop towing, as the vessel was, nothwithstanding the towing, fast on the reef. On the next day (18th April), Jackson received a letter from Aiken saying that as War Puffin had strained herself so badly during the attempt to clear her, any further attempt would be useless, and as the further services of the Gekko would no longer be required, Jackson was asked to go back to Chittagong with all despatch. Accordingly, after waiting for a towing wire which was made over on the 21st April, and in the meantime taking necessary coal from Moulmein, the Gekko left Amherst on the 21st April and reached Chittagong on the 24th April 1920. The plaintiffs claim from the defendant Rs. 27,768-12-0 for the hire of the tug from 9th April to the 24th April including Rs. 5,238 paid by them as insurance premium.

The defendant admitted that the tug arrived at Amherst on the 12th April and was at the scene of the salvage operations on the afternoon of the 13th, but that on the 14th the defendant's agent was not able to utilize the services of the tug, as Jackson said that the vessel had not enough coal to effectively assist in the salvage operations, and that in consequence all arrangements for that day and the favourable conditions of that date were lost to the defendant. The defendant denied that the salvage operations were postponed by Mr. Aiken to the 17th April for any such reasons as alleged by the plaintiffs, and contended that the Gekko made several trips between Amherst and Moulmein from the 14th to 16th April for Captain Jackson's benefit, as he was taking to his own use the pilotage fees which the defendant had ultimately to pay, and it was on the 16th that Captain Jackson for the first time asserted that the vessel had sufficient coal to perform the services for which it was hired and that the salvage operations were performed on the 17th April, as up to that date the Gekko was not in a position to render any service for which it was hired. The defendant submitted that the salvage operations on the 17th April were unsuccessful owing to the Gekko being unable to render any assistance or service, as the vessel was not capable to tow the War Puffin effectively, and as the tug was not provided with the necessary equipment, towing gear, etc., for such salvage operations, that conse-

quently the War Puffin was badly strained, and ultimately all saivage operations had to be abandoned, and that the defendant sustained substantial damage. It was further pleaded that in any case the defendant was not liable for the hire of the vessel except for the six days the vessel took in coming and going and for the one day it was engaged in the salvage operations.

In his additional written statement, filed on the 3rd November 1921, the defendant further pleaded that the Port Officer of Chittagong had no authority to represent and did not represent the plaintiffs in the negotiations and the contract, and further that the contract executed by the Port Officer of Moulmein as agent of the Port Officer of Chittagong for the plaintiff was illegal and void under the Chittagong Port Act and was not binding or of any legal effect on any of the parties thereto. It was also pleaded that the tug Gekko which was let out on hire to the defendant on his requisition to send a "powerful tug" was not of sufficient power to salve the steamer or to tow up the same from the Longstone's Reef to Rangoon, and that there was thus a breach of warranty on the part of the plaintiffs and the defendant was not liable to pay any amount for hire. The defendant claimed Rs. 50,000 as damages caused to the War Puffin.

Capain Jackson and Mr. Bryan, Port Officers, Moulmein, were the principal witnesses examined for the plaintiffs, and Rahman Chaudhury and Mr. England for the defendant. The defendants wanted to examine Mr. Aiken on commission. He was certainly an important witness, as he was in charge of the salvage operations on behalf of the defendant. A commission was sent out for his examination at New York where he was then residing, but he having left New York, the commission was returned unexecuted. Fresh commission was applied for by the defendant for his examination in California, but, as his whereabouts were not known with certainty, it was not issued. Ultimately the defendant stated that Aiken was residing in Mexico and applied for commission for his examination there. The Court, however, was of opinion that as the witness was so often changing his place of residence, and there was no certainty of his continuing to reside at Mexico, and as the commission to New York took about a year's time, the application for the defendant should be disallowed.

The learned Subordinate Judge, upon a consideration of the evidence, found in favour of the plaintiffs. The defendant has appealed. The first question for consideration is whether the salvage operations could not take place before the 17th April owing to any refusal or default on the part of the Captain of the tug. (After dealing with evidence the judgment proceeded). The Court below has shown that no warrant was given for the success of the salvage operations either expressly or impliedly, and that on the contrary the terms of the agreement indicate that Gekko was to play a subsidiary part in the salvage operations by making such contributions as she was capable of. We need not discuss the matter, as no arguments have been addressed to us on the point.

On the whole we see no sufficient reason to differ from the conclusion arrived at by the Court below on the point.

The next question is whether the hiring of the tug for the purpose of towing or salvage operations outside the Chittagong river, at Amherst, was ultra vires of the Port Commissioners.

Section 38 of the Chittagong Port Act lays down that the Commissioners may contract and carry out the following works . . . . . (g) "the procuring and employment of steam vessels for towing vossels into, out of, in or upon the river. . . . . ." It is contended for the appellant that "the river" means the Chittagong river, and that uuder the Act the Commissioners have no power to employ tugs outside that river and that they have no power to hire out a tug either for the purpose of towing or for salvage operations, at any rate outside the Chittagong river.

With regard to this contention it is to be observed that the words " towing vessels into" the river must refer to cases of towing from outside into the Chittagong river. It appears, however, that the vessel War Puffin was not to be towed into the Chittagong river but from Amherst to Moulmein of Rangoon both of which are outside the Chittagong river.

It is contended by the learned Advocate-General that under S. 69 of the Act.

the Commissioners may, for the purposes of the Act, acquire and hold moveable and immo-

vable property within or without the limits of the Port and may lease, mortgage, sell or exchange such property,

that the Commissioners, therefore, for the purposes of clause (g) of S. 38 had power to acquire the tug Gekko and hold it without the limits of the port, and also to let it out.

Mr. Pugh contends that the hiring of a vessel is not "lease." The expression "lease" is not defined in the Act and although it is ordinarily used in connexion with immovable property, it appears that in the agreement between the parties in the present case (Exhibit 4, dated the 9th April 1920,) the Port Officer of Chittagong is referred to as the "lessor." In Scrutton on Charter Party, 11th Edition, page 4, "demise or lease" of ship is referred to, though, at page 5, it is stated that the modern tendency is against the construction of a charter as a "demise or lease." It is contended by Mr. Pugh that whether there can be a "lease" of a ship or not, there was no lease in the present case as the Commissioners never parted with the whole control of the ship. Captain Jackson, the master of the vessel Gekko, was no doubt to act under the instructions of the defendant's agent Aiken, but the Commissioners did not part with the entire control of the vessel for the period. Paragraph 2 of the agreement, after providing that the lessor (the Port Officer of Chittagong) shall see that the Gekko arrives at the scene of salvage operations on the 13th April 1920, together with all necessary equipment, towing gear, fuel, oil, etc., states that :

the said Gekko wiil be thereafter at the disposal of and under the instructions of the said attorney saving and excepting such instructions as the officer in command of the said Gekko may consider as calculated to endanger the safety of the vessel.

It appears, therefore, that the Gekko was to be under the disposal and instructions of the defendant's agent so far as the operations to be performed by it were concerned, but that it was to be under the control of the Commander for the purpose of navigation. But, having regard to the nature of the property (a towing vessel), such control would necessarily be reserved in the Commander of the vessel, and would not show that it was not hired or let out, if the latter expression includes hiring.

The question, however, still remains whether a towing vessel can be let out by the Port Commissioners for operations outside the Chittagong port. If the contention of the learned Advocate-General is correct, the Commissioners can let out the vessel for towing or salvage operations in the Indian Ocean or the Mediterranean Sea. It seems that the provision in S. 69 that the Commissioners may hold moveable property without the limits of the Port should be qualified by the words "for the purposes of this Act," and the purposes of the Act under S. 38 (g) being to tow into the river (the Chittagong river), the lease is to be confined to cases where the vessel is leased for "towing vessels into, out of, in or upon the river" (i. e., the Chittagong river), and not for such operations unconnected with the Chittagong river. The expression "lease", however, occurs along with the words " mortgage, sell or exchange such property." It is difficult to see how there can be a sale for the purposes of the Act, and if a sale not to be qualified by the purposes of the Act, a lease may also be held to be not so qualified. The result of our accepting the contention of the respondents will be to hold that although the acquisition and holding property must be for the purposes of the Act, the lease, mortgage, sale or exchange need not be for such purposes. The words, used, however, are wide, and we accordingly hold, though not without hesitation, that it was not ultra vires of the Commissioners to let out the steam-tug for operations outside the Chittagong river.

The third question is whether the agreement, dated the 9th April 1920, between the Port Commissioners and the defendant is a valid contract which can be enforced.

As already stated, the agreement was executed between defendant by his attorney, Mr. Aiken, and the Port Officer, Chittagong, by his proxy, Lieutenant Commander Gordon, the Port Officer of Moulmein.

Now S. 28 (1) and (2) lays down :

The Commissioners may enter into contracts authorized by this Act with any person for the execution or supply of any works, labour, materials, machinery, stores, or for other matters necessary for carrying into effect the trusts and purposes of this Act. (2). Any such contract, the value or amount of which does not exceed two thousand five hundred rupees, may be made by the Chairman in the case of any work or matter which he is authorized to carry out by this Act or the rules or by-laws

thereunder or which has been sanctioned by the Commissioners, but other contracts shall not be entered into except in accordance with a resolution passed by the Commissioners in meeting.

Section 29 which lays down the mode of executing contracts and agreements is as follows :

Any contract, the value or amount of which does not exceed two thousand five hundred rupees, made by the Chairman for and on behalf of the Commissioners may be made in such manner and form as; according to the law for the time being administered in Chittagong, would bind him if such contract were on his own behalf. (2) Every contract or agreement by or on behalf of the Commissioners which shall exceed the sum of two thousand five hundred rupees shall be in writing and signed by the Chairman or Vice-Chairman and by two other Commissioners, and shall be sealed with the common seal of the Commissioners.

The contract was not made by the Chairman and it could not be, as Rs. 1,500 was payable daily and according to the telegram of Mr. Aiken, dated the 6th April 1920, the probable duration of the engagement was 12 days.

The value or amount of the agreement thus being over Rs. 2,500, it should have been under sub-S. (2) signed by the Chairman or Vice-Chairman and by two other Commissioners and sealed with the common seal of the Commissioners. This admittedly was not done. It is accordingly contended for the appellant that the agreement not having been executed as provided in Sub-S. (2) was not, under sub-S. (3), binding upon the Commissioners. The question is whether the provision is obligatory and not merely directory and whether a non-compliance with the provision renders the agreement unenforcible.

It is a rule of common law in England that, with certain exceptions, a corporation is bound by those contracts only which are made under the Corporate Seal. The exceptions are—(i) where the contract is executed, (ii) in small matters of very frequent occurrence, and (iii) where it is impossible to affix the seal, as in cases of great urgency.

In the case of *Clarke* v. *Guardians of the Cuckfield Union* (1), Wightman, J., reviewed the cases on the subject and held that :

> wherever the purposes for which a corporation is created render it necessary that work should be done or goods supplied to carry such purposes into effect, as in the case of the guardians of a poor law union, and orders are given at a board regularly constituted, and having general authority to make contracts for work or goods necessary for the purposes for which the corporation was created, and the work is done, or goods supplied and accepted by the corporation, and the whole consideration for payment executed, the corporation cannot keep the goods or the benefit, and refuse to pay on the ground that though the members of the corporation who ordered the goods or work were competent to make a contract and bind the rest, the formality of a deed or of affixing the seal were wanting, and then say : " No action lies, we are not competent to make a parol contract, and we avail overselves of our own disability.

Although the decisions on the point were not uniform, the above view may now be considered established by the decision of the Court of appeal in *Lawford* v. *Billericay Rural District Council* (2) where it was held that if the work done or goods to be supplied to carry into effect the purposes for which a corporation is created, are accepted by the corporation and the whole consideration for payment is executed, there is a contract to pay implied from the acts of the corporation, and the absence of a contract under the seal of the corporation is no answer to an action brought in respect of the work done or the goods supplied.

In common law, therefore, in cases of executed consideration, the absence of a contract under seal does not invalidate a contract and it is unnecessary to refer to the other cases cited. But where there is express statutory provision, that exception has been held not to apply even in cases of executed contract.

In *Young and Co.* v. *Mayor and Corporation of Royal Leamington* (3), the corporation, duly acting as an urban authority, contracted under seal with one Powis for the making of some waterworks. Powis failed to complete the contract, which, therefore, ceased. The urban authority then, without seal, directed their agent to contract with Young and Company to finish the works. The works were finished to the entire satisfaction of the corporation ; certain extra necessary works were also done. Then the corporation, having had the benefit of all the works, refused to pay the full price of the same.

In the Court of appeal, Lindley, L. J., said in this judgment :

(1) [1852] 21 L. J. Q. B. 349=16 Jur. 686=1 B. C. C. 81.

(2) [1903] 1 K. B. 772=88 L. T. 317=72 L. J. K. B. 554=1 L. G. R. 535=67 J. P. 245=51 W. R. 630=19 T. L. R. 322.

(3) [1883] 8 A. C. 517.

The last point urged for the plaintiffs was, that as the contract has been performed and the defendants have the benefit of the plaintiffs' work, labour, and material, the defendants are at all events liable to pay for these at a fair price. In support of this contention cases were cited to show that corporations are liable at Common Law quasi ex contractu to pay for work ordered by their agents and done under their authority. The cases on this subject are very numerous and conflicting, and they require review and authoritative exposition by a Court of appeal. But, in my opinion, the question thus raised does not require decision in the present case. We have to construe and apply an Act of Parliament. The Act draws a line between contracts for more than £50 and contracts for £50 and under. Contracts for not more than £50 need not be sealed, and can be enforced whether executed or not, and without reference to the question whether they could be enforced at common law by reason of their trivial nature. But contracts for more than £50 are positively required to be under seal; and in a case like that before us, if we were to hold the defendants liable to pay for what has been done under the contract, we should in effect be repealing the Act of Parliament and depriving the ratepayers of that protection which Parliament intended to secure for them.

In the House of Lords, Blackburn, after referring to the judgments of the Courts of appeal, the cases on the point, and the Public Health Act, 1875, observed:

I think, bearing in mind this, it is not possible to construe S. 174 as meaning anything else than that when the subject-matter of a contract exceeds £50 in value the contract must be under seal; and that the distinctions and differences which, according to the opinions of the Court of Queen's Bench, might dispense with a seal in the case of an ordinary corporation should not do so when the contract was by an urban authority, and related to a subject matter above that value. This was the construction put upon the Act in *Hunt* v. *Wimbledon Local Board* (4), as well as in the Court below. I think it is right, and it disposes of this appeal. It is true that this works great hardship upon the now appellants. They had an agreement, but it was not sealed; and though it is possible that if the agreement had been under seal the defendants might have established a defence on the merits to all or part of what is claimed, it is hard on the appellants that they should not be allowed to raise the question. It is, however, for the Legislature to determine whether the benefits derived by enforcing a general rule are or are not too dearly purchased by occasional hardships. A Court of law has only to inquire, what has the Legislature thought fit to enact.

Lord Bramwell, in the same case, observed:

The Legislature has made provisions for the protection of ratepayers, shareholders and others, who must act through the agency of a representative body, by requiring the observance of certain solemnities and formalities which involve deliberation and reflection. That is the importance of the seal. It is idle to say there is no magic in a wafer. It continually happens that carelessness and indifference on the one side, and the greed of gain on the other, cause a disregard of these safeguards, and improvident engagements are entered into. Whether that has been so in this case I have no notion; but certainly the ratepayers of Leamington may well be astonished at the amount claimed of them. The decision may be hard in this case on the plaintiffs, who may not have known the law. They and others must be taught it, which can only be done by its enforcement.

See also *British Insulated Wire Company, Limited*, v. *Prescot Urban District Council* (5) which also was a case of executed consideration.

Then again in the later case of *Hoare* v. *Kingsbury Urban District Council* (6), following *Young's* case (3) it was held that

in equity as well at law no contract, although executed, for over £50 in value can be enforced unless ft is under seal.

See also *Frend* v. *Dennett* (7).

In *Douglass* v. *Rhyl Urban District Council* (8), Joyce, J., observed:

Aithough there may have been a difference of opinion and conflicting authorities, I think it is now settled that, in the absence of an express statutory provision requiring a contract under seal, the requirement of the corporate seal at common law is subject to this exception,

and the case of *Lawford* v. *Billericay Rural District Council* (2) was referred to and there being no statutory prohibition applicable to the case, the plaintiff was held entitled on a *quantum meruit*.

In the cases decided in the Indian Courts, similar provisions in other Acts have been construed to be mandatory, and non-compliance therewith has been held to render the agreement unenforcible. See *Chairman, South Barrackpore Municipality* v. *Amulya Nath Chatterjee* (9), *Mathura Mohan Saha* v. *Ram Kumar Saha* (10), *Eziekiel & Co.* v. *Annada Charan Sen* (11), *Radha Krishna Das* v. *Municipal Board of*

(4) [1878] 4 C. P. D. 48=40 L. T. 115=48 L. J. C. P. 207=27 W. R. 123.

(5) [1895] 2 Q. B. 463=15 R. 633=64 L. J. Q. B. 811=73 L. T. 383=44 W. R. 224=59 J. P. 552.

(6) [1912] 2 Ch. 452=56 S. J. 704=81 L. J. Ch. 666=107 L. T. 492=10 L. G. R. 829=76 J. P. 401.

(7) [1858] 4 C. B. N. S. 576=27 L. J. C. P. 314=5 L. T. 73=4 Jur. (N. S.) 897.

(8) [1913] 2 Ch. 407=82 L. J. Ch. 537=77 J. P. 373=109 L. T. 30=11 L. G. R. 1162=29 T. L. R. 605=57 S. J. 627.

(9) [1907] 34 Cal. 1030=12 C. W. N. 50.

(10) [1916] 43 Cal. 790=20 C. W. N. 370=35 I. C. 305=23 C. L. J. 26.

(11) A. I. R. 1923 Cal. 35=50 Cal. 180.

*Benares* (12), *Raman Chetti* v. *Municipal Council of Kumbakonam* (13). Some of these were cases of executory contracts, and it is pointed out on behalf of the respondents that in the case of *Ahmedabad Municipality* v. *Sulemanji Ismalji* (14), the rule was applied in the case of an executory contract, whereas in the case of *Abaji Sitaram Modak* v. *Trimbak Municipality* (15), the same learned Judges held 'that though a contract by a corporation must ordinarily be made under seal, still where there is that which is known as an executed consideration, an action will lie, though this formality has not been observed. In the case of *Radha Krishna Das* v. *The Municipal Board of Benares* (12), however, following the English cases of *Young and Co.* v. *Mayor and Corporation of Royal Leamington Spa* (3) and *British Insulated Wire Co. Ltd.* v. *Prescot Urban District Council* (5) the learned Judges held that the rule applied to executed consideration also, and did not follow the statement of the law laid down in case of *Abaji Sitaram Modak* v. *Trimbak Municipality* (15).

In this Court, in the case of *Mathura Mohan Saha* v. *Ram Kumar Saha* (10), it was pointed out:

> The strict rule of the ancient common law, no doubt, was that a corporation could only act under its seal and was not bound by written contracts not under seal. This rule, however, was relaxed in many cases at an early date, and where a corporation is acting within the scope of the legitimate purposes of its institution even parol contracts made by its authorised agente raise implied promises, for the enforcement of which an action may well lie, specially where there is no express statutory requirement of a contract under seal and the benefit of the contract has been enjoyed by the corporation;

and that, as pointed out in the judgment of Neville, J., in *Hoare* v. *Kingsbury Urban District Council* (6):

> the exception based upon the doctrine of part performance cannot be applied where, as in *Frend* v. *Dennett* (7) and in *Young and Company* v. *Mayor and Corporation of Royal Leamington Spa* (3), the contract is, by statute, positively required to be under seal; to hold otherwise would in effect be, as Lindley, L. J., said [*young and Co.* v. *Mayor and Corporation of Royal Leamington Spa* (3)] to repeal the Act of Parliament and to deprive the ratepayers of that protection which Parliament intended to secure for them.

(12) [1905] 27 All. 592=2 A. L. J. 321=(1905) A. W. N. 111.
(13) [1907] 30 Mad. 290=2 M. L. T. 294.
(14) [1903] 27 Bom. 618=5 Bom. L. R. 592.
(15) [1903] 28 Bom. 66=5 Bom. L. R. 689.

In the present case the Chittagong Port Act expressly provides that the agreement must be in writing and signed by the Chairman or Vice-Chairman and two other Commissioners, and sealed by the the common seal of the Commissioners and that an agreement not so executed shall not be binding upon the Commissioners. Having regard to the express provisions of the statute, we think that non-compliance with the provisions of S. 29 renders the agreement not binding upon the Commissioners.

It may ba said, however, that the law only lays down that the agreement shall not be binding upon the Commissioners and that although it may not be binding upon the Commissioners, having regard to the express words of the Statute, there is no reason why it should not be binding so far as a private person is concerned who is not governed by any such provision of the law. Reference was made to the case of *Fishmongers Co.* v. *Robertson* (16), where the learned Judges observed:

> It may possibly be the case, that, up to the time of the corporation adopting the contract by performing the stipulations on their part, there was a want of mutuality, from the corporation not being compellable to perform their contract; and that the defendants might, during that interval, have the power to retract, and insist that their undertaking amounted to a *nudum pactum* only. But after the adoption of the contract by the corporation by performance on their part, upon general principles of reason the right to set up this defence appears altogether to fail.

In that case, however, there was no statutory provision which rendered the agreement invalid and the case therefore is distinguishable.

The question was raised in this country in the case of *Raman Chetti* v. *The Municipal Council of Kumbakonam* (13) (a case of executed contract) where the defendant, a private party, pleaded that the contract had not fulfilled the requirements S. 45 of the Madras District Municipal Act 4 of 1884. The learned Judges observed:

> The view of the Subordinate Judge that it does not bind the Municipality but does bind the other party is erroneous [see *Ahmedabad Municipality* v. *Sulemanji Ismalji* (14).]

In the latter case (which was a case of an executory contract) it was the defendant who pleaded the invalidity of the agreement. Sir Lawrence Jenkins, C. J., observed:

(16) [1843] 5 Man. & Gr. 131=12 L. J. C. P. 185=6 Scott. (N. R.) 56.

It is open to the defendant to say that it is not binding on him inasmuch as it is not binding on the plaintiff. We think that where a contract is invalid so far as one party is concerned by reason of statutory provisions, it cannot bind the other party also.

There remains the question whether it was a case of great urgency in which there was no time to comply with the requirements of the Statute. In the first place that principle cannot apply to a case such as the present, where the Statute requires the agreement to be executed in a certain manner, and secondly, there is nothing to show that the agreement could not be executed according to the Statute before the steam-tug *Gekko* sailed from Chittagong. It is true that the agreement was executed on behalf of the Port Commissioners of Chittagong by the Port Officer of Moulmein, but that was not in accordance with the original agreement to tow the *War Puffin*.

In these circumstances, we think that the contract sued upon cannot be enforced.

We do not see, however, why the plaintiffs should not recover *quantum meruit* for the services rendered by them to the defendants. It is contended by Mr. Pugh that the Chittagong Court would have no jurisdiction to entertain a suit for payment of *quantum meruit*. But any payment which was to be made for the services rendered by the steam-tug was to be made at Chittagong. We do not think that the invalidity of the agreement prevents the plaintiffs from recovering such amount as may be reasonable and just for the services rendered by them. The question as to what amount is reasonable for the use of the steam-tug has not been gone into, as the case proceeded upon the agreement. We think, therefore, that the case should go back to the Court below in order that the question as to what amount the Port Commissioners can reasonably claim from the defendant for the use of the steam-tug by the latter may be gone into and the case disposed of accordingly.

Costs will abide the result.

R.D. *Case remanded.*

---

## * A. I. R. 1927 Calcutta 472

MUKERJEE AND GRAHAM, JJ.

*Khetra Mohan Saha* and *others*—Plaintiffs—Petitioners.

v.

*Jamini Kanta Dewan* and *others*—Defendants—Opposite party.

Civil Rules Nos. 902, 912 and 913 of 1926, Decided on 5th January 1927, from an order of the Sub-J., 1st Court, Faridpur, in Money Suits No. 28, 29 and 30 of 1925.

* (*a*) *Negotiable Instruments Act* (1881), *S.* 13. *Expl.* (*i*) *as amended by Act* (8 *of* 1919)—*Explanation* (*i*) *does not apply to S.* 2 (5) (*b*) *of Stamp Act.*

Explanation (i) introduced by Act 8 of 1919 to S. 13 of the Negotiable Instruments Act of 1881 cannot be read into the definition of a bond as contained in S. 2 (5) (b) of the Stamp Act so as to make an instrument which on the face of it is not payable to order, one payable to order by virtue of the said explantion and thus to take it out of the said definition. For the purposes of the Stamp Act the documents as they appear on the face of them, have to be considered. A document which is attested by witnesses and is not payable to order or bearer is a bond within the meaning of the Stamp Act and should be stamped as such. [P 473 C 1, 2]

(*b*) *Stamp Act, S.* 35—*Suit disposed of and decree signed—S.* 35 *is not applicable to documents produced in the case.*

Where the suits have already been disposed of and the decrees signed and sealed the provisions of S. 35 of the Act are wholly inapplicable to the case. [P 473 C 2]

*Rajendra Chandra Guha* and *Debendra Nath Bhattacharjee*—for Petitioner.

*Dwarka Nath Chakravarty* and *Surendra Nath Guha* — for Opposite Party.

**Judgment.**—These three Rules are directed against as many orders passed by the Subordinate Judge, First Court, Faridpur, by which that learned Judge directed the petitioners to deposit stamp duty and penalty in respect of three documents. The petitioners had instituted three suits for recovery of money due upon the said documents and filed the same along with the plaints. A Commissioner was appointed for the examination of one of the plaintiffs and documents were proved in the course of the deposition of that witness taken by the Commissioner. Thereafter the suits were adjourned from time to time and ultimately resulted in a compromise on the basis of which decrees were passed on the 25th May 1926. On the 3rd

June 1925, the decrees were signed and sealed. On the 2nd July 1926, the sheristadar made a report stating that the documents were not promissory notes but bonds within the meaning of the Stamp Act and accordingly should have been stamped as such. On the said report the Subordinate Judge passed the orders against which these Rules are directed,

The two contentions urged on behalf of the petitioners : first, that the Subbordinate Judge had no jurisdiction to make these orders, and second, that the documents are promissory notes and not bonds within the meaning of the Stamp Act.

It will be convenient to deal with the second contention first. The documents are addressed to a particular person, namely, the Plaintiff No. 1. Each of them contains an unconditional undertaking signed by the maker to pay on demand to the person in whose favour it is executed, a certain sum of money principal together with interest. They are attested by a number of witnesses. The definition of promissory note as given in S. 2 (22) of the Stamp Act adopts the definition as given in S. 4 of the Negotiable Instruments Act of 1881 and includes some instruments not covered by that definition. The petitioner's contention is that as these documents are all dated subsequent to 1919, the amendment introduced by Act 8 of 1919 to S. 13 of the Negotiable Instruments Act of 1881 has to be taken into account in reading this definition, and if so read these documents would be instruments payable to order as they do not contain words prohibiting transfer or indicating an intention that they shall not be transferable. They would thus be instruments attested by witnesses but payable to order and consequently would not satisfy the definition of bond as given in S. 2 (5) (b) of the Stamp Act. In my opinion this argument is not sound. Explanation (i) which, amongst other amendments, was introduced by Act 8 of 1919 to S. 13 of the Negotiable Instruments Act of 1881, was meant to enlarge the definition of a negotiable instrument. By this amendment a promissory note not payble to order, which previously was not negotiable, was brought within the class of negotiable instruments; and the amendment, in my opinion, cannot be read into the definition of a bond as contained in S. 2 (5) (b) of the Stamp Act so as to make an instrument which on the face of it is not payable to order, one payable to order by virtue of the said Explanation and thus to take it out of the said definition. For the purposes of the Stamp Act the documents, as they appear on the face of them, have to be considered. They are attested by witnesses and are not payable to order or bearer. In my judgment they are bonds within the meaning of the Stamp Act and should have been stamped as such. The second contention, therefore, must fail.

The arguments advanced on the first contention shortly put, are as follows : It is said that the documents were never admitted in evidence by the Court as the depositions recorded by the Commissioner had not yet been brought on the record by reading them in Court, and that the suit never reached the stage at which the documents could be sought to be used in Court and consequently the Subordinate Judge had no jurisdiction to act under S. 35 of the Stamp Act. It is also said that if the documents are treated as having been admitted in evidence by the Subordinate Judge he was not entitled to re-open the matter and deal with the documents again under S. 35 of the Stamp Act by reason of the provisions of S. 36. I am of opinion that it is not necessary to deal with the first branch of this contention because as the suits had already been disposed of and the decrees signed and sealed the provisions of S. 35 of the Act were wholly inapplicable to the case. The Subordinate Judge had no jurisdiction to proceed in the way that he did.

The Rules should be made absolute and the orders complained of set aside. In view of the fact that the petitioners have not been successful in their second and main contention there will be no order as to costs in their favour.

G.B. *Rule made absolute.*

## A. I. R. 1927 Calcutta 474

MUKERJI AND GRAHAM, JJ.

*Fool Kumari Dasi*—Appellant.

v.

*Khirod Chandra Das Gupta*—Receiver—Respondent.

Appeal No. 80 of 1926 and Civil Revision No. 150 of 1926, Decided on 17th January 1927, from the Appellate Order of the 2nd Addl. Dist. J., 24-Pergannas, D/-23rd December 1925.

(a) *Provincial Insolvency Act* (1920), S. 4—*Insolvency Court can decide questions of title between Official Assignees and stranger.*

Under S. 4 the Insolvency Court has jurisdiction to decide questions of title, as between an Official Assignee and a stranger with reference to property which is claimed by the Official Assignee as the insolvent's and which on the other hand is claimed by the stranger as his. [P 475 C 2]

(b) *Provincial Insolvency Act* (1920), S. 75—*Decision of Sub-Judge under S. 4—Appeal lies to District Judge and second appeal to High Court.*

An appeal against a decision of a Subordinate Judge under S. 4 lies to the District Judge and a second appeal lies to the High Court under S. 75, [P 476 C 1& 2]

*Sarat Chandra Roy Choudhury* and *Santi Kumar Roy Choudhury*—for Appellant.

*Syed Nasim Ali*—for Respondent.

**Judgment.**—The appeal arises from and the Rule is directed against the appellate order of the Second Additional District Judge of 24-Pargannas, dated the 23rd December 1925.

One Dulal Chand Dutt applied on the 15th June 1923 to be adjudicated an insolvent. The Subordinate Judge passed the order of adjudication. The creditors alleged that the insolvent was the owner of certain properties which stood in the name of his wife, having been transferred to her by a deed of gift dated 1907. The Receiver in insolvency made a report and thereafter advertised the properties to sale as the properties of the insolvent. The insolvent's wife then applied to the Subordinate Judge claiming the properties as her own. The Subordinate Judge held an enquiry in which evidence was adduced on both sides. He held that the gift was bona fide and that the insolvent's wife acquired a good title under it and was in possession of the properties since the transfer. The Receiver preferred an appeal to the District Judge which was heard by the Second Additional District Judge and he by an order dated the 23rd December 1925, reversed the decision of the Subordinate Judge holding that the gift was a benami transaction. This order is now before us on appeal and in revision at the instance of the insolvent's wife. The value of the properties is said to be more than Rs. 10,000.

The question that we have to consider is whether the Subordinate Judge had jurisdiction to deal with the question of title that arose, and, if so, whether the appeal from his decision lay to the District Judge in view of the value of the properties involved.

The jurisdiction of Bankruptcy Courts under the English Bankruptcy Acts is a subject which presents a remarkable diversity of judicial opinion. S. 105 of the English Bankruptcy Act, 1914, is in the same words as S. 102 of the Act of 1883, and leaving aside the proviso to sub-S. (1) with which we need not be concerned, was also in the same words as S. 72 of the Act of 1869. In a series of cases, upon the contrast between S. 12 of the earlier Act of 1849 with S. 72 of the Act of 1869, it was held that whereas under the former section the Bankruptcy Court had only jurisdiction over persons actually within the bankruptcy or coming or submitting to its jurisdiction, it had, under the latter section complete jurisdiction in all cases to decide everything that might be considered necessary to be decided for the distribution of the bankrupts estate [*e. g.*, *Ex-parte Anderson* (1), *Re Johnstone* (2), *Smith* v. *Baker* (3), *Halliday* v. *Harris* (4) and *Morley* v. *White* (5)]. On the other hand, Lord Selborne, L. C., in *Ellis* v. *Silber* (6) speaking of the jurisdiction of the Bankruptcy Courts observes thus :

That which is to be done in bankruptcy is the administration in bankruptcy, The debtor and the creditors as the parties to the administration in bankruptcy are subject to that jurisdiction. The trustees or assignees as the persons entrusted with that administration are subject to that jurisdiction, The assets which come to

(1) [1870] 5 Ch. 473=18 W. R. 715=39 L. J. B. K. 32=22 L. T. 361.
(2) [1884] 1 Mor. 32.
(3) [1873] 8 C. P. 350=28 L. T. 637=42 L. J. C. P. 155.
(4) [1874] 9 C. P. 668=22 W. R. 756=43 L. J. C. P. 350=30 L. T. 680.
(5) [1872] 8 Ch. 214=21 W. R. 746=42 L. J. B. K. 76=27 L. T. 736.
(6) [1872] 8 Ch. 483=42 L. J. Ch. 666=21 W. R. 346=28 L. T. 156.

their hands and the mode of administering them are subject to that jurisdiction ; and there may be and I believe are some special classes of transactions which under special clauses of the Acts of Parliament may be specially dealt with as regards third parties. But the general proposition that whenever the assignees or trustees in bankruptcy or the trustees under such deeds as these have a demand at law or in equity or against a stranger to the bankruptcy, then that demand is to be prosecuted in the Court of Bankruptcy, appears to me to be a proposition without the warrant of anything in the Acts of Parliament and wholly unsupported by any trace or vestige whatever of authority.

The case was decided under the Act of 1869, but all that was necessary to be decided appears to have been whether the jurisdiction of the Court of Bankruptcy was not exclusive ; and it was held that where a suit would, but for the fact of the bankruptcy, be fit to be entertained by the Court of Chancery, the jurisdiction was not taken away by the Bankruptcy Act, 1869. In *Ex parte Dicken—In re Pollard* (7), which was a case of a money demand by the trustee of a bankrupt's property against a third party, Jessel, M. R., observed thus :

The very serious question, therefore, arises whether the Court of Bankruptcy has any jurisdiction to make an order for the payment of such a demand. It appears to me, however, that it is not necessary for us to decide this question now for if the jurisdiction exists, there is the further question whether it is expedient to exercise it in the present case.

He gave as one of his reasons for limiting the wide words of S. 72 of the Act of 1869 as being the absence of a right of appeal to the House of Lords except by leave. In the same case James, L. J., expressed himself thus :

The Court of appeal has given a very extended application to S. 72 of the Act. But it appears to me that the legislature introduced into that section the words which the Court may think it expedient or necessary to decide because they thought they could trust the Court of Bankruptcy not to exercise the jurisdiction unless it really was expedient to withdraw the case from the ordinary tribunals. It is not expedient to do that in the case of a mere money demand.

A more guarded expression of opinion than that contained in *Ellis* v. *Silber* (6) is to be found in *Maule* v. *Davis, in re Motion* (8), the judgment in which case was also delivered by Lord Selborne. The jurisdiction of Bankruptcy Courts to adjudicate on the right of third parties is now fully recognized (see the authorities in Williams on Bankruptcy, 12th Edition, pp. 377 to 378 ; and Robson on Bankruptcy 7th Edition, p. 36, etc.), though it has also been laid down that there is a discretion in the Bapkruptcy Courts to direct the trustee to institute or defend in the ordinary civil Courts suits concerning the rights of third parties.

Section 7 of the Presidency Towns Insolvency Act of 1909 is in exactly the same words as paragraph 1 of S. 105 of the English Bankruptcy Act of 1924. The words are these :

Subject to the provisions of this Act the Court shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of insolvency coming within the cognizance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.

Under this section also there was at one time a conflict of judicial opinion as to whether the legislature intended that the insolvency Court should have jurisdiction to decide questions of title, as between an Official Assignee and a stranger with reference to property which is claimed by the Official Assignee as the insolvent's and which on the other is claimed by the stranger as his : see *Naginlal Chunilal* v. *Official Assignee* (9), and *In re Rassul Haji Cassum* (10). The jurisdiction of insolvency Courts under the Presidency Towns Insolvency Act, 1909, to deal with and decide questions of title in such cases appears now to be well recognized, though the insolvency Court in the exercise of its discretion may in any case decline to deal with the matter and relegate the parties to a regular suit : *Official Receiver, Tinnevelly* v. *Sankarlinga Mudaliar* (11), *Abdul Khader* v. *The Official Assignee of Madras* (12), *In re Seehase* (13) and *Rash Behari Ghose* v. *The Official Assignee of Calcutta* (14).

Under the Provincial Insolvency Act, 1907, there was a diversity of judicial opinion on the question as to the jurisdiction of the insolvency Court in this respect, into the details of which it will serve no useful purpose to enter. The words of S. 4 of the Provincial Insolvency

(7) [1878] 8 Ch. D. 377=26 W. R. 731=38 L. T, 860.
(8) [1873] 9 Ch. 192=29 L. T. 757=43 L. J. B. K. 59=22 W.R. 225.
(9) [1911] 35 Bom. 473=12 I, C. 391=13 Bom. L. R. 900.
(10) [1910] 13 Bom. L. R. 13=9 I, C. 344.
(11) A. I. R. 1921 Mad. 204=44 Mad. 524.
(12) [1917] 40 Mad. 810=36 I. C. 524=4 L.W. 425.
(13) [1917] 22 C. W. N. 335=46 I. C. 196.
(14) A. I. R.1921 Cal. 95.

Act, 1920, are, if anything, clear and more comprehensive than those of S. 7 of the Presidency Towns Insolvency Act of 1909 and S. 105, sub-S. (1) of the English Bankruptcy Act of 1914, and appear to have been carefully chosen in view of the conflict that at one time existed with regard to the meaning of S. 7 of the Presidency Towns Insolvency Act of 1909. The interpretation of that section by the Bombay High Court in *Naginlal* v. *The Official Assignee* (9) proceeded upon the ejusdem generis maxim, and so to do away with all such objections the word "title" was introduced in sub-S. (1), and sub-S. (2) appears to have been enacted to remove all possible disputes as to the nature of the claim that may or may not be investigated. The words of the statute seem to be perfectly plain, and where that is the case, it is not permissible to speculate.

To this interpretation several objections have been urged and the consequent difficulties that will arise have been pointed out. To these I now propose to refer.

It is said that if it was intended that all questions of title may be gone into by the Insolvency Court, then S. 53 of the Act would be redundant, as S. 53 of the Transfer of Property Act, which lays down the general law, would be sufficient. But, as has been explained in *Muhammad Habib-ullah* v. *Mushtaq Husain* (15) this section is in one sense wider in its scope than S. 53 of the Transfer of Property Act, because under this section all that is necessary to show is that the transfer was made within two years of the adjudication, unless it is a transfer made before or in consideration of marriage and further that under this section it is not necessary to show that the transfer was made with intent to delay or defeat a creditor.

It is also said that whereas if the matter had been tried by the Subordinate Judge in a regular suit, an appeal to this Court would lie in view of the amount or value of the subject-matter, the matter having been dealt with by the same officer as a Judge of the insolvency Court, the appeal in the present case lay to the District Judge by reason of the provisions of S. 75 of the Act, and that again is in conflict with S. 5, sub-S. (2); in other words, it is urged that if under S. 5, sub-S. (2) the High Court has the same power in this matter as it has in regard to civil suits, then it has direct appellate powers over the Subordinate Judge, whereas under S. 75 only a second appeal is competent. The reservation in sub-S. (2) of S. 5, however, is expressly made subject to the provisions of the Act, and though by reason of the provision contained in S. 4, sub-S. (1) the final and binding character of the decision of the Second Additional District Judge is clear, and for that the appellant may justly complain, her right of a first appeal having been taken away, the matter really is not for us but for the legislature. Where the legislature has expressed itself in such clear and unambiguous terms, the consequence of the enactment, ignorance of which cannot be attributed to it, and any consideration of hardship or supposed hardship can scarcely affect the interpretation. It may, however, be pointed out that in the present case it was the appellant herself who submitted to the jurisdiction of the Insolvency Court by applying to that Court under S. 68 of the Act, which she necessarily need not have done, but having elected to come in in that way, she must take the consequences of the course she elected to adopt.

A number of authorities have been cited on behalf of the respondent showing that other Courts have also held that S. 4 of the Provincial Insolvency Act, 1920, enables the Insolvency Court to decide questions of title affecting third parties. The appellant has argued the matter as res integra and her contention is that these cases were wrongly decided.

It is, therefore, not necessary to refer to those authorities here.

The contentions urged on behalf of the appellant must therefore fail, and as the appeal is concluded by findings of fact, it is dismissed with costs—2 gold mohurs.

The Rule is also discharged.

R.D. *Appeal dismissed.*

(15) [1917] 39 All. 95=37 I. C. 684=14 A.L.J. 1183.

## A. I. R. 1927 Calcutta 477

DUVAL AND MITTER, JJ.

*Narayan Chandra Das*—Defendant—Appellant.

v.

*Dulal Chandra Dutta*—Plaintiff—Respondent.

Appeal No. 1192 of 1924, Decided on 23rd November 1926, from the Appellate Decree of the Offg. Dist. J., Hooghly, D/- 29th February 1924.

(a) *Civil P. C., O. 6. R. 17—Amendment is allowed if it does not alter character of suit.*

The powers given for amendment under the Code are very liberal and no amendment is refused at any stage of the suit, provided it does not change the character of the suit.

Where a major plaintiff is through a bona fide mistake described as minor and represented by another as his next friend and the lower appellate Court allowed the memo. of appeal to be amended.

*Held*: that the lower appellate Court possessed that power and rightly exercised it. [P. 477, C. 2]

(b) *Civil P. C. O. 7, R. 1. — Maintainability—Plaintiff wrongly described as minor and represented by next friend—Suit is maintainable —Civil P. C. O. 32, R. 3—O. 1, R. 10—Minor.*

Where in a suit it was through a bona fide belief that the plaintiff was described as a minor and was represented by his mother as his next friend,

*Held*: that inasmuch as the suit was instituted by the right person, though through another purporting to act as his next friend, the suit was maintainable.

[P. 477, C. 2; P. 478, C. 1]

(c) *Limitation Act, S. 22—Party already on record when filing plaint—Amendment describing him properly allowed at later stage—New party is not added under S. 22.*

Where a suit was wrongly instituted by a person as the next friend of the plaintiff but was subsequently allowed to be amended,

*Held*: that when the proper amendment was made, the plaintiff was not introduced as a new party to the suit but was already on the record when the plaint was filed; and consequently the amendment describing him properly at a later stage did not amount to the addition of a new party within the meaning of S. 22. [P. 478, C. 1]

*Tarakeswar Pal Choudhury* and *Jnan Chandra Roy*—for Appellant.

*Mrityunjoy Chattopadhyay* and *Paradas Dutt*—for Respondent.

**Mitter, J.**—This appeal is on behalf of the defendant and arises out of a suit for the winding up of a partnership business and for accounts. The suit was instituted by Srimati Promoda Sundari Dasi as the next friend of the infant, Dulal Chandra Dutt. One of the objections that was taken by the defendant is that the suit was not maintainable by Promoda Sundari. It transpires in the evidence that at the date of the institution of the suit, the infant Dulal had attained majority and that the suit could not proceed in the form in which it had been laid. I shall state here that this objection was not specifically taken in the written statement. But an issue was raised and the matter was discussed before the Court of first instance, who gave effect to this plea taken by the defendant, and dismissed the plaintiff's suit. On appeal by the plaintiff to the lower appellate Court, that decision was reversed and the plaintiff obtained a partial decree in the suit. Against that decision this appeal has been preferred to this Court and in this second appeal two contentions have been raised before us.

The first ground taken is that the son, Dulal, not being a party in the original suit the lower Court should not have allowed an amendment in the appellate stage without any application being made by any of the parties before it.

The second ground raised is that the suit is barred by limitation.

It may also be stated here that Dulal was an appellant before the lower appellate Court.

Now, with regard te the first point as to the power of the lower appellate Court to allow the amendment, we are of opinion that the lower appellate Court possesses that power and had rightly exercised it. Under the Code of 1908, the powers given for amendment are very wide and liberal and no amendment is refused at any stage of the suit, subject only to this: that it does not change the character of the suit. No such change is suggested in the present case.

With regard to the contention that the suit was not maintainable and that Promoda could not represent Dulal as Dulal had at the institution of the suit attained majority, we are of opinion that there is no force in that contention, for it appears that it was through a bona fide belief that Dulal was described as a minor and was represented by his mother as the next friend. The suit was instituted by the right person but through another person purporting to act as his next

friend. In these circumstances we think that the suit was maintainable.

With regard to the question of limitation, it has been argued that as the amendment making Dulal a party plaintiff to the suit the suit was made beyond three years of the institution of the suit for accounts and for the winding up of the partnership is barred under Art. 106 of the Limitation Act. We do not think that there is any force in this contention. Section 22 of the Indian Limitation Act which was invoked in the course of argument has no application to a case of this kind. For it cannot be said that when the proper amendment was made, Dulal was introduced as a new party to the suit. He was already there on the record when the plaint was filed; and consequently the amendment describing him properly at a later stage did not amount to the addition of a new party within the meaning of S. 22 of the Limitation Act; and if any authority for this proposition is needed, reference may be made to a somewhat analogous case decided by the Judicial Committee of the Privy Connecil and reported as *Peary Mohan Mukerji* v. *Norendra Nath Mukerji* (1).

In this view, the second ground of limitation also fails and the appeal must be dismissed with costs.

**Duval, J.**—I agree.

J.V. *Appeal dismissed.*

(1) [1909] 37 Cal. 229=5 I. C. 404=37 I. A. 27 (P. C.).

---

## A. I. R. 1927 Calcutta 478

CUMING AND GREGORY, JJ.

*Nazir Ahmed*—Accused—Appellant.

v.

*Emperor*—Opposite Party.

Criminal Appeal No. 447 of 1926, Decided on 22nd December 1926, from the order of the S. J. Noakhali.

*Criminal P. C., S. 476—False charge of theft made to Police—Sessions Court complaining under S. 476—Institution of false case to Police being basis of proceedings in Sessions Court, the offence is committed "in relation to" proceedings in Sessions Court within the meaning of S. 476.*

If two offences are even remotely connected by the relationship of cause and effect, then the first may be said to be committed in relation to the second.

The words "in relation to" in S. 476 are sufficiently wide to cover a case where an offence was actually committed before the proceedings began in the complaining Court and hence a false charge to the Police is obviously a matter related to the proceedings in the Sessions Court for it is the basis of such proceedings: *A. I. R.* 1925 *Pat.* 717, *Rel on.* [P 478 C 2. P 479 C 1]

*Jatindra Kumar Sen Gupta* and *Raj Kumar Chakravarti*—for Appellant.

*Khundkar*—for the Crown.

**Judgment.**—This is an appeal by one Nazir Ahmed against the order of the learned Sessions Judge of Noakhali who has complained against him in that he brought a false charge of theft against one Nawab Ali. The case of theft was instituted by Nazir Ahmad by giving information to the Police. The Police enquired into the case and sent up Nawab Ali who was committed to the Sessions. The learned Sessions Judge found the case false aud complained against Nazir Ahmad under S. 476, Criminal P. C. The first point urged by the learned vakil for the appellant is that the alleged offence was not committed in a proceeding or in relation to a proceeding before the Sessions Judge. The learned vakil contends that the offence, if any, was committed by the institution of the case before the Police and further that S. 476 refers to offences which are committed after the proceedings have begun before the Court.

We think, however, that the words "in relation to" are sufficiently wide to cover a case where the offence was actually committed before the proceedings began in the complaining Court. In the present case the proceeding was the trial of Nawab Ali for theft by the Sessions Court and that Court found that the charge was false and hence that the charge made to the Police was false. The false charge to the Police was obviously a matter related to the proceedings in the Sessions Court for it was the basis of the proceedings. Had there been no charge to the Police there would have been no proceedings in the Sessions Court.

So far as this Court is concerned the question may be considered as one of first impression. Our attention has not been drawn to any decision of this Court since S. 476 was amended. We are, however, fortified in the view that we take of the meaning of the expression 'in relation to' by a recent decision of the Patna High Court in the case of *Daroga Gope* v. *Emperor* (1), Mr. Justice Mullick held that if two offences are even remotely

(1) A. I. R. 1925 Pat. 717=5 Pat. 33.

connected by the relationship of cause and effect then the first may be said to be committed in relation to the second. If we consider the institution of the false case to the Police as the cause of the proceedings before the Sessions Judge—and this we think no doubt it was—then it may be held that the false case instituted before the Police was in relation to the proceedings in the Sessions Court.

That being so the present case falls within S. 476 and the Sessions Judge had jurisdiction to make the complaint. Mr. Sen Gupta would then seem to argue that the evidence which is relied on is not worthy of belief, that if we examine the evidence we shall not find it worthy of credit.

That is a question for the trial Court to decide in the first instance and not for us. It might obviously be very unfair to the appellant that we should express any opinion whatever on the point at this stage and we purposely refrain from so doing.

The Magistrate who hears the case will decide it and it is not for us to do the work of the Magistrate.

The appeal is dismissed

J.V. *Appeal dismissed.*

---

## *A. I. R. 1927 Calcutta 479

CAMMIADE, J.

*Chandi Charan Roy* and *others*—Defendants—Appellants.

v.

*Siraj Mia*—Plaintiff—Respondent.

Appeal No. 2300 of 1924, Decided on 17th November 1926, from the appellate decree of 1st Sub-J., Sylhet, D/- 17th July 1924.

(a) *Transfer of Property Act, S. 60—Person having fractional interest in equity of redemption is entitled to redeem whole mortgage.*

A person who has a fractional interest in the equity of redemption, is entitled to redeem the whole mortgage : 3 *Cal.* 397 (*P.C.*), *Foll.*; 22 *C. W. N.* 128 and 22 *C. W. N.* 800, *Ref.*; 5 *C. W. N.* 83, *not Foll.*; and 13 *M. I. A.* 404, *Dist.*

[P 480 C 1]

(b) *Civil P. C., O. 34, R. 1—Appeal—Redemption suit dismissed—One only of the mortgagors appeals—Others are not necessary parties.*

Where a suit for redemption is dismissed and only one of the mortgagors appeals against the dismissal, the mortgagee cannot raise an objection that the remaining mortgagors have not joined in the appeal : 9 *Bom.* 128, *Dist.*

[P 480 C 2]

* (c) *Transfer of Property Act, S. 60—Usufructuary mortgage—Mortgagor partially interested in mortgage—Tender of mortgage money refused—Decree giving credit for usufruct must give only for so much as actually fell to redeeming mortgagor's share.*

Where a decree is made for the amount payable to a mortgagor who is interested only in a fraction of the equity of redemption, on account of the usufruct enjoyed by the mortgagee subsequent to the date of tender of the mortgage money, the mortgagor should be given credit only for so much of the usufruct as fell to his share.

[P 480 C 2]

*Gopal Chandra Das* and *Satyendra Kishore Ghose*—for Appellants.

*Gunada Chandra Sen* and *Bhuban Mohan Saha*—for Respondent.

**Judgment.**—This is an appeal by the mortgagees defendants in a suit for redemption of the mortgage. At the trial the defendants had alleged that there had been a sale to them and not a mortgage but that contention of theirs has been given up. The suit was dismissed in the first Court, which found that there had been a sale. The Court of appeal found that the transaction was a usufructuary mortgage the principal amount borrowed being Rs. 25 and the intention being that the usufruct of the land should be enjoyed in lieu of interest. That Court further found that the plaintiff had tendered the amount of the mortgage-debt to the defendant in Pous 1329, and that tender had been refused by the defendants. It accordingly gave a decree for redemption of the mortgage on deposit of Rs. 25 by the plaintiff within two months of the date of the decree and ordered that an account be taken of the usufruct enjoyed by the defendants from the date of the tender up to the date of recovery of possession by the plaintiff.

In appeal before me various objections have been taken to the decree of the Subordinate Judge. The first is that only one of the mortgagors has appealed and, therefore, it is contended that he is only entitled to redeem his share of the mortgaged property. The second objection taken to the decree is that the appeal should have failed bacause the other mortgagors were not brought on the record either as co-appellants or as respondents and lastly an objectiou has been taken to the order for taking accounts on the ground that the person who was the appellant before the Subordinate Judge.

was not entitled to the whole of the usufruct derived from the property.

The first objection is supported by the case of *Nawab Azimut Ali Khan* v. *Jowahir Singh* (1). That decision does not help the appellants. In that case the mortgagee had acquired a fractional interest in the equity of redemption and what their Lordships of the Privy Council held was that the mortgagee could not be compelled to permit redemption of the portion acquired by him. A case decided in this Court, namely, *Grish Chander Dey* v. *Juramoni De* (2) has also been cited. In that case the ruling in *Nawab Azimut Ali Khan's* case (1), was construed as prohibiting a joint mortgagor from claiming to redeem an entire mortgage. That ruling, however, has been dissented from in two subsequent rulings of this Court, namely, *Baikantha Nath Dey* v. *Mohesh Chandra Dey* (3) and *Protap Chandra Dhar* v. *Peary Mohun Dhar* (4), where it is pointed out that in *Azimat Ali Khan's* case (1), the mortgagee had acquired an interest in the equity of redemption and it was only in respect of that interest that the mortgagors' prayer for redemption would be refused. In a subsequent Privy Council decision *Norender Narain Singh* v. *Dwarka Lal Munder* (5), it has also been ruled that a person who has a fractional interest in the equity of redemption is entitled to redeem the whole mortgage. So the first objection fails.

The second objection is based on the ruling in *Ragho Salvi* v. *Balkrishna Sakaram* (6). In that case the mortgagee had permitted the mortgagors to redeem the mortgage according to their respective interest in the equity of redemption, and, after several such partial redemptions, one of the mortgagors claimed to redeem the remaining portion of the mortgage. In those circumstances it was ruled that, if that mortgagor wished to redeem the whole of the remaining portion of the mortgage, it was necessary for him to bring all the persons interested in that portion on the record or otherwise he only be entitled to redeem his particular interest. That case, therefore, does not assist the appellants. I fail to see why the appellant should raise this objection about non-joinder of the other mortgagors in the appeal before the Subordinate Judge. His interest presumably is to recover the money lent by him, and, as long as he recovers that, it is immaterial to him what happens to the property. If the other mortgagors have any grievance against the person who has obtained the decree for redemption it would be for them to seek their proper remedy.

The third objection, however, is a good one. The respondent before this Court is only entitled to a fractional share of the mortgaged property and, therefore, he would only be entitled to a fraction of the usufruct. Accordingly when a decree is made, for the amount which will be payable to him on account of the usufruct enjoyed by the plaintiffs subsequent to the date of the tender, he should be given credit only for so much of the usufruct as fell to his share.

The appeal is allowed to this extent, the decree of the Subordinate Judge will be modified in the manner above mentioned and it is affirmed as regards the rest. Parties should have their costs in all Courts in proportion to their success.

J.V. *Appeal allowed.*

(1) [1869] 13 M. I. A. 404=14 W. R. 17=2 Suther. 346=2 Sar. 573 (P. C.).
(2) [1901] 5 C. W. N. 83.
(3) [1918] 22 C. W. N. 128=44 I. C. 77.
(4) [1918] 22 C. W. N. 800=48 I. C. 669.
(5) [1877] 3 Cal. 397=5 I. A. 18=1 C. L. R. 369=3 Sar. 771 (P. C.).
(6) [1885] 9 Bom. 128.

---

## A. I. R. 1927 Calcutta 480

CUMING AND GREGORY, JJ.

*Benodini Howladar* and *another*—Petitioners.

v.

*Emperor*—Opposite Party.

Criminal Revision Case No. 782 of 1926, Decided on 18th November 1926, against the order of the Dist. Mag., Backergunj.

*Criminal P. C., S. 494—First marriage performed with consent of legal guardian—Marriage is valid, making subsequent marriage a bigamy—Hindu Law—Marriage—Guardian.*

In the charge of bigamy, where in the first marriage the giving away of the bride was with the consent of tbe legal guardian who was in jail.

*Held* : that the first marriage was valid and hence the subsequent marriage with the same woman constituted bigamy. [P 481 C 1]

*Surita* and *Sures Chandra Talukdar*—for Petitioners.

**Judgment.**—This was a Rule granted by my learned brothers Mr. Justice Chakravarti and Mr. Justice Roy on the District Magistrate of Backergunj to show cause why the conviction of and the sentences passed on the petitioners under S. 494, and S. 494 read with S. 114, Indian Penal Code, should not be set aside on the grounds set forth in the petition.

It would appear that Peary, Petitioner No. 2, has been convicted of bigamy in marrying one Benodini Howladar, Petitioner No. 1, on the ground that she had already been married to one Jogeswar Kirtonia who was still alive.

The only ground which has been urged in support of this Rule is that the mother cannot make a gift of the bride to the bridegroom. It would appear that at the time when the first marriage took place the father of the bride for some reason or other was in jail and was unable to be present and personally to give away the bride. It is, however, admitted that what was necessary was that the giving away of the bride should be with the knowledge and consent of the legal guardian and the evidence oi the mother of the bride would go to show that the giving away of the bride was with the knowledge and consent of the bride's father ; she apparently had seen the father of the bride in jail and had dicussed the matter with him. She also gave her own consent to the marriage.

We see no reason to interfere with the conviction and sentence. The Rule is accordingly discharged.

J.V. *Rule discharged.*

---

## * A. I. R. 1927 Calcutta 481

CHATTERJEA AND RANKIN, JJ.

*Binoy Krishna Mukerjee* and *another*—Appellants.

v.

*Satish Chandra Giri* and *another*—Respondents.

Privy Council Applications Nos. 2 and 3 of 1926, Decided on 26th May 1926, for leave to appeal to Privy Council, against the judgments and orders passed by Greaves and Panton, JJ., in Division Bench of Calcutta High Court.

1927 C/61 & 62

* (a) *Civil P. C., S.* 109 (c)—*Interlocutory orders—Power to grant leave should be exercised in exceptional cases of great public or private importance.*

*Chatterjea, J.*—The power of the Court to deal with applications under Cl. (c) of S. 109 should be exercised only in exceptional cases of great public or private importance. [P 483, C 1]

*Rankin, J.*—Although interlocutory orders are within the ambit of Cl. (c) of S. 109 and their having some public or private importance may take the place of a high money value as a ground for leave to appeal, does not give the party complaining a right to take the matter to England but the desirability of taking interlocutory orders on appeal to England involves practical considerations of a special character : 21 *C. L. J.* 281 and *A. I. R.* 1922 *Cal.* 479, *Expl.* [P 487, C 2, P 488, C 1]

(b) *Civil P. C., S.* 109 (c)—*Interlocutory orders.*

*Rankin, J.*—The extreme undesirability of protracting interlocutory proceedings is based partly on the fact that in point of expense it may well be the plainest oppression and partly on the fact that it tends to postpone a real elucidation of the facts by a trial of the suit. [P 487, C 2]

*Bysack, Naresh Chandra Sen Gupta, Girija Prasanna Sanyal* and *Ramani Mohan Chatterji, Paramananda Lahiri, Indu Prokash Chatterji* and *Rebati Mohan Chatterji*—for Appellants.

*Binode Mitter, D. N. Mitter* and *Asita Ranjan Ghosh*—for Respondents.

**Chatterjea, J.**—This is an application for leave to appeal to His Majesty in Council against an order passed by Greaves and Panton, JJ., on the 8th Jan. 1926, directing the removal of the Receive appointed by Dist. Judge of Hooghly from a portion of the property in suit.

The suit was instituted on the 8th January 1922 by certain persons (who may be referred to as the original plaintiffs) under S. 92 of the Civil Procedure Code, with the sanction of the Collector, for the removal of the defendant from the office of mohunt of Tarakeswar, for appointment of a fit person as mohunt or trustee, for a declaration that the properties claimed by the defendant as his personal properties are debutter, for framing a scheme of management and for various other reliefs. The Defendant was charged with having attempted to set up a title adverse to the trust with respect to many properties, with misappropriation of large sums of money and moveables belonging to the debutter, with mismanagement and waste of debutter estates, neglect of the charities and various other allegations were made with respect to his management and character.

The defendant filed his written statement denying the allegations made against him.

In the beginning of January 1924 certain persons called the Mahabir Dal purporting to be actuated by a desire to remove all malpractices of religious muths took possession of the temple and the neighbouring lands. Later on, they were joined by other persons—and there was great feeling against the mohunt. As a result of their activities the mohunt was unable to attend to the muth or the ceremonies; he had to go away from Tarakeswar, and a chaotic condition prevailed there.

On the 12th May 1924, the original plaintiffs applied for appointment of a Receiver, and on the 16th May 1924 the mohunt consented to the appointment of a Receiver in respect of (i) the temple, (ii) the bazar, (iii) offerings to the deity and (iv) deb sheba, and one Shama Charan Banerjee Ukil, a retired Sub-Judge, was accordingly appointed Receiver in respect of the same.

On the 2nd August 1924 certain persons who may be referred to as the added plaintiffs applied) with the permission of the Collector) to be added as plaintiffs, and they were added as plaintiffs. On the 22nd September 1924, a petition of compromise between the original plaintiffs and the mohunt was put in, the main terms of which were that the mohunt abdicated the mohuntship, and his chela Probhat Chandra Giri was to be appointed mohunt, that the temple, the land and other buildings appertaining to the temple and all offerings made by pilgrims and other worshippers should form part of the debutter property. Certain properties which were admitted to be debutter in the list ka annexed to the petition would be managed by a committee, and the alleged personal properties mentioned in the list kha would be managed by Probhat Giri, subject to certain conditions and subject to the right of the said committee to take over charge in case of oppression and mismanagement by the said Probhat Giri, and the tenants of those properties would have the right of appeal in any matter of oppression to the said committee. Shortly before the petition of compromise was put in, the mohunt at a public meeting declared that he was abdicating the mohuntship.

An application was made by the original plaintiffs to take off the names of the added plaintiffs, which was rejected by the District Judge on the 25th September 1924. Then the added plaintiffs applied on the 1st November 1924 for the appointment of a Receiver of all the properties. The original plaintiffs on the 2nd December 1924 preferred an appeal to the High Court against the order refusing to strike off the names of the added plaintiffs, and further proceedings were stayed. The appeal was, however, dismissed and the stay order was removed.

On the 28th March 1925 the District Judge refused to sanction the compromise between the mohunt and the original plaintiffs referred to above. On the 9th May 1925 the application of the added plaintiffs for appointment of a Receiver was taken up, and a Receiver of the entire properties was appointed, the actual appointment being made later.

An appeal was preferred by the mohunt, and the same was heard by Greaves and Panton, JJ., on the 8th January 1926. The learned Judges classified the properties as follows :—(a) Properties admitted as debutter, (b) properties treated as debutter, and (c) properties known as personal properties of the mohunt. It was ordered that the Receiver would continue in possession in respect of classes (a) and (b) but would be removed in respect of properties class (c), and the District Judge was directed to frame a scheme for the residence of the mohunt which would include his office in a portion of the building known as the "palace." Liberty was reserved to either party to apply in case any dispute arose as to what should be comprised in the private properties, and it was directed that the scheme to be prepared by the District Judge with regard to the place would come up before the learned Judges for sanction and for such alterations as they might think fit.

Subsequent to the order of the High Court, the mohunt in a petition before the District Judge claimed 34 items of properties as his personal properties. On the 29th January 1926, the present application for leave to appeal to His Majesty in Council was made by the added Plaintiffs.

The order passed by the High Court on the 8th January 1926 is not a final but is an interlocutory order. The case, therefore, cannot come under Cls. (a) and (b) of S. 109 of the Civil P. C., and the question we have to consider is whether the case comes under S. 109 (c), that is, whether it is "otherwise a fit case for appeal."

The power of the Court to deal with applications under Cl. (c) of S. 109 and the decisions on the point were considered by Sanderson, C. J., and Richardson, J., in the case of *Shiva Prasad Singh* v. *Rani Prayag Kumari* (the Jheriah case) (1). The power is rarely exercised, and should be exercised only in exceptional cases of great public or private importance. See *Banarasi Prasad* v. *Kashi Krishna Narain* (2) and *Damra Coal Company* v. *Benares Bank* (3).

We have therefore to see whether it is a case of an exceptional nature involving questions of real importance. It is contended for the respondents that no case at all was made out for the appointment of a Receiver, no evidence having been adduced to prove the charges made in the plaint against the mohunt, that there was no case for the appointment of a Receiver even of the properties of classes (a) and (b), but that as no objection was made on behalf of the mohunt with respect to classes (a) and (b), the High Court ordered the Receiver to continue in possession of the said two classes of properties.

It appears that the District Judge appointed the receiver on the grounds among others, that the mohunt in the written statement had set up a title adverse to the trust, that there was a breach of trust, that he had abdicated in favour of another person, and such abdication was unconditional, that under the scheme set forth in the "terms of settlement,"

certain persons improperly obtained certain advantageous terms, and an attempt was made to induce the Court to give its sanction to the unfair arrangement,

and that what the mohunt did in the matter was for his own safety and convenience and not for the welfare of the religious endowment of which he was a trustee, that the mohunt had been obliged to leave Tarakeswar and went outside Bengal, that he was "utterly dispossessed" of all properties situated in Tarakeswar, and that if he could not have access to Tarakeswar, to the temple, the bazar, the place, etc., "it is inconceivable how he can successfully administer the properties," that no rents were being realized, that there was real danger to the properties in suit if left in the possession of the mohunt, and that in the circumstances it was just and convenient that a Receiver should be appointed.

The learned Judges of this Court were of opinion that there was considerable delay in making the application for the appointment of a Receiver. The suit was instituted on the 8th September 1922, and the original plaintiffs made an application for appointment of a Receiver on the 12th may 1924 and the added plaintiffs made the application on the 1st November 1924. But it is pointed out for the appellants that they came upon the scene only on the 2nd August 1924, and proceedings were stayed by the High Court at the instance of the original plaintiffs, and that as soon as the stay order was removed, they (the appellants) proceeded with their application.

The learned Judges attributed the abdication of the mohunt and the settlement arrived at by the mohunt to the force of circumstances. The Appellants also point out that matters at Tarakeswar were in a chaotic condition: the first Receiver, though an officer of the Court, had to go to take possession accompanied by a hundred constables, that even he could not get peaceful possession of all the properties, and that it was not until the present Receiver was appointed Receiver of the entire estate that things settled down, and that these circumstances amply justified the appointment of the Receiver. It is further contended that the order appointing the Receiver has not been set aside by the High Court, and the question at the hearing of the appeal before the High Court was narrowed down to whether the properties claimed by the mohunt as personal should be left in the hands of the Receiver. The question, whether the appointment of the Receiver of the entire estate was proper or whether the order of the High Court is right, is one

(1) A. I. R. 1922 Cal. 479=49 Cal. 967.
(2) [1900] 23 All. 227=28 I. A. 11=8 Sar. 447 (P. C.).
(3) [1914] 21 C. L. J. 281=28 I. C. 569.

for the decision of the Judicial Committee, and it is not open to us to express any opinion upon the point. I have referred to the facts only to show the circumstances under which the appointment of the Receiver was made by the District Judge.

When this matter came up for hearing before us on the 8th February 1926, various grounds were urged before us for granting the certificate of leave to appeal. Shortly stated the contentions of the appellants were (1) that the order will give rise to protracted enquiries as to which of the properties were treated as debutter and which are claimed by the mohunt as his personal property especially as many of the 34 items now claimed before the District Judge were not so claimed in the written statement; (2) that the "palace" was not claimed at all as personal, and that the direction to set apart a portion of it for the use of the mohunt as his residence and office will inevitably lead to friction ; (3) that things at Tarakeswar have settled down only recently after the present Receiver was appointed in respect of the entire properties, and the management of the mohunt of a portion of the estate will lead to serious troubles again : (4) that the charities will suffer ; and lastly that the income of the zemindaris which may be made over to the mohunt will be absolutely lost to the estate.

As the order of the learned Judges was not complete, we allowed the application to stand over, as we desired to have the orders of the Division Bench in a final form before deciding upon the application. The learned Judges have since completed their order.

The first ground, viz., that the order of the learned Judges, dated the 8th January 1926, would give rise to protracted enquiries as to which properties were treated as debutter, and which are claimed by the mohunt as personal, has no force now, as the learned Judges have by their order, dated the 26th March 1926, held that all the properties claimed by the Respondent as personal (except a few mentioned therein) should be treated as his personal properties for the purposes of the application.

The learned Judges were of opinion that the mohunt had been in possession of those properties as personal for a long time past. It is pointed out on behalf of the appellants that Madhab Giri, whom the defendant succeeded as mohunt, brought a suit in 1878 against one Sham Chand Giri (who had dispossessed him) and set up his personal title to the properties, but that title was negatived, and he succeeded on the ground that the properties then in suit were debutter. The judgment of Mr. Brett, the District Judge, in that suit is on the record, but it was not tendered in evidence. The appellants wanted to use that in evidence in this Court but the respondents objected.

It is contended for the appellants that apart from the findings in Mr. Brett's judgment, the defendant in para. 23 of his written statement admitted the fact of the properties (mentioned in Sch. A of the plaint ) having been held to be debutter by Mr. Brett, and only pleaded that the finding was merely incidental, and that in the circumstances in which Madhab Giri was placed at the time of that suit, he was not in a position to produce complete evidence in support of his claim. It is accordingly contended for the appellants that the properties belonging to the estate up to 1878 were found to be debutter.

The properties converted by Mr. Brett's judgment are mentioned in Sch. A of the plaint of the present suit and those subsequently acquired by Madhab Giri are described in Sch. B of the plaint. It is urged that in the face of Mr. Brett's judgment which is sufficient prima facie evidence in an interlocutory proceeding, and having regard to the fact that the mohunt succeeded Madhab Giri under his Will, he cannot claim any of these properties as his personal properties. These are, however, matters to be decided in the suit.

It is next contended that in any case the learned Judges were wrong in treating them as personal properties without any enquiry whatsoever and that it constitutes a grave injury to the plaintiffs. But that is not a question to be decided by us. Rightly or wrongly they have held that the properties are to be treated as personal properties of the mohunt for the purposes of this proceeding and there is no necessity therefore for any enquiry into the matter.

The second ground is that in any case the " palace " has not been claimed by the mohunt in his written statement or

anywhere else as his personal property. This is admitted on behalf of the mohunt but it is contended that there is nothing to prevent the Court from making a special order and directing a portion of the palace to be used by the mohunt.

The District Judge in submitting the scheme as ordered by the Division Bench observed that the palace was never meant for the occupation of two persons independently, still less of two persons having adverse interests and that the preparation of the scheme was a difficult one but he nevertheless submitted three alternative proposals for the consideration of the High Court and also sent up a report of the Receiver, dated the 9th March 1926, for consideration of the High Court before finally sanctioning the scheme. The Division Bench by their order, dated the 31st March 1926 accepted the first alternative proposal, and directed that :

the Receiver will give possession to the mohunt of that portion of the palace other than what according to the order just passed is reserved for the Receiver and except that part in which neither the mohunt nor the Receiver are to be allowed to live.

It is contended on behalf of the appellants that if the mohunt is allowed to reside in a portion of the palace and if his office and the Receiver's office be in the same building, it will inevitably result in serious troubles and confusion again.

The Appellants referred to the report of the Receiver, dated the 9th March 1926, to the District Judge where he stated as follows :

I should mention again in this connexion that the Congress party or the Satyagrahis quietly delivered possession of the temple to me pursuant to the decision arrived at by Mr. M. K. Gandhi and Mr. C. R. Das and in doing so they (Satyagrahis and Mahabir Dal) gave me to understand that they did so as I was going to take possession of the entire property from the mohunt and that if the mohunt got back to the palace or to the temple they would again start Satyagraha.

So that the risk of fresh troubles (to meet which public authorities were recently put under a high strain) if the mohunt should come back and take up his residence at Tarakeswar which he had so long kept away from, is not over, and there is considerable apprehension that Satyagrahis may again appear on the scene and create disturbance, the past history of which I need hardly recall in this connexion. In short I apprehend a serious breach of the peace on the arrival of the mohunt Maharaj at Tarakeswar. I am corroborated in this view of the situation by no less an authority than the District Magistrate himself.

Besides I apprehend considerable trouble from the mohunt himself and his men and officers who will interfere with my work, and the location of his office along with my offices in the place will lend countenance to the efforts of his men who might pick up quarrels with my men as his men and retainers have no great reputation for peaceable ways. For the offices, treasury, record room and every thing important relating to this estate are within the palace and his residence in the heart of all this is likely to create confusion in my work and exercise a demoralising influence on the present administration as I have in my employ almost all the old officers of this estate who as well as the local adherents of the mohunt Maharaj, about whose propaganda I have submitted many reports, will not, I am affraid remain within proper bounds and discipline.

During this short period of my management here, there have been sufficient grounds for my raising the objections set forth above, and some specific cases of his attempt to interfere with and obstruct me in the management of the estate, some directly through his men and officers including the manager and some indirectly by his adherents who are still actively at work at Tarakeswar and in the mahals, have confirmed my apprehension on the score of the possible dangerous consequences of his residence in the palace at Tarakeswar close to my offices there.

I beg leave to state further that there are no other suitable buildings or houses at Tarakeswar where my office, which contains valuable moveable and important papers as well as money belonging to this estate can be accommodated.

The suit No. 28 of 1922 is directed inter alia against the maladministration of the endowment by the defendant and for his removal from office ; if, therefore, the endowment is to be preserved in status quo ante without any devastation and the pilgrims and the other persons interested in the endowment are to be secured unmolested in their acts of worship, etc., and if the administration of the estate is to be kept altogether free from the personal intervention of the mohunt during the pendency of the suit it would be very desirable to hold our respective offices separately and far from one another's.

The third ground is that serious complications will arise if the zemindari properties be made over to the mohunt. It is contended that since 1924 the mohunt had left Tarakeswar and there was no responsible person to manage the estate or the sheba of the deity, and in the then chaotic condition of things, the Court could not but appoint a Receiver. It is further contended that the mohunt's resuming the management of a portion of the estate, and holding office in a position of the palace, would inevitably lead to fresh troubles and confusion resulting in grave injury to the estate and serious inconvenience to the public and the pilgrims. It is pointed out that payment of rents had been stopped by the

tenants. The District Judge's finding on the point is as follows:

It has been definitely stated in the plaintiff's affidavit that sometime ago the defendant went to Tarakeswar and tried to regain his position but he was unsucsessful and had to leave. Tarakeswar again two months ago. This fact has not been denied. It is alleged by the plaintiffs that certain third parties have been instigating the tenants not to pay rent and as a result no rents are being relised. So the income of the endowment has considerably fallen and the mohunt is powerless to do anything because his opponents are too powerful for him. One of the tenants himself has sworn an affidavit that he himself has been intimidated and he has not been able to pay rent himself. As against this in the counter-affidavit it is only sworn that the mohunt is in peaceful possession of all the properties except those with respect to which a Receiver was appointed, that he has been realising rents as usual and that the person who swore the affidavit is no tenant at all. In the facts of the case, I cannot believe the statement in the counter-affidavit. It is unlikely Kenaram Chatterjee will admit his liability to pay rent when he is not a tenant himself. and if one or a few of such tenants have come forward to state their grievances, it is very probable there is a bulk of tenantry in a similar predicament. Such a state of things cannot be said to be beneficial to the estate.

The Receiver in his report, dated the 15th July 1925, to the District Judge stated that he had got possession of the entire estate, the tenants were paying rents and the officers of the estate were carrying out his orders.

Reliance was placed on behalf of the appellants upon an affidavit, dated the 1st February 1926, in which it is stated:

That from the begining of 1924, disturbances commenced at Tarakeswar, as a result of of which the entire administration of the temple and worship as well as of the estates in the hands of the defendant mohunt was upset, and the mohunt left Tarakeswar and left the management of affairs there to drift. The result was considerable maladministration of the estate and great hardship and inconvenience to the public and the pilgrims who went to offer pujas to the deity at Tarakeswar.

That the state of disturbance and mis management continued unabated till the appointment of a Receiver for the entire estate. That upon his appointment the present Receiver took over peaceful possession of the estate as well as of the temple which was at that time in possession of the Congress people, and order and good administration has since bean restored and the convenience of pilgrims and the public has been secured.

That after the passing of the order of the Hon'ble High Court releasing some of the properties from the hands of the Receiver, declarations have been publicly and privately made by Swami Sachidananda and other persons who were chiefly responsible for the previous disturbances, threatening to resume a campaign of Satyagraha the moment the mohunt attemped to take back possession from the Receiver of the properties released to him by the order of the Hon'ble Court.

That these declarations and other preparations for the purpose of resuming obstruction have created considerable alarm in the minds of the people of Tarakeswar and the neighbourhood and it is apprehended that the recrudescence of the disturbances would lead to fresh discomfort and insecurity of worshippers and pilgrims at Tarakeswar and neglect and maladministration of the estates.

That after the passing of the order of the High Court above referred to the mohunt's officers and men have been visiting Tarakeswar and the neieghbouring villages, within the admitted debutter properties as well as in the other properties, and both the deponents have severally heard them telling people in their presence that the mohnnt would be coming back very shortly and take possession of all the estates and the temple and would punish all persons who go against him with violence and other serious harm.

That durwans and officers of the mohunt have also been trying to induce the tenants of the Tarakeswar estate not to pay rents to the Receiver and are distributing leaflets and carrying on other propaganda against the administration of the Receiver.

That a great commotion and unrest has been caused among the inhabitants of Tarakeswar and the neighbourhood as well as among the tenants of other estates admitted to be debutter and claimed by the defendant mohunt as his nij properties, and as a result of these movements we apprehend that if the properties are handed over to the mohunt, there would be serious danger of disturbances and loss to the endowment.

The fourth contention is that the charitable institutions which are of great importance to the public will suffer, if a portion of the income of the estate goes to the mohunt. According to the mohunt the income of the immovable properties claimed by him as personal is Rs. 30,000 a year, while according to the plaintiffs the net income thereof is Rs. 81,000 a year. The income of other immovable properties in possession of the Receiver is Rs. 7,000 besides the income from the offerings and bazar, etc., is said to be Rs. 81,000 a year. There is an affidavit on behalf of the mohunt giving figures for three years to show that the net income does not on the average exceed Rs. 30,000 a year. The appellants say that the figures refer to the collections only and that the mohunt had chosen the particular three years in giving the figures. However that may be, it is contended that the expenses connected with the charities were met from funds of the entire estate while in the hands of the mohunt, and the income of the estate will be diminished by at least Rs. 30,000 if the properties claimed by

the mohunt as personal be made over to him.

The last ground is that at least Rs. 30,000 a year will be absolutely lost to the estate in the event of the suit being decreed, if the properties claimed by the mohunt as personal be made over to him pending the suit, as the mohunt has no properties other than those claimed as personal, and no security has been ordered to be taken from him, and this will cause irreparable injury to the debutter estate.

The 1st of June has been fixed for the hearing of the suit, but we were told that commission have been issued for examination of witnesses all over India, and having regard to the course the suit has hitherto taken, there is no certainty when the suit will be heard.

The case is of a peculiar nature. Of course threats which may be held out by third parties to create disturbances should not deter the Court in making orders securing to parties their just rights. But leaving such threats out of account, having regard to the exceptional circumstances stated above, I think the case involves questions of great public importance, and in my opinion it is a fit case for appeal under S. 109 (c) of the Civil Procedure Code. Let a certificate be issued accordingly.

**Rankin, J.**—As my learned brother after much consideration is of opinion that a certificate should be granted, I will not dissent, partly because it may turn out that public interest is involved but chiefly out of deference for his opinion. As this suit was instituted on 15th September 1922 and as the certificate asked for in 1926 concerns only the more or less of the properties over which a Receiver should be appointed before trial, I desire to add some observations of my own since I much fear lest we be throwing open one of the few opportunities of delay, complication and expense which settled practice has hitherto kept closed. The order complained of has discharged the Receiver so far as regards properties claimed by the defendant to be his own. There is room here for difference of opinion as to what is just and convenient before trial, and it may be conceded without any disrespect to the Division Bench that another tribunal might take the same view as the District Judge. Unless however the applicants can put their case on a much stronger and more special ground than this, a certificate, under S. 109, Cl. (c) of the Code, must be refused. There are two decisions of this Court which show this very clearly. One is *Chundi* v. *Parmanand* (4) and the other is *Md. Musaji Saliji* v. *Ahmed* (5). In these cases as in the present case there had been a difference of opinion between the Courts in India. The extreme undesirability of protracting interlocutory proceedings is based partly on the fact that in point of expense it may well be the plainest oppression and partly on the fact that it tends to postpone a real elucidation of the facts by a trial of the suit. In the present case a new consideration appears prominent since it seems clear that the suit could and should be heard in less time than it will ordinarily take to obtain the judgment of the Judicial Committee upon the proposed appeal. If therefore this certificate is followed by a stay of the order appealed from, that order is in effect reversed : if it is not followed by a stay, it is likely to be ineffective altogether.

Interlocutory orders are, certainly within the ambit of Cl. (c) of S. 109 ; but what Lord Hobhouse in *Banarasi* v. *Kashi* (6) and Lord Buckmaster in *Radha Krishna* v. *Swaminatha* (7) have said as to this not specially addressed to this clause is not specially addressed to this particular class. They point out that where a right is decided, public or private importance may take the place of a high money value as a ground for leave to appeal, especially in cases, e. g., as to caste rights, which are not capable of being valued in terms of money. There are, however, two cases in this Court as to interlocutory orders, viz., *Damra Coal Company* v. *Benares Bank* (3) and *Shiva Prasad Singh* v. *Rani Prayag Kumari* (the Jheria case) (1). These are both cases in which it was thought doubtful whether the order complained of was not such as to incapacitate one of the parties from effectively maintaining his case. The suit in the *Damra* case (3)

(4) [1895] 22 Cal. 928.
(5) [1911] 13 C. L. J. 507=10 I.C . 439.
(6) [1900] 23 All. 227=28 I. A. 11=7 Sar. 825 (P. C.).
(7) A. I. R. 1921 P. C. 25=44 Mad. 793=48 I. A. 31 (P. C.).

was to set aside a mortgage as fraudulent. The High Court reversed an order of the trial Court for an injunction restraining the execution, pending trial, of the mortgage decree. This meant that whether the decree was or was not fraudulently obtained, it was to be executed. Again in *Shiva Prasad Singh* v. *Rani Prayag Kumari* (the Jheria case) (1) the party who had succeeded was restrained from dealing with the property and required to deposit a large sum in Court. There appeared to be grounds for saying that restrictions imposed upon a party in possession were oppressive and in their cumulative effect crippling. I rather gathered from the argument at the Bar that the discretion exercised in these cases is in some little danger of being regarded as authority for the proposition that in debatable cases interlocutory matters should at the option of the party complaining be taken to England provided only that they have a certain "public or private importance." I think it important to discountenance any such idea. Incidental matters and temporary matters may have a great deal of private importance, and the desirability of taking interlocutory orders on appeal to England involves practical considerations of a special character.

R.D. *Leave granted.*

---

## A. I. R. 1927 Calcutta 488

RANKIN, C. J., AND C. C. GHOSE AND MITTER, JJ.

*Satis Chandra Bandopadhya* and *others*—Defendants—Appellants.

v.

*Hashem Ali Kazi* and *others*—Plaintiffs—Respondents.

Letters Patent Appeal No. 37 of 1926, Decided on 20th January 1927, from the decree of Cuming, J., Reported in *A. I. R.* 1927 *Cal.* 109.

(*a*) *Bengal Tenancy Act* (1885), *Sch.* 3, *Art.* 3 —*Dispossession need not necessarily be by landlord as such.*

Dispossession contemplated in Col. 3 is not necessarily dispossession by landlord as such. If it is shown that the plaintiff raiyat is in fact a tenant of the defendant who dispossessed him in respect of the land claimed in the suit, then Art. 3 applies to the suit. The reason or excuse, good, bad, indifferent, given or supposed to have been given by the landlord for dispossessing his tenant has no bearing on the enactment: 2 *P. L. J.* 567, *Appr.* [P 490 C 1, 2]

*Obiter*: The meaning of dispossession is satisfied when the defendant landlord comes in against the will of occupying tenant even by the machinery of a Court of law. [P 490 C 1]

(*b*) *Civil P. C., O.* 32, *R.* 4 — *Guardian appointed without his consent — Proceedings are void.*

*Obiter*: Where a person is appointed as guardian without his consent, the proceedings and the decree passed therein are void: 30 *Cal.* 1021 (*P. C.*), *Expl.* [P 491 C 2]

*Jotindra Nath Sanyal* and *Suresh Chandra Taluqdar*—for Appellants.

*Brojendra Nath Chatterji* and *Hemendra Chandra Sen*—for Respondents.

**Rankin, C. J.**—This is a Letters Patent appeal from a difference of opinion arising at the hearing of a Second Appeal before my learned brothers Mr. Justice Cuming and Mr. Justice Page.

I agree with the view of Mr. Justice Page that the plaintiffs' suit must be dismissed on the ground that it is out of time by reason of Art. 3 of Sch. 3 to the Bengal Tenancy Act; and in this view the other considerations which might have arisen for our attention do not require to be argued at the bar.

The facts of the case are not in dispute between the trial Court and the District Court. The position shortly is that there was a rent suit against the plaintiffs and also Defendants Nos. 3 and 4 brought by Defendants Nos. 1 and 2 on the 30th of May 1914. Defendants Nos. 1 and 2 were landlords of a holding of which the plaintiffs were co-sharer tenants. The rent suit was brought and was decreed on the 10th of November 1914 ex parte. In that rent suit it appears that the Court without obtaining consent of the plaintiffs' mother appointed her as guardian to the plaintiffs and it is to my mind clear that in the three Courts before which this case has come the fact that the mother did not consent to that appointment was treated as plain. I consider that it sufficiently appears from the judgment of the trial Court. In these circumstances the decree having been passed on the 10th of November 1914, on the 15th of December 1915 the plaintiffs in that suit—Defendants Nos. 1 and 2 in the present suit—obtained symbolical possession of the land in question.

At sometime which is plainly before the 2nd of November 1916 there was an actual ouster of the plaintiffs from their land. This suit has been brought on the 25th of July 1919—more than two years

after that ouster, and it is argued before us on behalf of the landlords—Defendants Nos. 1 and 2—and the new tenants whom they have put upon the land—Defendants Nos. 5 to 7—that the suit is within Art. 3 of Sch. 3 to the Bengal Tenancy Act.

On these simple facts it might be supposed that the question of the applicability of Art. 3 was fairly free from difficulty. As a matter of fact, the decisions of this Court make the question a little complicated and the present case requires us to consider carefully the scope and meaning of the article, as to which there is much contradiction in the decisions.

Art. 3 of Sch. III is clearly modelled upon Art. 142 of the Indian Limitation Act. The description of suit is expressed thus—" To recover possession of land claimed by the plaintiff as a raiyat or an under-raiyat ; " and there is little difficulty in seeing from that description that the article applies only where the plaintiff is asserting a subsisting tenancy right as against the person under whom he claims to hold. As applicable to such a person and such a person only, would one expect to find in this Act the not very precise language which one finds in column I of that Schedule. On that question this Court, so far as I know, has not entertained any doubt. Starting, therefore, from the fact that the class of case we are considering is a suit brought by a person claiming a subsisting tenancy right under the defendant we come to consider the third column of the schedule. There the language is " the date of dispossession." In the corresponding column in Art. 142 there is a reference to " discontinuance of possession " ; and I put aside any question which may arise out of that slight change. It is clear, therefore, that the article contemplates a suit of the character I have already described based upon dispossession as part of the cause of action.

The next question which arises is this. Is it necessary and safe and right to add to the third column the words " dispossession by the defendant " ? The defendant in such a case must be the alleged landlord. Is it to be taken as plain that the third column means that the defendant and no other person must have dispossessed the plaintiff ? No such words are to be found in the third column of Art. 142, and in the ordinary way, the matter being left to the general law, such words would be misleading rather than necessary. It all depends upon the particular facts. If the plaintiff is ousted by trespasser A and trespasser B comes and overthrows A and proceeds to trespass, in a case of that sort the two trespassers' occupation cannot be tacked together and such a suit brought against B would be brought against B on the ground that B had dispossessed the plaintiff. On the other hand, if the plaintiff is dispossessed by trespasser A and trespasser B buys his right or claim of right from him and there is a privity in law, in act or in contract between the two, the suit against B might be based on a dispossession which was originally a dispossession by B's predecessor-in-title. All that is not expressed in the third column of Art. 142 and is left to the general law.

In this case I do not think it is necessary to express an opinion whether it is necessary or right to read the words " by the defendant " into the third column of Art. 3. There is some serious reason to suppose that this may be the meaning, because otherwise a person on whose land a trespasser had come and against whom he had twelve years to bring his suit might by assigning to the landlord defeat the tenant's right of suit. Whether, therefore, the words " the date of dispossession by the defendant " should be taken to be the true meaning of the third column is a matter upon which I desire to reserve my opinion. But when one gets beyond that question one comes to the suggestion which can be found in some of the cases that the true way to read the third colum is to say that it means " dispossession by the landlord as such " and by direct action. Some of the cases suggest that the third column of the article must exclude cases where the landlord dispossesses as auction-purchaser and other cases take the view that it excludes also cases of dispossession effected by the instrumentality of a Court of law.

I have myself a somewhat strong opinion that those two propositions are a complete misunderstanding and misinterpretation of this article and that there is no sufficient reason for adding anything to the words which have been used by the legislature except possibly adding the

words "by the defendant" to the word "dispossession" in the third column. But the character of the plaintiffs' claim here is to assert as against the defendant that they have a subsisting tenancy right in the land held by the plaintiffs under the defendant; the relief asked is the recovery of the land accordingly; and it turns out that the only ouster in the case was effected not by the Court but at some date before November 1916 by the landlord. It is therefore not a case of ouster by the machinery of a Court of law and although I agree with Page, J., in the opinion that the meaning of dispossession is satisfied when the defendant landlord comes in against the will of the occupying tenant even by the machinery of a Court of law, the present case does not actually require us to decide that question. The delivery of symbolical possession operated nothing as against the plaintiffs.

As regards the contention that in order to avoid the operation of Art. 3 it is sufficient to say that the landlord came into possession as auction-purchaser, in the capacity of auction-purchaser and not qua landlord, there, again, it seems to me that the words of the legislature are being seriously distorted. It is not a question of capacity, but of incapacity. The plaintiffs' case is—and what alone matters is the real character of the plaintiffs' suit—that the landlord's re-entry was wrongful. Whether the landlord wrongfully claimed to re-enter for one reason or another is a matter which can only be imported by force into the words which the legislature has employed.

The view taken by Chamier, C. J., in the case of *Jaimangalabati Misrain* v. *Jharu Lal Das Mozumdar* (1) is, I think, correct.

It has been held in a large number of cases that Art. 3 applies only to a suit by a raiyat or under-raiyat against his landlord, including one or more of several landlords. I accept that construction of the article. So far it would appear that these suits are governed by this article. But it is contended on behalf of the appellant that the article applies only where the raiyat has been dispossessed by his landlord acting as such. In fact the argument went to the length that the article applies only when the landlord says either expressly or impliedly to the raiyat, 'I am your landlord, you are my tenant. You must vacate the land,' and then turns the raiyat out wrongfully. If this contention is correct, Art. 3 does not apply to the present case; for although on the findings the appellant was one of the landlords of the respondents, she did not claim the plots in question as the landlord of anyone and certainly did not admit that the respondents were or ever had been her tenants in respect of the plots. She claimed that the plots were her kamat land by reason of the fact that she had purchased the share to which according to her they were appurtenant or attached. I am not prepared to place such a narrow construction on Art. 3. It appears to me that if it is shown that the plaintiff raiyat is in fact a tenant of the defendant who dispossessed him, in respect of the land claimed in the suit, then Art. 3 applies to the suit. The object of that article seems to provide a short period of limitation for a suit by a raiyat to recover a holding from which he has been dispossessed by his landlord. The reason or excuse, good, bad, indifferent, given or supposed to have been given by the landlord for dispossessing his tenant appears to have no bearing on the enactment and much confusion must ensue if the applicability of the enactment is made to depend upon such considerations.

It seems to me that that opinion is clearly right, because when you are applying the words of the article to a case which *ex concessis* is a case to the effect that the ouster by the landlord was wrongful, it cannot be reasonable to add to the third column not merely the words "by the defendant," not merely the words "by the landlord" but the words "by the landlord as such." There is, in, my opinion, some confusion of thought in such a suggestion. In the argument before us it was debated whether or not in a case where a guardian ad litem was appointed for a minor without his consent the decree was a nullity or was merely voidable; consequently whether in this case at the time when the execution sale of the holding was made and the landlord purchased it, the tenancy came to an end. The contention is on the one hand that the whole thing was void and the plaintiffs' tenancy went on as before and subsisted to the date of this suit. On the other hand, it is said that the decree was at most voidable, and until it was avoided, it stood; and, therefore, at the time when this sale was held, symbolical possession given, and the actual ouster was made, there was a subsisting decree, the plaintiffs' tenancy had come to an end and the dispossession was not by the landlord.

To my mind that consideration is altogether beside the point. First of all, while it may be clear that the suit contemplated under Art. 3 is a suit to assert against a landlord a right of tenancy in the property sold, it is a matter requiring

(1) [1917] 2 P. L. J. 567.

some warrant to say that the dispossession must have been by a person who at that time was the landlord. But in any case, what does it matter whether this decree was void or voidable? The plaintiff brings his suit to establish that his tenancy right is still subsisting. If the plaintiff cannot make out that in law and in equity his tenancy right has as against the defendants continued from the beginning down to the date of his suit, then he has no case on the merits. He claims to show that by showing that the decree was one which he can in this proceeding ask the Court to disregard. In any event a decree set aside because it was improperly procured is set aside as though it had never been made so far as the parties are concerned.

I do not think it necessary to decide the question raised by the long and learned judgment of Mr. Justice Das in the case of *Satdeo Narain* v. *Ramayan Tewari* (2), where he advances the theory that if no guardian is appointed or if a person who is not competent under the law to be the guardian is appointed for a minor, then the proceedings in the suit are null and void; but that if a person otherwise competent is appointed without his consent under the new Code the proceedings in the suit are irregular and are not necessarily void. That view of Mr. Justice Das is based really upon an interpretation of the case in the Privy Council of *Walian* v. *Banke Behari Pershad* (3). I am not satisfied that the learned Judge's interpretation of the Privy Council judgment is correct. I cannot read the Privy Council judgment except on the basis that the only defect which they under the old Code had to consider was the fact that while the Court had appointed a guardian a formal order to that effect had not been made at the time. It has been pointed out to us that in the course of the case the guardian did not contest the suit and that the decree was ex parte. That may very well be. Guardians who are validly appointed have good reasons sometimes for not contesting the claim. The Privy Council was satisfied that in spite of that fact the interest of the minor had been effectively protected by the mother as the guardian and it was on that ground alone that the Privy Council held that the suit and the decree were not void. The most that can be said with regard to the judgment of Lord Davey in the case of *Khiarajmal* v. *Diam* (4) is that it is not quite clear with regard to certain expressions with reference to the particular case of the minor Amirbaksh whether their Lordships were addressing themselves to the circumstance that the guardian had not been appointed or to the circumstance that the individual share of Amirbaksh was not really before the Court at all. I think myself that it was to the former. In my judgment there is, however, a passage in that case which Mr. Justice Das's judgment renders it desirable to bring into prominence. The passage is at page 312 of the case of *Khiarajmal* v. *Diam* (4).

> Their Lordships agree that the sales cannot be treated as void or now be avoided on the grounds of any mere irregularities of procedure in obtaining the decrees or in the execution of them. But on the other hand the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record.

I only desire on this matter to say that I am not as at present advised prepared to assent to the proposition that while a decree will be void if no guardian is appointed or if the guardian is not a competent person, some different consequence will result where a person is appointed who never consented to act at all—the most useless possibly of all appointments.

For the reasons I have given I consider that the appeal in this case ought to be allowed and the plaintiffs' suit ought to be dismissed with costs in all the Courts.

**C. C. Ghose, J.**—I agree.

**Mitter, J.**—I entirely agree in the judgment that has just been delivered by my Lord the Chief Justice and have nothing further to add.

G.B. *Appeal allowed.*

---

(2) A. I. R. 1923 Pat. 242=2 Pat. 335.
(3) [1903] 30 Cal. 1021=30 I. A. 182=7 C. W. N. 774=8 Sar. 512 (P. C.).
(4) [1904] 32 Cal. 296=32 I. A. 23=1 C. L. J. 584=9 C. W. N. 201=8 Sar. 734 (P. C.).

## A. I. R. 1927 Calcutta 492

SUHRAWARDY AND DUVAL, JJ.

*Gopal Chandra Saha*—Plaintiff—Appellant.

v.

*Abdur Rahim Biswas* and *others*—Defendants—Respondents.

Appeal No. 981 of 1924, Decided on 11th November 1926, from the appellate decree of the Dist. J., Jessore, D/- 11th March 1924.

*Civil P. C., S. 97—Decree—Appeal against preliminary decree after passing of final decree —No steps taken to set aside final decree—Appeal is infructuous.*

Where an appeal is preferred against the preliminary decree after the final decree is passed, the later decree cannot be held to be contingent or dependent on the result of the appeal against the preliminary decree. Hence where no steps are taken to have the final decree set aside, the appeal against the preliminary decree must be held to be infructous: *A. I. R.* 1925 *Cal.* 218; and *A. I. R.* 1925 *Cal.* 790, *Foll.* [P. 492, C. 2]

*Radhabinode Pal, Bhupendra Kishore Basu, Jatindra Mohan Banerjee* and *Bansarilal Sarkar*—for Appellant.

*Nasim Ali*—for Respondents.

**Suhrawardy, J.**—A preliminary objection is taken on behalf of Respondent No. 1 to the hearing of this appeal. The facts on which it is based are somewhat peculiar. The appellant brought a mortgage suit against Respondent No. 1 with a further prayer that in case it was found that any amount was paid to the pro forma defendants who are the heirs of the original mortgagees and from whom the plaintiff purchased the mortgage, that amount might be decreed as against those defendants. The defence was a plea of payment of a certain amount by the Defendant No. 1 to the original mortgagees, the predecessors of the other defendants. The Munsif in the first Court did not believe the plea of payment and passed a preliminary mortgage decree against the Defendant No. 1. On 18th July 1923 that decree was made absolute. The Defendant No. 1 preferred an appeal against the preliminary decree to the District Judge who, by his order, dated the 11th March 1924, set aside the preliminary decree in so far as it disallowed the plea of payment taken by the Defendant No. 1. Against that decision of the District Judge this appeal was lodged in this Court on 2nd May 1924.

It appears that on the 26th April 1924 the order of the appellate Court varying the preliminary decree was forwarded to the Munsif in the first Court who on the 26th April 1924 set aside the previous final decree passed by his predecessor and passed a final decree in terms of the judgment of the lower appellate Court. No step appears to have been taken by the appellant against the order passing the final decree. On these facts it is urged on behalf of the Defendant No. 1 who alone appears before us that the present appeal so far as he is concerned is incompetent inasmuch as the final decree passed by the Munsif on the 26th April 1924 remained unaffected. In my judgment, this contention should prevail. It has been held in several cases which are considered and followed in *Nanibala Dasi* v. *Ichhamoyee Dasi* (1) that an appeal against a preliminary decree after the final decree is passed becomes infructuous. In that case the preliminary decree and the final decree were passed by the same Court. Despite this distinction I do not think that there is any difference in principle. The principle underlying the law as laid down above is that where an appeal is preferred against the preliminary decree after the final decree is passed, the latter decree cannot be held to be contingent or dependent on the result of the appeal against the preliminary decree. Hence where no steps are taken to have the final decree set aside, the appeal against the preliminary decree must be held to be infructuous. This principle was more fully explained in *Jogendra Narayan Das* v. *Satyendra Chandra Ghosh Mullik* (2). I am accordingly of opinion that the appeal as against Defendant No. 1 must be held to be incompetent and must fail. But the learned vakil appearing for the appellant asks us to treat the decree passed by the Munsif on the 26th April 1924 as a nullity because he never asked for a final decree under O. 34, R. 5. We are not prepared to agree with this submission. We are not in possession of all the facts relating to the passing of the decree. The appeal against the Defendant No. 1 must, therefore, be dismissed with costs.

As against the other respondents it is argued that the learned District Judge

(1) A. I. R. 1925 Cal. 218.
(2) A. I. R. 1925 Cal. 790.

was wrong in not allowing a decree against them to the plaintiff. In the deed of assignment executed by the mortgagee in favour of the plaintiff it is stipulated that if any sum is subsequently found to have been paid to the assignor over and above the amounts entered on the back of the bond, the assignor will return such amounts to the plaintiff. It has now been finally found by the lower appellate Court that the sum of Rs. 460 was paid by the mortgagor to the mortgagee which was not entered on the bond. The decree which is now passed in favour of the plaintiff is therefore reduced by the sum of Rs. 460 under the decree of the lower appellate Court. In the plaint the plaintiff prayed for an alternative decree against the defendants other than Defendant No. 1 claiming the entire amount which he paid by way of compensation. He is clearly not entitled to it but he is in equity and justice entitled to recover the amount which they took from the mortgagors and did not wrongfully disclose to the plaintiff at the time of the deed of assignment. The learned District Judge did not take this part of the plaintiff's case into consideration as he ought to have done.

In this view we are of opinion that the decree passed by the lower appellate Court as regards respondents other than Respondent No. 1 should be discharged. A decree should be passed in favour of the plaintiff as against those respondents for the sum of Rs. 460 with proportionate costs. The amount so decreed will in the event of non-realisation bear interest at the rate of six per cent per annum.

**Duval, J.**—I agree.

R.D. *Decree partly varied.*

---

## A. I. R. 1927 Calcutta 493

DUVAL AND MITTER, JJ.

*Kasim Ali Prodhanya* and *others*—Defendants—Appellants.

v.

*K. S. Bonnerjee* and *others*—Respondents.

**Appeals Nos. 143 and 714 of 1922, Decided on 23rd November 1926, from the decrees of the Spl. J., Tipperah, D/- 2nd September 1921.**

*(a) Bengal Tenancy Act, S. 50—Uniform rate shown for twenty years—Old wasil baki papers in which these tenancies are not found does not rebut the presumption.*

Where the tenants have produced dakhilas of a uniform rate of rent for over twenty years which gives them the presumption that their rent is fixed, the presumption is not rebutted by producing jama wasil baki papers of over hundred years old, wherein the tenancies do not find a place. [P 493 C 2]

*(b) Bengal Tenancy Act, S. 50 (3)—Addition or substraction of land affects the presumption.*

The operation of S. 50 (3) is affected by the fact of the land having been separated from other land which formed with it a single holding, or amalgamated with other land into one holding. The addition of other parcels to the original holding as well as the increase in the rental, change the incidents of the original holding and admittedly a new holding is created : 22 *C. L. J.* 81, *Ref.* [P 494 C 1]

*Jogesh Chandra Roy, Girija Prosanna Roy Choudhary* and *Manmohan Banerjee* —for Appellants.

*Jatindra Nath Sanyal* and *Biraj Mohan Majumdar* for *Deputy Registrar* —for Respondents.

**Duval, J.**—*Appeal No. 714 of 1922* : This is an appeal by landlords against the order of the Special Judge refusing to settle enhanced rents in respect of 7 khatians in a Settlement proceeding on the ground that the tenants have produced dakhilas of a uniform rate of rent for over twenty years which gives them the presumption that their rent is fixed —a presumption which is not rebutted by any evidence which the plaintiffs have been able to adduce. There are 185 tenants respondents in the appeal but in respect of Khatians Nos 5, 20, 21, 36, 38, 47, 49, 53, 61, 62, 63 and 78 some or all of the tenants had died pending these proceedings and no substitution had been made. The appeals necessarily stand dismissed as against those respondents.

As to the other cases the evidence of the tenants is the production of dakhilas which have been accepted as genuine. The only evidence produced by the landlords is that jama wasil baki papers of over hundred years old had been put before the Court and it is pointed out that these tenancies do not find a place. This really rebuts nothing and the learned vakil for the appellants admits that in all similar cases it has been held that such evidence would not rebut the presumption and, therefore, he does not press the appeal.

The result is that the appeal is dismissed with costs which we assess at two gold mohurs.

**Mitter, J.**—I agree.

*In Appeal No.* 143 *of* 1922

**Mitter, J.**—These appeals arise out of proceedings taken under S. 105 of the Bengal Tenancy Act in respect of eight Khatians Nos. 5, 16, 28, 37, 41, 50, 51 and 73. The lower appellate Court has come to the conclusion that the holdings of these khatians are not the original holdings but they are parcels of lands which comprise the original holding and other lands which have been added to these holdings within 20 years from the date of the suit and it has come to the conclusion that by reason of this circumstance the defendants have failed to establish any presumption in their favour under S. 50, Cl. (3) of the Bengal Tenancy Act.

It has been urged before us that, having regard to the provisions of Cl. (3) of S. 50, the operation of that section so far as it relates to land held by a raiyat, will not be affected by the fact of the land having been separated from other land which formed with it a single holding, or amalgamated with other land into one holding, the lower appellate Court ought at any rate to have raised the presumption with regard to the holdings as they existed before these amalgamations were made. We are unable to accede to this contention, for, in our view, the addition of other parcels to the original holding as well as the increase in the rental having changed the incidents of the original holding admittedly a new holding was created which came into existence after the date of the Permanent Settlement. So there is no room for the presumption under S. 50 of sub-S. (3). We are supported in this view by a decision of this Court in the case of *Raj Kumar Sarkar* v. *Faizuddi Tarafdar* (1).

In this view the only point raised before us fails and the appeal must be dismissed with costs two gold mohurs.

**Duval, J.**—I agree.

D.D. *Appeals dismissed.*

(1) [1915] 22 C. L. J. 81=30 I. C. 283.

## A. I. R. 1927 Calcutta 494

DUVAL AND MITTER, JJ.

*Lalit Mohan Banerjee* and *another*—Defendants—Appellants.

v.

*Norodamoyi Dasi*—Plaintiff—Respondent.

Appeal No. 1957 of 1924, Decided on 15th December 1926, from the appellate decree of the Dist. J., Hooghly, D/- 21st July 1924.

*Succession Act* (1925), *S.* 187—*Knowledge of right to elect is necessary to bind one by the principle of election.*

No person is bound by the principle of election unless he has the knowledge of his right to elect and of the circumstances which would influence the judgment of a reasonable man in making the election. [P. 495, C. 1]

*Bijan Kumar Mukherjee*—for Appellants.

*Rupendra Kumar Mitra*—for Respondent.

**Judgment.**—This is a suit in partition. It was dismissed by the first Court but on an appeal to the lower appellate Court the decree of the first Court was set aside and the suit was decreed. It appears that there were two brothers, Khettro and Dharani. Dharani died before Khettro, leaving a widow, the present plaintiff-respondent. Khettro died leaving no wife. Khettro left a Will appointing the present appellants executors to his estate. By the Will he dealt with all the properties which he enjoyed with Dharani as his own. It appears that the properties consisted of a rope-factory, cash and residence. He left Rs. 300 out of the cash to the plaintiff. She was also to get Rs. 4 a month from the profits in the rope-factory and she was to have also a life-estate in the residence. Thereafter it appears that she had to bring two suits for her maintenance to recover her monthly allowance out of the rope-factory and interest on the legacy of Rs. 300 which for some reason or other was not made over to her in cash.

She has now brought this suit claiming that Dharani and Khettro being joint in mess, properties and worship were each 8 annas co-sharers in all these properties and she sued for partition to have her own share declared. The lower appellate Court has decreed the suit for partition except in respect of two plots half of which is in the possession of a

gentleman who is not before the Court. The lower appellate Court found as a fact that the properties were joint properties of the two brothers Khettro and Dharani and that finding of fact is admittedly conclusive. It is urged, however, that the lady elected to take under the Will and so under S. 187 of the Indian Succession Act of 1925 (reproducing the old S. 173 of Act 10 of 1865) she has elected to take under the Will and, therefore, cannot now claim a half share in the properties in suit. No doubt there may be a presumption against her as she enjoyed the benefits of the Will to a certain extent for over two years. But the finding is that she is uneducated and deaf and did not know her legal position in this matter. It is clear that no person is bound by the principle of election unless he has the knowledge of his right to elect and of the circumstances which would influence the judgment of a reasonable man in making the election. We think that this finding as to the plaintiff's ignorance must mean that the principle of election cannot apply to this case. In this view, therefore, we consider that the learned District Judge is right and that the lady is entitled to the partition as claimed.

It is urged that the lady after the partition should be made to account for the benefits she has so far received under the Will. We do not think that there is very much in this contention. Apparently, all that she got is not more than Rs. 7 a month and that also after her having to go to Court twice and her residence in the ancestral house. Therefore, there is nothing, in our opinion, really substantial for which she can be asked to account. Rs. 7 is much less than what she would get for her half share of the two brothers' properties.

In this view the appeal is dismissed with costs.

R.D. *Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 495

MITTER, J.

*Sefatullah Bepari*—Petitioner.

v.

*Sadhu Molla*—Opposite Party.

Civil Revision No. 995 of 1926, Decided on 7th January 1927, against the decree of the 1st Munsif, Serajgunge, D/- 18th August 1926.

*Limitation Act, S. 19—Partnership accounts adjusted and balance due from one of the partners carried over—Adjustment not signed by party—Subsequent adjustment made and balance found due from the same partner—Cause of action for suit for balance arises from the next adjustment.*

Plaintiff and defendant carried on business in partnership and there was an adjustment of account in 1327 and a certain sum was found due from the defendant. This amount was carried over to the account of 1329 when another adjustment was made. Defendant had not signed the adjustments. Plaintiff sued for this amount after three years of first adjustment:

*Held*: a new cause of action arose at the end of 1329 and the suit being within three years from that date was not barred: 15 *C. W. N.* 882, *Rel. on.* [P 495 C 2, P 496 C 1]

*Rupendra Kumar Mitter* — for Petitioner.

**Judgment**.—This rule was issued on the Opposite Party to show cause why the decree passed by the Munsif, 1st Court, Serajgunge, dated the 18th August 1926, should not be vacated and a decree passed in favour of the plaintiff for Rs. 84 odd found to be due to the plaintiff. The facts are that plaintiff and defendant and some other persons carried on business in partnership and the partnership was dissolved at the end of the Bengali year 1329. There was an adjustment of account in 1327 B. S. and a sum of Rs. 78-11-3 pies was found due from the defendant. This amount was carried over to the account of 1329 together with two other sums taken by the defendant and the adjustment of account in 1329 showed that the defendant owed Rs. 89 to the plaintiff. Rs. 5 was paid to the plaintiff and the plaintiff seeks to recover Rs. 84 in this suit. The defendant's plea is that the plaintiff's claim for Rs. 78 is barred by limitation as the suit was not commenced within three years of 1327 and this plea has been given effect to and the Small Cause Court Judge dismissed the plaintiff's suit in regard to the same. The present rule has been obtained by the plaintiff and it has been argued that the Small Cause Court Judge has committed an error of law in holding that the suit is barred by limitation. It is argued that although the adjustment of accounts was not signed by the defendant there was an implied promise to pay on the date of the adjustment and this gave rise to a fresh cause of action in 1329. It is not a case of account stated and consequently Art. 64 of the 1st Schedule to

the Limitation Act does not apply, nor is it a suit on running mutual account as the entries are all on one side and consequently Art. 85 does not apply. The adjustment of account is not signed by the defendant but it arises out of partnership relations.

The finding of the Small Cause Court Judge is that the amount of Rs. 78-11-3 pies was carried over to the account of 1329 and together with two other items therein noted, the debt swelled to Rs. 89 which was forwarded to next year's account. It appears to me that the plaintiff has established that the suit is one on an adjusted account which entitles him to claim that sum by virtue of that adjustment. A new cause of action arose at the end of 1329 B. S. and the suit being within three years is not barred whether Art. 115 or Art. 120 applied to the case.

I am supported in this view by a decision of Sir Lawrence Jenkins, C. J., in the case of *Jalim Singh* v. *Choonee Lal* (1). The result is that the decree of the Small Cause Court Judge is set aside and a decree for Rs. 84 be passed against the defendant with costs and interest at 6 per cent per annum. I assess the hearing-fee at one gold mohur. I may mention that the opposite party has not appeared to show cause in this rule.

G.B. *Decree set aside.*

(1) [1911] 15 C. W. N. 882=11 I. C. 540.

---

## ✻ A. I. R. 1927 Calcutta 496

RANKIN, C. J., AND MAJUMDAR, J.

*Girindra Nath Banerjee* and *another*—Appellants.

v.

*Birendra Nath Pal*—Respondent.

Appeal No. 85 of 1927, Decided on 30th March 1927, from the judgment of Buckland, J.

✻ (*a*) *Government of India Act, S. 80-A, Cl.* (1)—"*Peace and good Government*"—*Court of law is not competent to consider the merits of a particular enactment.*

The words "for the pease and good goverment" are used because they are words of the widest significance and it is not open to a Court of law to consider with regard to any particular piece of legislation whether in fact it is meritorious in the sense that it will conduce to peace or to good government. They are words which are intended to give, subject to the restrictions of the Act, a legislating power to the body which it invests with that authority. There is nothing in that expression which can be the foundation of any reasonable argument to the effect that the Criminal Law Amendment Act of 1925 was outside the jurisdiction of the local legislature. [P 499 C 1,2]

✻ (*b*) *Government of India Act, S. 80-A, Cl.* (4)—"*Affect*"—*What is preserved from interference of Indian Legislature is the effect of an Act of Parliament by its own force as a determination of the will of Parliament with reference to a particular subject-matter.*

Cl. 4 is doubtless wider than the mere provision that the local legilature shall not have power to repeal an Act of Parliament and the word "affect" may cover any interference with the will of Parliament as expressed in a statute. But what Cl. 4 of S. 80-A refers to and preserves from interference is the effect of an Act of Parliament by its own force as a determination of the will of Parliament with reference to a particular subject-matter. It may well be that it guards against any possibility that a local legislature might attempt to interfere with the operation of Acts of Parliament that do not technically extend to India. But it cannot be construed as meaning that beeause in 1726 when there was no other law, the Courts in Calcutta adopted the law that prevailed at home subject to many modifications, therefore any part of that law so introduced which originated in statute as distinct from common law cannot be interfered with by the local legislature. [P 501 C 1,2]

✻ (*c*) *Government of India Act, S. 80-A, Cl.* (4)—*Bengal Criminal Law Amendment Act of* 1925 *is not ultra vires—Bengal Criminal Law Amendment Act.*

The Bengal Criminal Law Amendment Act of 1925 does not affects Acts of Parliament and is not ultra vires of the local Government that passed it. [P 503 C 2]

(*d*) *Bengal Criminal Law Amendment Act* (1925), *S.* 11 — *Whether a person is legally detained has to be dealt with under Criminal P.C.*

Bengal Criminal Law Amendment Act is an Act which was intended to supplement the ordinary criminal law in Bengal and the question whether or not a particular person is legally detained under it has to be dealt with, if at all, under the Code of Criminal Procedure. [P 504 C 2]

✻ (*e*) *Criminal P.C., S.* 491—*For purposes mentioned in S.* 491 *writ of habeas corpus cannot be issued on Civil Side of Hight Court—Habeas Corpus.*

For any of the purposes mentioned in what is now S. 491 it is not open to an applicant to say that he will make his application independently of that section altogether for the prerogative writ of habeas corpus on the civil side of the High Court. [P 504 C 1]

*B. C. Chatterjee, Sudhir Roy, B. K. Chaudhuri, D. N. Sen* and *P. C. Ghose*—for Appellants.

*B. L. Mitter* and *H. R. Panckridge*—for the Crown.

**Rankin, C. J.**—In this case an application was made to Mr. Justice Buckland, purporting to be in the Original Civil Jurisdiction of this Court for the issue of a writ of habeas corpus, on behalf of one Girindra Nath Banerjee whom I will call "the applicant." The general circumstances giving rise to the application are these. The applicant was arrested on the 25th day of October 1924 at his the then Residence No. 4/3 Malanga Lane in the town of Calcutta. He was kept in custody at the Alipore Central Jail and afterwards at the Midnapore Central Jail. After he had been in custody for some time an order, dated the 19th January 1925, was made under Ordinance No. 1 of 1924 that he should be committed to custody in the Midnapore Jail. On the 12th June 1926 he was served with an order made by the Government of Bengal under the Bengal Criminal Law Amendment Act, 1925, by which he was directed to proceed to Midnapore, to report himself to the Superintendent of Police there, to proceed afterwards direct to the police-station of a certain village in that District and to reside until further orders in that village. He was directed to reside in premises defined and approved by the Superintendent of Police ; he was prohibited from leaving such premises at night or from interviewing visitors: he was also directed to report himself twice daily to the officer at the police-station. He was prohibited from receiving visits without permission and was not to converse, communicate or associate with school boys or school masters or to attend at any meeting. He had to deliver unopened to the officer in charge of the police-sation all communications sent to him by letter, telegram or otherwise. In particular he was directed not to go beyond certain limits defined in the order.

The applicant at the day of his application to this Court was the subject of another order made by the Government of Bengal under the same Act and dated the 29th November 1926. That order was similar in its terms to the one I have already referred to and it directed him in effect, to go to the Canning Town police-station in the District of the 24-Perganas and to reside in premises defined and approved by the Superintendent of Police there, the restrictions which I have already mentioned being repeated. In particular, the applicant was prohibited from exceeding certain limits defined in that order, viz., on the north Bidyadhari river, on the east Matla river, on the south Canning Town Bazar, on the west siding line from Canning Railway Station up to Bidyadhari river.

The applicant had been arrested and detained in jail between October 1924 and some subsequent date ; but long before the date of his application to this Court he was not a person who was being detained in jail. His exact position was defined by S. 11 of the Bengal Criminal Law Amendment Act, 1925. That was an Act passed by the local legislature of Bengal. It was made by the Governor of Bengal under the provisions of S. 72 E of the Government of India Act. It was made with the previous sanction of the Governor-General under sub-S. (3) of S. 80A of the said Act. The terms of this enactment, so far as it affects the present question, are to be found in Ss. 11, 12, 13, 14 and 15. Section 11 prescribes that where in the opinion of the Local Government there are reasonable grounds for believing that any person has committed or is about to commit certain acts in the nature of offences the Local Government, if it is satisfied that he is a member, or is being controlled or instigated by the member of any association of which the object or methods include the doing of any such acts or the commission of any of such offences, may, by order in writing, give certain directions. These directions are : That he should notify his residence, report himself to the police, reside or remain in a specified area, be committed to custody in jail. The sanction attaching to such an order is that contained in S. 15 of the Act.

Section 15 makes it an offence to disobey any direction of such order. It says that a person who comes within its scope shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine. The position of this applicant at the time of this application was that an order, directing him to do or abstain from doing certain specified things, has been made and he was obeying that order. If he chose at any moment to disobey the order then he would have to take his chance of being arrested and put before a criminal Court. He would have to take

his chance of that Court finding that under S. 15 he had committed an offence which rendered him liable to imprisonment for a term which might extend to three years.

It is important to notice that the applicant at the time of his application was not within the limits of Calcutta and the person who is said to have him in custody was a member of the police force who was not within the limits of Calcutta. Both of these persons were at Port Canning in the District of the 24-Parganas. The only connexion with Calcutta which this matter would appear to have is that the applicant says (and it is not contradicted) that he is a person whose ordinary residence is within the limits of this Court's Original Jurisdiction. The circumstance that some years ago when he was first arrested, not under this Act but under a different enactment, he was at the time at Calcutta, would appear to have nothing to do with this case. The circumstance that he is a person who is an ordinary resident of Calcutta may have something to do with this case. If it be true that a person ordinarily resident within the Original Jurisdiction of this Court although he be an Indian is clothed with certain rights given originally years ago by Parliamentary enactment to Englishmen in England and if it be true that when he goes into the Mofussil he carries those rights about with him as a kind of personal law differentiating him from ordinary Indian subjects of His Majesty who belong to the 24-Parganas, than the circumstance that he is ordinarily resident in Calcutta may be a matter of considerable importance.

An application having been made to the learned Judge for a writ of habeas corpus the learned Judge in the first place directed notice to go to the respondent and without issuing a rule nisi heard the application in the presence of both parties, the Advocate-General appearing on behalf of the respondent. In the result he refused to make any order on the application, on the ground that he was not satisfied that the respondent had the custody of the applicant in any sense sufficient to warrant his directing that the respondent should produce the body of the applicant before the Court. The learned Judge did not have occasion to deal with the main ground of the application. The main ground of the application before him and before us has been that the Bengal Criminal Amendment Act, 1925, was ultra vires of the local legislature and on that question the learned Judge did not pronounce.

The matter coming before this Court on appeal the Advocate-General took a preliminary objection that no appeal lay on the ground that the Letters Patent of this High Court since 1919 when Cl. 15 was amended excepts from the general right of appeal every sentence or order made by a Judge in the exercise of criminal Jurisdiction. Logically, therefore, there are three questions before us, first, whether there is a right of appeal, secondly, whether the respondent is a person to whom a writ of habeas corpus could be directed, thirdly, whether or not the contention that the Act of 1925 is illegal is correct. Both the question of the right of appeal and the question decided by the learned Judge are matters of some difficulty, particularly the former. In order to decide the question of the existence of the right of appeal it is necessary to determine such questions as for example whether it is open to the applicant to get relief in the nature of a habeas corpus otherwise than under S. 491 of the Criminal Procedure Code.

It appeared to us that as there are more persons than the applicant in the situation created by the Act of 1925 it was hardly consistent with the proper conduct of the public business that this question raised by him should be avoided by reason of pleas in bar directed to the particular relief claimed. It seemed to us that it would be more reasonable to examine the matter as a whole because whether this applicant has a right of appeal or not, whether or not habeas corpus is the correct form of remedy in this case, it must be the duty of this Court sooner or later to determine the very important question whether a certain number of people are being illegally detained under a void Act of the local legislature.

I propose partly as a matter of convenience and partly for other reasons to deal first with the careful and elaborate argument of Mr. Chatterjee on the question whether or not the Act of 1925 is ultra vires of the authority which

purported to make it. I would point out that in doing so, I shall treat this applicant according to the true facts of his position and not as a person committed to custody in jail. I am going to treat him as a person against whom an order has been made under S. 11, who is obeying that order, and who is apprehensive that if he disobeys the order he may either be put on his trial in a Court of law for an offence created by S. 15 of the Act, or (perhaps) be made the subject of another order under S. 11 (f).

The contention of Mr. Chatterjee is based upon the terms of the Government of India Act itself. The section with which we are chiefly concerned is S. 80A. By the first clause it is enacted that:

> The local legislature of any province has power subject to the provisions of this Act to make laws for the peace and good government of the territories for the time being constituting that province.

These words "for the peace and good government" appear in the first clause of S. 71 of the Act and also in S. 72. Section 71 says that the Local Government of any part of British India to which that section applies may propose to the Governor-General in Council the draft of any regulation for the peace and good government of that part. Thereupon the Governor-General in Council may approve it and it shall have the like force of law subject to the like disallowance as if it were an Act of the Indian legislature.

Section 72 gives the Governor-General power to make ordinances in case of emergency. The language of that section is that:

> The Governor-General may, in case of emergency, make or promulgate ordinances for the peace and good government of British India or any part thereof.

So that the phrase "peace and good government" applies not only to the local legislature but to the Governor-General's power of making ordinances and the power of making regulations in parts of India where there is no Legislative Council. In my judgment it is reasonably clear that these words are used because they are words of the widest significance and it is not open to a Court of law to consider with regard to any particular piece of legislation whether in fact it is meritorious in the sense that it will conduce to peace or to good government. It is sufficient that they are words which are intended to give, subject to the restrictions of the Act, a legislating power to the body which it invests with that authority. There is nothing in that expression which can be the foundation of any reasonable argument to the effect that the Act of 1925 was outside the jurisdiction of the local legislature.

Again there is in the history of the present question nothing which need detain us. It is quite true that the matters covered by the Act in question were previously dealt with by ordinances made by the Governor-General under S. 72. That in no way complicates or affects the question of law which is now before us. The local legislature has not purported to control or supersede any ordinance so far as the applicant is concerned or at all.

The main argument of Mr. Chatterjee —in my judgment the only argument upon this point which the Court requires to examine at any length—is the argument to the effect that the Act of 1925 is obnoxious to the 4th clause of S. 80A. That clause runs:

> The local legislature of any province has not power to make any law affecting any Act of Parliament.

Now before proceeding to consider this matter concretely it may be as well to refer to certain passages in the Government of India Act which have or may be thought to have some importance for the interpretation of Cl. 4. The phrase here is "affecting any Act of Parliament" and we have to consider carefully the implications of those words. It is clear enough from the second clause of the same S. 80A that subject to certain sanction for special cases the local legislature has power to "repeal or alter as to that province" any law made by any authority in British India whether made before or after 1919. Clause (2) of S. 65 which deals with the Indian legislature says that it shall not have power unless expressly so authorised by an Act of Parliament to make any law "repealing or affecting any Act of Parliament passed after the year 1860 and extending to British India" or certain other Acts which I need not particularly mention. Section 84 in its first clause contains these provisions:

> A law made by any authority in British India and repugnant to any provision of this or

any other Act of Parliament shall to the extent of that repugnancy but not otherwise be void.

The question, therefore, is whether the power conferred by S. 11 of the local Act of 1925 to give the directions given by the Government of Bengal to the applicant or S. 15 of the said Act which purports to make any disobedience thereof a punishable offence, are repugnant to Cl. 4 of S. 80A which says that the local legislature shall not make a law affecting any Act of Parliament. If they are, then to that extent they would be void. It they are not, then they are valid.

Attention has been drawn by Mr. Chatterjee to the fact that the Act of 1925 was passed under S. 72 E, that is to say, not by the vote of the Legislative Council but by certification. This circumstance has no bearing in my judgment upon the question before us. The statute in such circumstances says that the Bill shall on signature by the Governor become an Act of the local legislature and that the Act shall have the same force and effect as an Act passed by the local legislature and duly assented to. The question, therefore, remains whether as an Act of the local legislature it is intra or ultra vires.

Now the argument by which it is sought to show that the enactment is ultra vires of the powers conferred by the local legislature is as follows : It is said and quite correctly that it has long been accepted law in this Province that the English common and statute law as it existed in the year 1726 was applied in Calcutta not merely to Europeans in Calcutta but to all persons within the limits of the Original Jurisdiction of this Court. The history of this matter has been set out in many books of reference and it is no part of my intention to burden this judgment with an historical disquisition, but it is quite true that ever since the Charter of 1726 which established the Mayor's Court of Calcutta it has been generally accepted that the law which prevails within the Original Jurisdiction began as I have stated. English statute and English common law as it stood in 1726 was "applied" to Englishmen in this town and with certain special modifications in certain respects which do not now matter, to the Indian inhabitants as well. But at this time Calcutta was a factory, and part of the territory over which the Mogul Emperor was the sovereign. The cases to which I will refer as showing the nature of the introduction of the law of England as it stood in 1726 are three only.

The first is the well-known judgment of Lord Stowell in the case of "*The Indian Chief*" (1) which is perhaps the most accurate of all the statements of the history of this matter. The second is the case of *Mayor of Lyons* v. *E. I. Company* (2) in which Lord Brougham delivered the judgment of the Privy Council in 1836 upon the question whether the Statutes of Mortmain were part of the law of the Supreme Court. The third is the case of the *Advocate-General of Bengal* v. *Rani Swarnomoyee Dassee* (3), where Lord Kingsdown gave the judgment of the Privy Council upholding the decision of Sir Barnes Peacock and other Judges and deciding that the doctrine of forfeiture to the Crown of the properties of persons who are felons of themselves was not part of the law of England which had been introduced into or received in Calcutta. Now those three cases are sufficient to show the nature of the introduction of the English law. In Blackstone's commentaries and other books there was much learning as to what happened when Englishmen went out and settled in uninhabited countries and as to what happened in the case of conquered or ceded territories.

The cases I have referred to are important as showing this that the introduction of English law into the factory of Calcutta and its position after Calcutta had ceased to be a factory and the English Crown had obtained rights of sovereignty is not a case within any of these principles. Calcutta was not the plantation or settlement of an uninhabited country, nor in 1726 was it a country conquered from or ceded by the Moguls. The position was that there being a factory of the English in a territory which had a sovereign of its own, that sovereign permitted the introduction of English law within the limits of the factory and that introduction in the end extended not merely to Europeans themselves but to those who

(1) [1801] 3 Rob. Adm. 28.
(2) [1836] 1 Moo. P. C. 175.
(3) [1863] 9 M. I. A. 387=1 W. R. P. C. 14=2 Mor. P. C. (N. S.) 22=1 Suther. 515=2 Sar. 39 (P. C.).

associated themselves with Europeans and became part of the inhabitants of that place. In the cases of the *Mayor of Lyons* v. *E. I. Company* (2) and *The Advocate-General of Bengal* v. *Rani Swarnomoyee Dassee* (3), the question is discussed in the Privy Council on the basis that one has to see how much of the English law was introduced by the practice of the place and with the sanction of the sovereign.

If there is one more elaborate way of going wrong, open to this Court, than another, it is to argue from the analogy of the Colonial Laws Validity Act and from considerations of that kind. The plantation of places in Australia may be cases where from the moment of the settlement the English settlers from the first carried with them their own law because the sovereignty of the Crown of England went with them. That is not the case with Calcutta. English common law and statute law as in 1726 was not imported into Calcutta by virtue of any right of sovereignty in the British Crown nor by virtue of the fact that Englishmen at international law or otherwise carried with them their own statutes, but because by the sanction and permission of the sovereign of the place the community was allowed to practise its own law and to introduce in part the laws to which they had been accustomed. These laws were applied even to Englishmen only in part and only with adaptation to the local circumstances. It was on those propositions that the cases to which I have referred were decided.

Now the argument of Mr. Chatterjee is that the 4th clause of S. 80A which says that the local legislature has no power to make a law affecting any Act of Parliament prevents it from making any law which would affect the operation of any of the statutes, prior to 1726 which were introduced into the area of Calcutta at the time when the Mayor's Court Charter was first granted. I am of opinion that that argument distorts the meaning of the 4th clause of S. 80A. Such a clause as that is doubtless wider than the mere provision that the local legislature shall not have power to repeal an Act of Parliament and the word "affect" may cover any interference with the will of Parliament as expressed in a statute. But what Cl. 4 of S. 80A refers to and preserves from interference is the effect of an Act of Parliament by its own force as a determination of the will of Parliament with reference to a particular subject-matter. It may well be that it guards against any possibility that a local legislature might attempt to interfere with the operation of Acts of Parliament that do not technically extend to India. But it cannot be construed as meaning that because in 1726 when there was no other law the Courts in Calcutta adopted the law that prevailed at home subject to many modifications, therefore, any part of that law so introduced which originated in statute as distinct from common law cannot be interfered with by the local legislature. In my judgment that would be giving an extraordinary meaning to a very simple phrase appearing in an enactment which is concerned to delimit the jurisdictions of local legislatures under Parliament.

The Statute of Uses, the Statute of Frauds and various other statutes were observed in old Calcutta, other statutes were not. It is quite true that with reference to the criminal law the Courts endeavoured to put into practice English statutes and principles and English procedure including of course the procedure and principles which safeguard the personal liberty of the subject. So far as the Criminal Jurisdiction is concerned I apprehend that they did that in the case of persons accused of committing crimes within the limits of Calcutta whether they were inhabitants of Calcutta or whether they were inhabitants of the Mofussil. So late as 1842 it was stated in the case of *Maharanee of Lahore* (4) that :

> that English law as to personal liberty does prevail in Calcutta as to all its inhabitants. Beyond the local limits of Calcutta, the English law on this subject is the personal law of a class, viz., British subjects which they carry with them. The common law of England, which gives the right to this writ, has been introduced in Calcutta with the general body of the English law.

Since the time when the laws enforced by the Courts in Calcutta were taken from England in the way to which I have referred there have been various arrangements for giving local laws to Calcutta and to other parts of India. There were the old Regulations which had to be registered by the Supreme Court. By 3 and 4 Will. S. 4, C. 85 legis-

(4) [1848] Taylor 428.

lative powers were given to the Governor-General in Council. The chief land-marks in recent years have been the East India Councils Act of 1861 and and the Government of India Act of 1919. It has to be observed that when the High Courts in 1861 were founded to be one Court for the whole province the introduction of such Courts was part of a much wider scheme. The Indian Penal Code, the Code of Civil Procedure and the Code of Criminal Procedure date from about the same time, and I need only refer to the Letters Patents of 1862 and 1865 to show how these things went together. Since then, one by one the territories which formerly used to be occupied by this system of English laws introduced by practice or by consent or by the prerogative have been conquered by definite provisions made by competent legislative authority in India itself. A very good instance is the Contract Act.

At one time the English law of contract was applied in India; then that was changed. It was directed that the personal law was to apply to contracts and to questions of succession and family law. That matter was dealt with so far as contract was concerned by the enactment in the Indian Contract Act of what may be called a statutory common law. In the same way English conveyancing statutes have been replaced by a general law in the Transfer of Property Act. No part of the law has been more thoroughly covered than the criminal law. The old English law introduced into Calcutta has been superseded by the Indian Penal Code (cf. Cl. 30, Letters Patent, 1865). The old principles of English practice in criminal cases have been reduced to a Code of Criminal Procedure, which now applies in the Original Jurisdiction of the Court. If in 1924 any ingenuous inhabitant of Calcutta asked himself:

> How is it that I am not liable to be arrested and imprisoned save by due process of law and after access to the Courts of the country.

The answer I conceive would have made no reference to the Magna Charta. The answer would have been that there is no warrant for any such process in the Code of Criminal Procedure and many safe-guards in the Code of Criminal Procedure to protect against it. It does not matter whether one is an inhabitant of Calcutta or a comparatively unhappy inhabitant of Alipore, one's rights in this matter have been reclaimed from the old law introduced from England and they are part of the great statutory common law of India which has now no special application to the city of Calcutta. It is to my mind therefore in the present case doubly wrong to maintain that Act of 1925 in this respect affects Acts of Parliament. These are matters which were at one time controlled not by Act of Parliament but by the power which determined to regulate itself by certain Acts of Parliament. They have been taken under control by the legislature of India and from a lawyer's point of view the rights of the subject depend upon that code of law which is now common law throughout the whole country. Although that Code enshrines the old principles it cannot be contended that the Magna Charta and the Petition of Rights have been affected by the Act of 1925. I do not admit it as a sound proposition of present-day law that a citizen of Calcutta who goes to the Mofussil is for any purpose of the Criminal law in a dfferenl position, if he be an Indian, from any other Indian whom he meets. In my judgment the contention that the Magna Charta and the other statutes to which reference has been made entitle this Court to hold the Act of 1925 to be ultra vires is a contention which fails.

I propose next to consider whether the various enactments of the Indian legislature leading up to the Code of Criminal Procedure, in its present form have in providing a form of procedure applicable to a case of this class abolished expressly or impliedly any right there would have been in the Supreme Court to grant the high prerogative writ of habeas corpus. Now that question was adverted to in 1911 in the case of *Rudolph Stallman* (5) and it was adverted to in terms which were intended to cast grave doubt upon the authority of the Indian legislature to make any provision which would take away the old writ of habeas corpus. One of the learned Judges said that:

> If the question arose for consideration we should have to examine the principles recognised in the cases of *Ameer Khan* (6), *Maharanee of*

(5) [1911] 39 Cal. 164=15 C. W. N. 1053=12 I. C. 273=14 C. L. J. 373.
(6) [1870] 6 B. L. R. 392.

*Lahore* (4) and *Surendra Nath Banerjee* v. *Chief Justice and Judges of the High Court of Bengal* (7).

So far as I can find for many years past this question instead of being dealt with and determined has been left on the basis that it was extremely doubtful whether the Indian legislature can be supposed to have had the power of prohibiting even for certain purposes recourse to the old writ of habeas corpus. [Ss. 106 and 131 (3) of the Government of India Act would seem to have removed the doubt in the case of statute passed by the Indian legislature after 1919].

It does not seem to me to be possible to couduct public business in an atmosphere of doubt maintained after this manner upon such a point and as we have to pronounce upon the question whether there is in this case a right of appeal, I think we are called upon to decide the question. The Indian High Courts Act of 1861 (24 and 25 Vic., chapter 104) by its 9th clause gave power to Her Majesty to set up High Courts which should have such jurisdiction, power and authority as Her Majesty may, by such Letters Patent, grant and direct

> subject, however, to such directions and limitations as to the exercise of Original Civil and Criminal Jurisdiction beyond the limits of the Presidency Towns as may be prescribed thereby ; and, save as by such Letters Patent may be otherwise directed and subject to and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at time of the abolition of such last mentioned Courts.

That was S. 9 of the Act and it plainly authorised Her Majesty under the Letters Patent to put qualifications to the extent to which the powers of the old Courts should come down to the High Courts and it likewise made this very matter subject to the legislative powers of the Governor-General in Council. The Letters Patent of 1865 were issued under additional powers conferred by 28 Vic., C. 15 (*cf.* S. 6 thereof) and carried out these directions. Both by Cl. 44 and by other clauses (see Cl. 38 in particular) it was expressly provided that the provisions of the Letters Patent were to be subject to the legislative powers of the Governor-General in Council.

The matter which has given rise to difficulty is apparently this that in the East India Councils Act of the same year there was a provision in S. 22 that the Governor-General in Council shall not have the power of making any laws or Regulations which shall repeal or in any way affect "any provisions of any Act passed in this preasent Session of Parliament," etc. This provision gave rise to discussion in two cases : *Queen* v. *Meares* (8) and *Emperess* v. *Burah* (9). An examinition of these decisions and of the statutes and Letters Patents convinces me that the doubts thrown upon the power of the Indian legislature prior to the Government of India Act to make enactments which should modify the exercise by the High Court of the powers previously possessed by the Supreme Court are unfounded. I see no reason whatever for holding that the old writs or forms of procedure were put beyond the reach of the Indian legislature.

I proceed, therefore, to enquire whether according to the law in India as it now stands there is or is not power in the High Court to grant the writ of habeas corpus at common law independently of S. 491 of the Criminal procedure Code. Now in 1870 in the case of *Ameer Khan* (6) Mr. Justice Norman held that the High Court could issue the writ of habeas corpus outside the Original Jurisdiction to the Superintendent of the Jail at Alipore. In 1872 the Code of Criminal Procedure (Act 10 of 1872) was enacted which gave the right to European British subjects detained in custody whether within the limits of the High Court's Original Jurisdiction or outside those limits to apply for an order directing the person detaining him to bring him before the High Court ; in other words, for an order under S. 81 in the nature of habeas corpus, S. 82 provided that

> neither the High Courts nor any Judge of such High Courts shall issue any writ of habeas corpus *mainprise de homine replegiando*, nor any other writ of the like nature beyond the Presidency Towns.

This prohibition cannot, in my opinion, be confined to the case of European British subjects, nor has this been contended before us. In 1875 the High

(7) [1883] 10 Cal. 109=10 I. A. 171=4 Sar. 474 (P. C.).

(8) [1874] 14 B. L. R. 106.

(9) [1879] 4 Cal. 172=5 I. A. 178=3 C. L. R. 197=3 Suther. 556=3 Sar. 834 (P. C.).

Courts Criminal Procedure Act (Act 10 of 1875) in S. 148 set out various purposes for which an order in the nature of habeas corpus might be made and it gave power to the High Courts to make such orders in the case of persons within the limits of their Origiual Jurisdiction. It went on to say that

"neither the High Court nor any Judge thereof shall hereafter issue any writ of habeas corpus for any of the above purposes.

Certain particular matters were excepted, it being stated that nothing in this section applies to a person detained under Bengal Regulation 3 of 1818 and certain other Regulations. But it is quite clear that for the purposes provided for by S. 148, the intention was that relief should be granted under the section and recourse should not be had to the old prerogative writs. Rules were made by this Court under S. 148 of the Act (cf. Belchamber's Rules and Orders, Ed. 1880, p. 253). The subsequent history of the matter is shortly this that when the Code of Criminal Procedure was amended in 1882 the Acts of 1872 and 1875 were comprised in Sch. 1 as enactments repealed by S. 2 " but not so as to restore any jurisdiction or form of procedure not existing or followed " on the 1st January 1883 (Act 10 of 1882). The matter remained very much in the same position until 1923, when a right was given to everybody within the Appellate Jurisdiction of this Court to make an application under S. 491 of the present Criminal Procedure Code.

The question whieh arises is whether for any of the purposes mentioned in what is now S. 491, it is open to an applicant still to say that he will make his application, independently of that section altogether, for the prerogative writ of habeas corpus on the civil side of the High Court. I observe that it has been stated in certain cases that if there is to be any question of the abolition of this right then the legislature must say so in the most specific terms. Whether that be a correct view in a matter of procedure of this kind, need not be discussed, for the legislature has used the most specific terms ; and it is plain that the Indian Legislature never intended that the Courts in giving relief of this character should for any of the purposes mentioned in S. 491 be at liberty to act under it or under the old procedure. There may or may not be purposes for which habeas corpus is available and which are not within S. 491. For any purposes which are not within S. 148 of Act 10 of 1875 the old writ may survive within the limits of the Original Jurisdiction. After all the writ of habeas corpus had several forms and different uses. But there is no question of applicants having a choice as to whether to be governed by the Indian statute or whether to have recourse to such right as an historical enquiry of some difficulty might disclose as having been the law of the Supreme Court at a former time. The policy of S. 148 of Act 10 of 1875 is exactly the same as that of S. 50 of the Specific Relief Act with regard to mandamus. It has to be remembered that one of the reasons that led to the abolition of the Supreme Court was the fact that the various jurisdictions of the Supreme Court were wrapped in a good deal of confusion. Indeed it was stated on very high authority that for one reason or another,

the Supreme Courts have come to stand at last in circumstances in which it is a very hard matter to say what are thier rights, their duties or their use.

That was the language of Sir Charles Grey and Sir Edward Ryan, distinguished Judges of the Court (Heckle's Rules and Orders—Preface).

In my judgment the right to the kind of relief sought in this case would have been solely under the Criminal Procedure Code. This would have been an exercise of Criminal Jurisdiction and no appeal would lie under Cl. 15 of the Letters Patent. But the Bengal Criminal Law Amendment (Supplementary) Act of 1925—an Act of the Indian legislature—expressly provided that the powers conferred by S. 491 of the Code should not be exercised in respect of any person arrested or detained in custody under the Local Act. The Local Act is an Act which was intended to supplement the ordinary criminal law in Bengal and the question whether or not a particular person is legally detained under it has to be dealt with, if at all, under the Code of Criminal Procedure, I do not think therefore that the principles acted on in *Clifford and O'Sullivan* (10) govern the application of Cl. 15 of the Letters Patent to this case. The applicant has

(10) [1921] 2 A. C. 570.

done all he can to claim that he is entitled to a remedy on the civil side of the Court and apart from its Criminal Jurisdiction. If we limit him to that he would have a right of appeal at the expense of all chance of success.

I ought here to add that Act 10 of 1872 and Act 10 of 1875 do not seem to have been brought to the notice of the Judges who took part in deciding *In re R. Nataraja Iyer* (11), *Re Kochunni Elaya Nair* (12), *In re E. P. Govindan Nair* (13) or the case of *Mahomedalli* v. *Ismailji* (14).

It can serve no useful purpose now to discuss the correctness of Mr. Justice Norman's decision in the case of *Ameer Khan* (6) that habeas corpus could issue to the Mofussil, but in so far as he proceeded upon the 4th clause of the Charter of 1774 the opinion of Sundara Ayyar, J., in *In re R. Nataraja Iyer* (11) that he misconstrued that clause coincides with the views of Sir Lawrence Jenkins, C. J., and Stephen, J., in *Governor of Bengal* v. *Motilal Ghosh* (15).

With regard to the question whether the Respondent has been shown to have such custody or control of the appellant as would entitle this Court to direct a writ of habeas corpus, I am of opinion that this matter lies very close to the border-line. After examining the position which is disclosed by the affidavits I am not, however, satisfied that this particular respondent is shown to have such custody or control of the applicant as would entitle the applicant to get a direction to the respondent that he should produce him before the Court. On that point I think the decision of the learned Judge must be upheld. This appeal must be dismissed.

**Majumdar, J.**—I agree.

G.B. *Appeal dismissed.*

(11) [1912] 36 Mad. 72=23 M. L. J. 393=16 I. C. 755=(1912) M. W. N. 1012.
(12) A. I. R. 1922 Mad. 215=45 Mad. 14.
(13) A. I. R. 1922 Mad. 499=45 Mad. 922 (F.B.).
(14) A. I. R. 1926 Bom. 332=50 Bom. 616.
(15) [1913] 41 Cal. 173=17 C. W. N. 1253=20 I. C. 81=18 C. L. J. 452.

## * A. I. R. 1927 Calcutta 505

CUMING, GRAHAM AND BUCKLAND, JJ.

*Government of Assam*—Appellant.

v.

*Kantila Chutia* —Accused—Respondent.

Criminal Government Appeal No. 7 of 1926, Decided on 16th March 1927, from an order of the Sub-Divl. Mag., Golaghat, D/- 4th May 1926.

(a) *Penal Code, S. 354—Catching a woman while sleeping by neck—Offence under S. 354 is not committed (Cuming, J., Graham, J., contra).*

*Cuming, J.*—Every assault on a woman or every use of criminal force to a woman does not necessarily fall under S. 354, Indian Penal Code, namely, an assault or use of criminal force to a woman with intent to outrage her modesty. [P 506 C 1]

*Graham, J.*—Catching a woman by neck while she is sleeping is an act which clearly comes within the purview of S. 354, since the accused may fairly be presumed to have known that his act was likely to outrage the woman's modesty. [P 507 C 1 & 2]

* (b) *Criminal P. C., S. 360—Accused sent on trial for offences under Ss. 457 and 354—Evidence disbelieved and commission of offence under S. 354 not suspected—Trial of accused only under S. 457 summarily is not illegal.*

A complaint was lodged of an offence as one under S. 456, Indian Penal Code. An investigation was held and the police sent the accused up for trial upon charges under Ss. 457 and 354, Indian Penal Code. While recording the evidence the Magistrate disbelieved the whole story, tried the accused summarily under S. 457 and acquitted him, [P 507 C 1]

*Held*: that though it would have been preferable had the Magistrate proceeded regularly and tried the accused upon the two charges upon which he was sent up for trial, yet it cannot be said that the course followed by the Magistrate is one which requires that as a matter of course the case should be retried or that by reason of that course there has been a miscarriage of justice requiring that, the High Court should interfere. [P 509 C 1]

*Khundkar*—for the Crown.

*Satindra Nath Mookerji*—for Accused.

(The differing Judgments of Cuming and Graham, JJ., were as follows):

**Cuming, J.**—This is an appeal by the Government of Assam in the case of one Kantila Chutia who was tried by the Sub-Divisional Magistrate of Golaghat on a charge of lurking house trespass by night and acquitted.

The ground on which we have been asked to interfere with the order of acquittal is that in the case against the accused he was not only charged under

S. 457, but there was also a charge under S. 354 Indian Penal Code, of outraging the modesty of a woman. The learned Deputy Legal Remembrancer, on behalf of the Government of Assam, contends that a charge under S. 354, Indian Penal Code, is not triable summarily, and as there was a charge under S. 354, Indian Penal Code, the learned Magistrate was not justified in trying the case only under the charge under S. 457, Indian Penal Code, in a summary way.

The facts would appear to be these: On the 4th of April 1926 one Tileswar Mohanto came to the police-station and reported to the following effect. That last night while he was away from house, his wife was sleeping with her children and a lamp was burning in the room. At about 10 p.m. in the night Kantila Chutia, the person accused, entered the room by opening the door. His wife on seeing the accused asked why he had entered the room. On this he put out the lamp. Thereupon his wife cried out, but the accused caught her by the neck. Apparently on hearing the woman's cry people came and the man ran away. The case was entered in the station diary as one of house-breaking by night under S. 456, Indian Penal Code. S. 354, Indian Penal Code, did not appear in this first information report and quite naturally too, because it is clear from the statement made to the police that there was no suggestion that the woman's modesty had been outraged. The police, however, made an investigation and sent up charges under Ss. 457 and 354, Indian Penal Code. The Magistrate apparently not putting very much reliance on the charge under S. 354, Indian Penal Code, tried the case, as I have stated above under S. 457, Indian Penal Code. As far as I can see there was no charge made by the complainant that the modesty of his wife had been outraged. I may point out here that every assault on a woman or every use of criminal force to a woman does not necessarily fall under S. 354, Indian Penal Code, namely, an assualt or use of criminal force to a woman with intent to outrage her modesty. After all the woman herself was the best person to state whether her mcdesty had or had not been outraged by the fact that the accused had put his hand on her neck. There was no suggestion in the first information that her modesty had been so outraged. Neither in her evidence which she gave when the case of house-breaking was tried did she suggest that her modesty had been outraged. In order to constitute an offence under S. 354, Indian Penal Code, it is necessary that the assault or use of criminal force to a woman must be used with intent to outrage or knowing it to be likely that he would thereby outrage her modesty. There is nothing in the statement made to the police to show that this assualt on the woman was made with the intention of outraging her modesty. It was, apparently, as far as I can see from the circumstances of the case, made because the accused, if he had entered the hut, desired to prevent the woman from crying out and so to prevent the discovery of his presence to the neighbours.

In this view of the circumstances the learned Magistrate was quite right in thinking that there was no charge of outraging the modesty of the woman, and he therefore quite rightly did not try the accused under that charge which apparently had only been evolved during the course of the police investigation, but has tried the case on the charge as it was originally made by the complainant where, as I have pointed out, there was no suggestion that the modesty of the woman had been outraged. As I have already stated the best person who can say whether ths modesty of the woman has been outraged or not is the woman herself and she does not suggest it has been. The learned Magistrate had, therefore, jurisdiction to try the case under S. 457, Indian Penal Code, and it was triable in a summary form.

I would therefore reject this appeal against the order of acquittal. As, however, my learned brother holds a different opinion under S. 429, Criminal P. C., the case will be laid before the learned Chief Justice with a view that it may be heard by a third Judge.

**Graham, J.**—This is an appeal by the Government of Assam against an order of the Sub-Divisional Magistrate of Golaghat, dated the 4th May last, acquitting one Kantila Chutia, on a charge under S. 456 of the Indian Penal Code.

As I have the misfortune to disagree with my learned brother, who is of opinion that the appeal should be dismissed, I will state my reasons for coming to a

contrary conclusion. The facts of the case appear to be shortly as follows :

On the 4th April last one Tileswar Mohanto lodged an information at the Golaghat police-station alleging that on the previous night at about 10 p. m. while he was at the house of a neighbour, the accused Kantila Chutia entered the room where his (complainant's) wife was sleeping and caught hold of her by the neck, and that hearing his wife's screams he hastened thither accompanied by others, but that the accused had in the meanwhile decamped. His wife then produced an ear ornament, which she said she had snatched from the accused when he seized her by the neck.

The case was investigated by the police and in due course the accused was sent up for trial under Ss. 457 and 354 of the Indian Penal Code. Of these the former offence is triable by the summary procedure, while the offence under S. 354 is not so triable. The Magistrate, however, ignoring the charge under S. 354 proceeded to try the accused for an offence under S. 456, Indian Penal Code, and in due course found him not guily and acquitted him.

Mr. Khundkar, on behalf of the Crown, has contended that in view of the fact that the case against the accused was from the begining under both sections and as the police submitted a charge-sheet in respect of both offences, viz., Ss. 457 and 354 of the Indian Penal Code, the Magistrate acted illegally and without jurisdiction in trying the case summarily, that the evidence was somewhat perfunctorily recorded, and that this may have led to a failure of justice.

On behalf of the Opposite Party on the other hand it has been urged that no offence was ever disclosed under S. 354, that the Magistrate was entitled to decide what charge he would proceed with, and that we ought not to interfere unless it has been shown that there has been a failure of justice.

In my opinion the procedure adopted in this case cannot be supported. The facts stated in the first information made out a prima facie case under both Ss. 457 and 354 of the Indian Penal Code, the allegation being that the accused had at about 10 p. m. entered the room where the complainant's wife was sleeping and had seized her by the neck. That is an act which I think clearly comes within the purview of S. 354, since the accused may fairly be presumed to have known that his act was likely to outrage the woman's modesty. Indeed I am of opinion that the offence under this section would be committed even if the primary object of the accused in entering the room was theft or robbery.

It is true that in the first information S. 456 of the Indian Penal Code only was mentioned, and no reference was made to S. 354, but too much importance should not, I think, be attached to this, as these particulars are not always very carefully given, and the officer who records the information may be doubtful as to the offence which has been committed. In any view of the facts it is clear that S. 456 was not appropriate, since whether the intention was to commit theft, or rape, or adultery, there would be an offence under S. 457.

As a result of the police investigation a charge-sheet was submitted, stating that the offences under Ss. 457, 354 of the Indian Penal Code had been well-established. That being so, the Magistrate was not justified, in my opinion, in ignoring the charge under S. 354, and proceeding to try the accused summarily upon the charge under S. 457 [see *Ramanund Mahton* v. *Koylash Mahaton* (1)]. There were no materials before him at that stage upon which he could hold that the charge under S. 354 was false, nor did he record any such opinion. By adopting the course which he did, the learned Magistrate at the outset rejected a material portion of the story.

Further it cannot be gainsaid that the evidence has been recorded in a very summary fashion, and I am inclined to think that this may have brought about a failure of justice.

For the reasons stated I am constrained with all respect for my learned brother's opinion to differ from him and to hold that the appeal should be allowed, the order of acquittal set aside, and that the case should be directed to be retried according to law by a Magistrate other than the Magistrate whose order forms the subject-matter of this appeal.

(On a difference of opinion Buckland, J., as the third Judge delivered the following :)

(1) [1885] 11 Cal. 226.

**Judgment.**

**Buckland, J.**—On the 4th April 1926, the complainant reported at the police-station that in his absence from home, at 10 o'clock at night, Kantila Chutia, whom for convenience I will call the accused, though he has been acquitted, entered his house where his wife was sleeping with her children. His wife called out asking why he had entered the room. The accused extinguished the lamp which was alight, whereupon the complaint's wife called out, but the accused caught her by the neck. Other people came up and the accused ran away.

In the first instance the case was entered in the diary as one under S. 456, Indian Penal Code. An investigation was held and the police sent the accused up for trial upon charges under Ss. 457 and 354, Indian Penal Code. It is not suggested that the charge under S. 457 was substituted for the charge under S. 456 on account of the alleged offence charged under S. 354. The offences with which the accused was charged therefore were those of house-breaking by night in order to commit an offence punishable with imprisonment and assaulting a woman with intent to outrage her modesty. The former charge is triable summarily under S. 360 (1) (i) of the Code of Criminal Procedure. That under S. 354 is not so triable. The Magistrate tried the case summarily, and in doing so ignored the charge under S. 354. This is the gravamen of the complaint, for, as the accused was acquitted, the Government of Assam has appealed against the acquittal. As my learned brothers constituting the Bench which have heard the appeal have differed as to the order to be made, the case has been referred to me under S. 429 of the Code of Criminal Procedure.

The arguments which have been addressed to me by the learned Deputy Legal Remembrancer who appears on behalf of the Government of Assam are based upon the irregularity which he submits has taken place in the trial and on the facts. He has invoked the principle that a Magistrate cannot by ignoring a charge which he has no jurisdiction to try give himself jurisdiction to try an accused person upon another charge. But that is not the case here. There is no question of the jurisdiction of the Magistrate to try the accused for either of the offences, and different considerations arise.

The learned Deputy Legal Remembrancer has argued that the Magistrate approached the case with bias by reason of which he ignored the charge under S. 354. For that observation I see no grounds, the less so when the next contention is considered. That is that when the evidence of Jayanti, the wife of the complainant, had been recorded, the Magistrate should on her evidence at once have stopped the summary trial and tried the case regularly. That he could no doubt have done had he deemed it the correct course to adopt, but in that he would be influenced by the view he took of the evidence. This brings me to the argument based upon the facts.

It is obvious that if any offence under S. 354, Indian Penal Code, had been committed, an offence under S. 456 or 457, for this purpose it is immaterial, must have been first committed. The one could not happen without the other. The Magistrate was trying a case under S. 457. Unless he believed the . . . . . evidence upon the charge there was no possibility of his believing the evidence upon a charge under S. 354, Indian Penal Code. The Magistrate has clearly disbelieved the whole story. That he was entitled to do, and I am not prepared to say that a Magistrate who has seen the witnesses and heard them give their evidence is necessarily wrong because acceptance of the evidence of a lesser number of witnesses called for the defence involves disbelief of the evidence of a larger number of witnesses called on behalf of the prosecution. Had the Magistrate believed the evidence of the witnesses for the prosecution, in particular Jayanti, it may be that he would have adopted the course which it has been argued he should have followed even in the circumstances.

It has been argued that had the Magistrate, irrespective of the view which he took of the evidence, adopted that course, there would have been a fuller record and the materials before the Court would have been more ample. This is not an argument which commends itself to me because it ignores the view which the Magistrate took of the evidence, and there is no reason to suppose that he would have taken any different view of

the evidence given on the charge under S. 457 had he so proceeded.

I agree that it would have been preferable had the Magistrate proceeded regularly and tried the accused upon the two charges upon which he was sent up for trial. The result might have been in no way different, and indeed, if I have formed a correct appreciation of what influenced the mind of the Magistrate in acquitting the accused, it would not have been different, but that does afford an excuse for the Magistrate not having proceeded in the first instance in a manner more strictly correct.

Having regard to the whole case I am not prepared to say that the accused should have been convicted of the charge under S. 457. Nor am I of the opinion that the course followed by the Magistrate is one which requires that as a matter of course the case should be retried or that by reason of that course there has been a miscarriage of justice requiring that this Court should interfere.

In the view which I have expressed no question need be considered whether the facts disclose an offence under S. 354, Indian Penal Code, and I express no opinion upon the point.

The appeal will be dismissed.

The accused will be discharged from his bail-bond.

D.D. *Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 509

SUHRAWARDY AND CAMMIADE, JJ.

*Krishen Doyal Jalan*—Accused—Petitioner.

v.

*Corporation of Calcutta* — Opposite Party.

Criminal Reference No. 1181 of 1926, Decided on 21st January 1927, from an order of the Presy. and Muncipal Mag., Calcutta.

*(a) Calcutta Municipal Act, S. 363—Party to proceeding under, is not exempted from administration of oath under Criminal P. C., S. 342.*

**A party to a proceeding under S. 363 of the Calcutta Municipal Act relating to demolition of an unauthorised structure is not an accused person and as such is not exempted from administration of oath under S. 342 of the Criminal P. C.: *A. I. R. 1925 Cal. 1251, Expl.***

[P 511, C 1]

*(b) Calcutta Municipal Act—Proceedings by Municipal Magistrate are not criminal.*

The Act has invested Municipal Magistrates with power to deal with certain proceedings under the Act which are not criminal proceedings. One of such powers is to order demolition of unauthorised structures. [P 511, C 1]

*(c) Calcutta Municipal Act, S. 363—Punishment.*

The demolition of uulawfully erected work is not a punishment within the meaning of S. 363 : 8 *C. W. N.* 142, *Foll.* [P 511, C 2]

*(d) Calcutta Municipal Act, S. 483—Offence.*

So long as there is no disobedience by a party to the order of demolition of an unauthorised structure passed by the Magistrate, he commits no offence. [P 510, C 2]

*Sures Chandra Taluqdar* and *Mohendra Kumar Ghose*—for Petitioner.

*K. N. Chaudhuri, Baranoshibasi Mukerji* and *Bhudhar Haldar*—for Opposite Party.

**Judgment.**—In this matter the petitioner has been ordered by the Municipal Magistrate to demolish certain sheds in a house abutting on the Central Avenue. The present Rule has been obtained by him on the ground that the Magistrate was wrong in administering oath to the petitioner, examining him as a witness and subjecting him to cross-examination. Before proceeding further with regard to the merits of the question raised by the ground on which the Rule was issued, it is necessary to observe that there is nothing in the record to show that the Magistrate put the petitioner into the box and forced him to take oath and subjected him to cross-examination. From the judgment passed by the Magistrate in this case it may be presumed that the petitioner himself went to the box to support his case, namely, that the projections were of long standing. In one part of his judgment the Magistrate says:

> The defendant gave evidence but did not say anything about this shed or the verandah though the defence witness Puran Mall spoke in his evidence that he has been seeing the verandah for the last 6 or 7 years.

There is no sense in supposing that the Magistrate put the witness into the box, for evidently his evidence could not have helped the prosecution. In the petition before us it is not distinctly stated that it was under the order of the Magistrate that the petitioner took oath. The only allegation made therein is that the petitioner was examined on oath and was submitted to cross-examination by the opposite party. We have no doubt

that the petitioner offered himself as a witness in the case to support his version of the story and having thus offered himself as a witness it is not fair for him to come to this Court and say that the Magistrate was wrong in administering oath to him.

We will now deal with the important question raised in this case, namely, that the administration of oath to the petitioner was such an illegal procedure as to vitiate the proceeding before the Municipal Magistrate. The bar to the administration of oath to an accused person is contained in S. 342, Criminal P. C. This brings us to the consideration of the first question that arises, namely, whether the Criminal P. C. applies to the present proceedings before the Municipal Magistrate. In S. 1 of the Code, it is said that it shall not affect any special or local law now in force or any special jurisdiction or power conferred by any other law for the time being in force. S. 5 (2) provides :

> All offences under any other law shall be investigated and, etc.

This again brings us to the consideration of another question, namely, whether the act which the petitioner is said to have done, namely, the erection of unauthorised sheds is an offence within the meaning of the Criminal P. C. In several cases it has been held that the Criminal P. C. is applicable to prosecution under the Calcutta Municipal Act, See the cases of *Sisir Kumar Mitter* v. *Corporation of Calcutta* (1), *Umesh Chandra Mitter* v. *Corporation of Calcutta* (2) and *Sew Prosad Poddar* v. *Corporation of Calcutta* (3). The point was not argued in those cases; and moreover the Court was considering the proceeding in which the petitioners had been fined under the penal provisions of the Calcutta Municipal Act. We are not disposed to hold that the proceeding held by the Magistrate in which the question was whether the sheds in question were new and so liable to be demolished is governed by the provisions of the Criminal P. C., which would attract the application of several sections of the Code relating to procedure which on the face of them are inapplicable to proceedings such as the present.

(1) A. I. R. 1926 Cal. 786=53 Cal. 631.
(2) A. I. R. 1926 Cal. 614.
(3) [1904] 9 C. W. N. 18.

The question that pertinently arises in this case is whether the petitioner can be said to have committed an "offence"; in other words, whether the petitioner is an "accused" person within the meaning of the Criminal P. C. S. 363 under which the present order is passed by the Municipal Magistrate provides that if the Corporation are satisfied that the erection of any building has been commenced without obtaining the written permission of the Corporation, they may after giving the owner of such building an opportunity of being heard, apply to a Magistrate, and such Magistrate may, make an order directing that such erection be demolished by the owner thereof. If this order by the Magistrate is not carried out, under S. 488 the person on whom it is passed renders himself liable to punishment for an "offence," which word appears for the first time in the penal clause of S. 438 and to a fine, the amount of which is prescribed in the section. Under S. 536 of the Act the Magistrate may order him to pay a fine as well as require him to demolish the work, thus making a distinction between a punishable offence and an executive order.

In our opinion so long as there is no disobedience by a party to the order of demolition passed by the Magistrate, he commits no offence, i. e., when he disobeys that order, he then can be said to have committed an offence and renders himself liable to punishment under S. 488 of the Act. It is further to be observed that proceedings under S. 363 are started not upon complaint but upon an application made to the Magistrate, whereas in proceedings for rendering a person liable to punishment for an offence under the Act, complaint has to be made before a Magistrate within the period prescribed by the Act. It has now been held in the Full Bench case of *Narendra Chandra Rudra Pal* v. *Sabarali Bhuiya* (4) that a party to a proceeding under S. 145, Criminal P. C., is not an accused person. In the same sense a party to a proceeding under S. 133, Criminal P. C., is also not an accused person though under the section the Magistrate has power to order the demolition or removal of the obstruction. [*Hirananda Ojha* v. *Emperor* (5)]. S. 340,

(4) A. I. R. 1925 Cal. 822=52 Cal. 721 (F.B.).
(5) [1905] 9 C. W. N. 983=2 C. L. J. 149.

Criminal P. C., also lends countenance to the view that parties to quasi-criminal proceedings are not accused persons, for in such proceedings a party thereto may offer himself as a witness. If he is taken to be an accused person, the Magistrate has no right under S. 342 (4) to administer oath to him. The position is so anomalous that it cannot possibly be maintained. If a party to a proceeding under Chap. XII of the Criminal P. C., is not an accused person, it is hardly conceivable that a party to a proceeding under the Municipal Act relating to demolition of an unauthorised structure is an accused person and as such exempted from administration of oath. It has, however, been argued on the authority of the case of *Ram Gopal Goenka* v. *Corporation of Calcutta* (6) that a Municipal Magistrate in Calcutta is a Presidency Magistrate and so the Criminal P. C., will apply to proceedings before him in all its details. The case referred to does not lay down any such proposition. The learned Chief Justice has made some observation which is clearly an obiter and not necessary for the decision of that case, namely, that the Municipal Magistrate being a Presidency Magistrate, the High Court has jurisdiction under S. 439, Criminal P. C., to revise his orders. The learned Chief Justice has further observed that whether the proceeding before the Municipal Magistrate is civil or criminal, the High Court has under both the Codes, viz., the Civil P. C. and the Criminal P. C., power to interfere with the orders of the Municipal Magistrate. That case, therefore is no authority for the broad proposition that because the Municipal Magistrate happens to be a Presidency Magistrate the Code of Criminal Procedure will apply to all proceedings before him. Under S. 531 of the Calcutta Municipal Act, 1923, the Municipal Magistrates are appointed by the Local Government for the trial of offences against the Act or rules made thereunder. The Act has also invested such Magistrates with power to deal with certain proceedings under the Act which are not criminal proceedings. One of such powers is to order demolition of unauthorised structures. The case of *Corporation of Calcutta* v. *Keshub Chandra Sen* (7) is an authority for the view that the order of demolition passed under the Calcutta Municipal Act is not a punishment for an offence. Offence has been defined in S. 4, Cl. (o), Criminal P. C., as any act or omission made punishable by any law for the time being in force. The word "punishable" has not been defined in the Code, but in S. 53, I.P.C., every kind of punishment has been mentioned of which demolition of structure is not one. We agree with the observation made in the case of *Corporation of Calcutta* v. *Keshub Chandra Sen* (7) that the demolition of unlawfully erected work is not a punishment within the meaning of S. 631, Sub-S. (1) of the Calcutta Municipal Act (B C. III of 1899) corresponding to S. 363 of the present Act. There is great force in the observation of the Municipal Magistrate in his explanation that an order under S. 363 or S. 364 of the Calcutta Municipal Act is in the nature of a mandatory injunction passed by a civil Court. On these grounds we are of opinion that the proceeding before the Municipal Magistrate was not vitiated by any illegality or irregularity and this Rule must be discharged.

R.D. *Rule discharged.*

(6) A. I. R. 1925 Cal. 1251=52 Cal. 962.

(7) [1902] 8 C. W. N. 142.

---

## A. I. R. 1927 Calcutta 511

MUKERJI AND GRAHAM, JJ.

*Saradindu Mohan Mukerjee* and *others* —Decree-holders—Petitioners.

v.

*Girish Chandra Tewari* — Judgment-debtor—Opposite Party.

Civil Rule No. 914 of 1926, Decided on 3rd December 1926, from an order of the Munsif, Ranaghat, D/- 29th June 1926, in Title Execution Case No. 1953 of 1921.

*Civil P. C., O. 21, R. 90—Sale set aside—Before dismissing execution, reasonable opportunity should be given to decree-holder for taking further steps.*

Where an execution sale is set aside, before dismissing execution proceedings the Court should give a reasonable opportunity to the decree-holder to take such steps as he may be advised in the matter. [P 512, C 2]

*Girija Prasanna Roy Choudhury*, *Ramesh Chandra Sen* and *Bankim Chandra Banerjee*—for Petitioners.

*Tarakeswar Pal Choudhury*—for Opposite Party.

**Mukerji, J.**—This Rule had been issued to show cause why an order passed by the Munsif of Ranaghat, dated the 29th June 1926, and referred to in the petition upon which the Rule has been issued should not be set aside or such other or further orders passed as to this Court may seem fit and proper. It is not necessary to refer to the earlier proceedings that took place in connexion with the execution case out of which this Rule has arisen. We may begin for our present purposes from the 29th June 1926, the date on which the order in question was passed by the learned Munsif. On that day the learned Munsif disposed of certain proceedings that were pending before him for setting aside the sale which had taken place in the said execution proceedings. This order appears to have been passed sometime at about 4-30 in the afternoon. There is some controversy as to whether the pleader for the petitioner decree-holder was present in Court at that moment or not and it is fairly clear that the petitioner's karpardaz was absent at the time. After setting aside the sale by the order to which I have already referred the learned Munsif proceeded then and there to pass an order calling upon the decree-holder to take steps, if any, at once, obviously meaning that the decree-holder was to ask for issue of fresh sale proclamation. The next order which appears on the order-sheet and bears the very same date runs in these words:

> The decree-holder's pleader Mr. S. C. Mitra was informed of the above order. He did not sign that order. No further step taken by the decree-holder. The execution case is dismissed for default.

As regards the question whether the decree-holder's pleader was informed of the order or not and whether he refused to sign the order although it was shown to him, I do not think we need go into that matter at the present moment. The finding of the learned Subordinate Judge in the present case is that it has not been established that in point of fact the Court had personally asked the pleader to sign the order-sheet or to take steps—which was the interpretation that was sought to be put upon the order recorded by the learned Munsif. It may be taken for our present purpose that the pleader had information of the order which the learned Munsif had passed and that he did not sign the order-sheet or take any steps. The position then is this that the proceedings in connexion with the setting aside of the sale had terminated. Immediately after the passing of the order in the said proceedings a further order was passed by the Munsif calling upon the decree-holder to take steps and it must be remembered that this last mentioned order could not possibly have been passed very much earlier than 4-30 p. m. and shortly thereafter finding that no body was present or prepared to take steps on behalf of the petitioner the learned Munsif proceeded to dismiss the execution proceedings for default. To say the least the haste with which the proceedings were conducted by the Munsif on this particular occasion appears to my mind to have been somewhat indecent.

Be that as it may, the order dismissing the application for default does not, in my judgment, appear to have been at all a reasonable one. It could not be expected that the decree-holder or his men should be present in Court in order to find out the precise moment at which the proceedings for setting the sale aside would terminate and to hear what further order was going to be passed by the Court. I am of opinion that in dismissing the execution proceedings for default in the way that he did the Munsif acted with such material irregularity as calls for our interference under S. 115 of the Code of Civil Procedure.

I am accordingly of opinion that that order should be set aside and that the execution proceedings should be restored and a reasonable opportunity should be given to the decree-holder to take such steps as he may be advised in the matter. The Rule is made absolute. The petitioner is entitled to his costs two gold mohurs.

**Graham, J.**—I agree.

R.D. *Rule made absolute.*

## A. I. R. 1927 Calcutta 513

MUKERJI AND GRAHAM, JJ.

*Jnanendra Chandra Ghose*— Decree-holder—Petitioner.

v.

*Royman Sheikh*—Applicant—Opposite Party.

Civil Revision No. 730 of 1926, Decided on 3rd January 1927, from the judgment of the Dist. J., Khulna, D/- 14th June 1926, in Miscellaneous Appeal No. 179 of 1925.

*Bengal Tenancy Act, S. 170, Cl. (3)—Under-raiyati interest in contravention of S. 85 (2) is not an incumbrance and holder of such interest is not entitled to make deposit.*

The expression "voidable on the sale" in S. 170, Cl. (3), does not mean an interest injuriously affected by the sale but an interest which subsists and which is to be avoided after the sale, and refers to interests coming within the description of "incumbrance", which, unless steps are taken to avoid them, subsist after the sale. [P. 513, C. 2]

An under-raiyati interest in contravention of S. 85 is not such an incumbrance: *A. I. R.* 1926 *Cal.* 934 (*F. B.*) and 19 *C. W. N.* 412, *Foll.* [P. 513, C. 2]

*Hemendra Chandra Sen* — for Petitioner.

**Mukerji, J.**—This Rule is directed against an order passed by the Munsif, 1st Court, Khulna, on the 12th November 1925. The petitioner before us obtained a rent decree against the recorded tenant in respect of a non-transferable occupancy holding and in execution of that decree the said holding was advertised for sale. The Opposite Party, who claims to have taken an under-raiyati lease in respect of the said holding from the said recorded tenant, applied to deposit the decretal amount in accordance with the provisions of S. 170, Cl. (3) of the Bengal Tenancy Act. The learned Munsif allowed the said application of the Opposite Party being of opinion that notwithstanding the provisions of S. 85 of the Bengal Tenancy Act, the Opposite Party being in possession of the holding must be regarded as one having an interest therein which was voidable on the sale of the holding and being further of opinion that on a previous occasion the said Opposite Party had been allowed to make the deposit of a certain amount which formed the decretal amount in a certain rent decree which had been obtained by the petitioner against the recorded tenant and the said amount had been withdrawn by the petitioner.

Against this order the petitioner preferred an appeal to the District Judge of Khulna but the learned District Judge held that the appeal was incompetent and in that view of the matter rejected the same. Now, as regards the withdrawal of the deposit on a previous occasion that has been referred to above, all that need be said is that no facts have been found nor for the matter of that are there any to be found on the record which would go to raise an estoppel as against the present petitioner. As regards the question whether the Opposite Party has an interest in the holding voidable on the sale within the meaning of S. 170, Cl. (3) of the Bengal Tenancy Act, the decision of the Full Bench of this Court in the case of *Jharu Mandal* v. *Khetra Mohan Bera* (1) appears to me to leave no room for any doubt whatsoever on the point. It has been held in that case that the expression "voidable on the sale" does not mean an interest injuriously affected by the sale but an interest which subsists and which is to be avoided after the sale and in the judgment of Mr. Justice Chatterjea at page 732 of the reports it is said that apart from the authorities on the point the words "interest voidable on the sale" refer to interests coming within the description of "incumbrance," which, unless steps are taken to avoid them, subsist after the sale. Now, S. 161 of the Bengal Tenancy Act, sub-Sec. (a) defines "incumbrance" as used in Chap. XIV of the Act and it says that the term "incumbrance," used with reference to a tenancy, means any lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein, and not being a protected interest as defined in S. 160 of the Act. An under-raiyati interest then is an "incumbrance", but to be so it must be such an under-raiyati interest as the law recognises as valid.

Now, it appears from the terms of the lease under which the Opposite Party claims the under-raiyati interests that the expression "*Putra Poutrathi Krame*" has been used. The lease, therefore, to all intents and purposes, was a perpetual lease. That being so, in view

(1) A. I. R. 1926 Cal. 934 (F. B.).

of the provision of sub-Sec. (2) of S. 85 of the Bengal Tenancy Act, it was a document which should not have been admitted to registration and consequently by reason of the provisions of sub-Sec. (1) of that section, the sub-lease was not valid as against the landlord. It has been held in numerous cases in this Court of which mention need be made only of one, namely the case of *Asutosh Singha Roy* v. *Bonomali Sain* (2), that an under-raiyati lease registered in contravention of S. 85, sub-Sec. (2) of the Bengal Tenancy Act is not operative against the superior landlord of the occupancy raiyat. That being so, it cannot be contended that the interest which the Opposite Party acquired in the aforesaid lease was one which it was necessary to avoid on the sale. In my opinion, therefore, the Opposite Party did not acquire such interests as would entitle him to make the deposit that he intended to do. The order passed by the learned Munsif, therefore, in my opinion, is without jurisdiction.

The Rule, therefore, is made absolute and the order against which it is directed is set aside. The petitioner is entitled to his costs in this Court which we assess at two gold mohurs.

**Graham, J.**—I agree.

D.D. *Rule made absolute.*

(2) [1913] 19 C. W. N. 412=21 I. C. 104=18 C. L. J. 252.

---

## A. I. R. 1927 Calcutta 514

CHOTZNER AND DUVAL, JJ.

*Madari Sikdar* and *others*—Accused—Petitioners.

v.

*Emperor*—Opposite Party.

Criminal Misc. Petition No. 124 of 1926, Decided on 10th September 1926, from the orders of the Addl. Dist. Mag., Mymensingh, D/- 6th and 27th July 1926 respectively.

(a) *Criminal P. C. (amended* 1923), *S.* 162—*Amendment makes it obligatory on Court to give copies to accused.*

The effect of the amendment of S. 162 is to make it obligatory on the Court to give the accused copies of the statements subject only to the exclusion of irrelevant matters which the public interest requires should not be disclosed. [P 515, C 1]

(b) *Criminal P. C. (amended* 1923), *S.* 162—*Accused is entitled to request for copies only after witness is called and cross-examined.*

The accused is entitled to be furnished with copies of statements of witnesses only after the witness has been called for the prosecution and the cross-examination has laid the foundation for the suggestion that the evidence given by the witness in Court is contradicted by his statement recorded under S. 161 and not before the commencement of the preliminary enquiry. [P 515, C 1]

(c) *Evidence Act, S.* 145—*Object is to give witness a chance of explaining his statement.*

The object of the provision in S. 145 is to give the witness the chance of explaining or reconciling his statements before the contradiction can be used as evidence. [P 515, C 1]

*Radhika Ranjan Guha* — for Petitioners.

**Judgment.**—This Rule raises the important question as to the stage at which an accused person is entitled to be furnished with a copy of the statements of the prosecution witnesses recorded by a Police Officer under the provisions of S. 161 of the Criminal Procedure Code. S. 162 is in these terms:

> No statement made by any person to a Police Officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statsment or record, be used for any purpose (save as hereinafter provided) at any inquiry, or trial in respect of any offence under investigation at the time when such statement was made.

The first proviso is as follows:

> Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the Court shall, on the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by S. 145 of the Indian Evidence Act. When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

The second proviso is as follows:

> Provided further, that if the Court is of opinion that any part of such statement is not relevant to the subject-matter of the inquiry or trial or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests, it shall record such opinion (but not the reasons therefor) and shall exclude such part from the copy of the statement furnished to the accused.

It will be observed that in the amended S. 162 of the Criminal Procedure Code there is a departure from the procedure

laid down in the former section. In the former section it was obligatory on the Judge at the request of the accused to refer to the writing made under S. 161, but it gave the Judge a discretion to decide whether a copy should be given to the accused. The effect of the amendment is to annul the Judge's discretion, and to make it obligatory on him to give the accused copies of the statements subject only to the exclusion of irrelevant matters which the public interest requires should not be disclosed.

The next question is at what stage the accused is entitled to make his request. It is plain, first of all, that it must be after the witness has been called for the prosecution and not before the commencement of the preliminary enquiry. Secondly, the statement can only be used (i) if duly proved and (ii) in order to contradict the witness as provided for by S. 145 of the Evidence Act. In order to "prove it duly" the accused must prove it either by cross-examination of the witness or of the police officer who recorded it, but to use the words of S. 145 of the Evidence Act "if it is intended to contradict him" i. e., the (witness):

> by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

The object of the provision is to give the witness the chance of explaining or reconciling his statements before the contradiction can be used as evidence, and in *Bal Gangadhar Tilak* v. *Shriniwas Pandit* (1), the Privy Council pointed out the impropriety of treating the oral testimony of a witness as rebutted by statements by him contained in documents in evidence unless such statements were put to him in cross-examination.

This decision, as also the wording of S. 145 of the Evidence Act, make it clear that it is at the time of cross-examination and not before that the previous statements of a witness can be put to him. But the cross-examination must lay the foundation for the suggestion that the evidence given by the witness in Court is contradicted by his statement recorded under S. 161 of the Criminal Procedure Code and it is only then that the accused is entitled to ask the Judge to refer to the writing and grant him copies. S. 162 does not impose the duty upon the Judge of granting copies of the statement recorded under S. 161 before the cross-examination has been opened. This view of the law has also been taken by the Madras High Court in *In re Peramasami Rayudu* (2). We may add that if the Legislature had intended to invest the accused with the right to have the copies at any stage of the trial, it must have said so.

In the present case we have examined the deposition of the witnesses named in paragraph 3 of the petition as well as of the Investigating Officer (P. W. 28). In no case was the witness asked in cross-examination whether he had made the same statements before the Investigating Officer as he had made in Court; and beyond asking the Sub-Inspector whether he had examined the witnesses under S. 161, which he admitted, the defence put no question to him as to the statements which the witnesses had made before him. As, therefore, no foundation had been laid in cross-examination for the suggestion that the witnesses had made previous statements which, if produced, would have contradicted their testimony in Court, we are of opinion that the learned Magistrate was justified in refusing to grant copies of those statements. The Rule is, accordingly, discharged.'

R.D. *Rule discharged.*

(1) [1915] 39 Bom. 441=29 I. C. 639=42 I. A. 185 (P. C.).

(2) A. I. R. 1926 Mad. 183.

---

## A. I. R. 1927 Calcutta 515

CUMING AND GREGORY, JJ.

*Monohar Ali*—Accused—Appellant.

v.

*Emperor*—Opposite Party.

Criminal Appeal No. 445 of 1926, Decided on 8th December 1926, from a complaint made by the S. J., Noakhali.

*Criminal P. C., S. 476—Witness's false evidence in no way affecting the case—Complaint should not be lodged.*

If a false statement made by a witness is immaterial to the case, in the course of which it is given, and if nothing hinges on it, then clearly this is not a fit case for making a complaint for the prosecution of the witness.

[P 516, C 1]

*Jitendra Kumar Sen Gupta* and *Raj Kumar Chakravarti*—for Appellant.

*Kunndkar*—for the Crown.

**Judgment.**—This is a complaint made by the Sessions Judge of Noakhali under S. 476, Criminal Procedure Code, against one Monohar Ali on the ground that this person gave false evidence in his Court. In his complaint the learned Judge states that Monohar appears to have given false evidence before him in the Sessions Case No. 1 of April 1926, having made the following statement :

I know Golam Rahaman, son of Idris constable's sister. He married P. W. Monu Chowkidar's sister now dead.

The learned Judge is of opinion that this statement that "Monu Chowkidar's sister now dead" is false because it was contradicted by Manu Chowkidar himself. He states that his sister is not dead but has been divorced and is still living. It may here be stated that the case in which this false evidence is alleged to have been given was a case of theft brought againt Noab Ali by one Nazir Ahmed. It was alleged in that case that Noab Ali had entered Nazir Ahmed's house and stolen a number of articles. Mr. Khundkar, the counsel for the Crown, admits that whether Monu Chowkidar's sister was alive or whether she was dead had nothing whatever to do with the case and nothing in the case turned upon it. Obviously, therefore, whether she was alive or dead made no difference whatever in the case. If the false statement made is clearly immaterial and if nothing hinges on it then clearly this is not a fit case for making a complaint for the prosecution of the witness.

The result is we must order that this complaint should be withdrawn.

J.V. *Order accordingly.*

---

## A I. R 1927 Calcutta 516

RANKIN AND DUVAL, JJ.

*Moslem Sirkar* and *others*—Petitioners.

v.

*Emperor*—Opposite Party.

Criminal Revisions Nos. 599 and 600 of 1926, Decided on 26th August 1926, from the order of the Dy. Mag., Tangail, D/- 30th April 1926.

(a) *Forest Act, Ss. 29 (a) and 32—Notification under S. 29 (a) fixing no date is bad—Conviction for cutting trees reserved by such notification is illegal under S. 32*

A notification, under S. 29 (a) which does not fix any date from which any class of trees is to be reserved, is bad and a conviction for cutting trees described as reserved in such notification under S. 32 is illegal. [P. 518, C. 1]

(b) *Forest Act, Ss. 63 and 29—Offence under S. 29—Forest Officer cannot arrest without warrent—His custody is not lawful within Penal Code, S. 225.*

Under S. 63 a Forest Officer cannot arrest, without warrent, persons committing an offence under S. 29 and his custody is not a lawful custody under S. 63 within the meaning of S. 225, Penal Code. [P. 518, C. 1]

*P. C. Mitter* and *M. Nurul Huq*—for Petitioners.

*Khundkar*—for the Crown.

**Rankin, J.**—These are two Rules issued by this Court in a case arising in connexion with a forest called the Atia Pargana, a large tract of land in the district of Mymensingh, which is described as interspersed with jungles and trees between cultivations, and inhabited by 1,00,000 people. The Rule No. 599 is in respect of some seven persons who have been convicted under Ss. 143, 224, 225 and also 225/114 of the Indian Penal Code, and sentenced to divers terms of imprisonment. These accused have been convicted, to put the matter shortly, for obstructing the forest officer by rescuing from his lawful custody certain persons whom he had apprehended on the ground that they were cutting gazari trees in this forest ; those trees having been reserved.

The Second Rule No. 600 deals with three people, the people who were in the custody of the forest officer, and who have been convicted under Section 32 of the Indian Forest Act, being Act VII of 1878, for cutting these gazari trees. It will be sufficient for the present purpose to take those Rules together.

It appears that this forest has not yet been made a reserved forest by any notification finally operative under Section 19 of the Act. The notifications with which we are concerned are notifications in respect of protected forests, and they are two in number. The first is dated the 16th February 1925. It recites that owners of more than two-thirds of the shares of the land had represented in writing their desire that the said lands be managed on their behalf by the Government forest officer and so on. It goes on to say :

In the exercise of the power conferred by the penultimate paragraph of S. 38 of the Indian Forest Act, the Governor-in-Council is pleased to apply to the said land the provisions of S. 2 and Ss. 28 to 33 both inclusive of the said Act.

The penultimate paragraph referred to in S. 38 is this :

In either case the Local Government may, by notification in the local official Gazette, apply to such land such provisions of this Act as it thinks suitable to the circumstances thereof and as may be desired by the applicants,

and under that power what is applied is Ss. 2 and 28 to 33. The notification goes on :

In the exercise of the powers conferred by the proviso of S. 28 of the said Act, the Governor-in-Council is further pleased to declare the said land to be protected forest, but not so as to abridge or affect any existing rights or any individual or community, which rights will be inquired into and recorded in such manner as the Governor-in-Council may think sufficient.

Upon reference to S. 38, which is the first section in Chapter IV, it appears that in the ordinary way the Act does not authorize a notification declaring a land to be a protected forest, except there has first been an inquiry and settlement regarding the rights of persons in the land. But the notification with which I am now concerned takes advantage of the special provision contained in the proviso to that section, which says that if the Local Government thinks that the inquiry and record will occupy such length of time that the rights of Government will be in the meantime endangered, the Local Government may, pending the inquiry and record, declare such land to be protected forest, but so as not to abridge or affect any existing rights of individuals or communities. Now following upon that notification there was another notification, dated the 5th November, 1925, and this was, so far as I am concerned with it, under S. 29, Clause (a) :

In the exercise of the power conferred by Clause (a) of S. 29 of the Indian Forest Act, the Governor-in-Council is pleased to declare the following species of trees to be reserved in the Atia protected forest, in the districts of Dacca and Mymensingh,

and then come (1) gazari trees. Clause (a) of S. 29 is in the following terms :

The Local government may, from time to time, by notification in the local official Gazette (a) declare any class of trees in a protected forest, or any trees in any such forest, to be reserved from a date fixed by such notification.

So far as the accused persons in Revision No. 600 of 1926 are concerned, the charge against them is that under S. 32 of the Act they have committed an offence against the notification of the 5th November, 1925. So far as the accused in Revision No. 599 are concerned, the charge against them is to the effect that the forest officer was, under S. 63 of the Forest Act, entitled without warrant to arrest any person against whom a reasonable suspicion existed of his having been concerned in any forest offence punishable with imprisonment for one month or upwards. But it has to be observed in connexion with the lawful powers of the forest officer that S. 63 also provides that nothing in this section shall be deemed to authorize such an arrest for any act which is an offence under Chapter IV of this Act, unless such act has been prohibited under S. 29, Clause (c). These are, I think, the relevant sections for the purpose of these two Rules.

It turns out that there are two contentions which have to be considered. The first contention is that under the proviso to S. 28 the notification must be one which does not abridge or affect any existing rights of any individual, and the point can, therefore, be taken whether, under such notification, it is possible by another notification under S. 29 (a) to prevent individuals cutting gazari trees in which they have any proprietary right. That question does not require to be decided for the purpose of either of the present rules.

The second question is whether the notification in this case under S. 29 (a) is not a bad notification altogether for the simple reason that the person who drafted it did not follow out the clause which he was supposed to apply. The words are :

Declare any class of trees in a protected forest or any trees in any such forest, to be reserved from a date fixed by such notification.

The notification which is before us fixes no date whatsoever. It is quite clear from the Forest Act that the intention is that the notification shall be made in the local official Gazette nominating a future date and that, under S. 30, the intermediate time shall be spent in causing translations into the language of the district of this notification to be affixed in a conspicuous place in the neighbourhood of the forest with the result that some attempt should be made to give the cultivators, the tenants or the inhabitants of the locality information of the prohibition contained in the notification before it comes into effect. It turns out that whoever had the management of this matter made no

attempt to apply the plain words of the clause. Under these circumstances, I cannot entertain a doubt that the notification is bad altogether, and that, if it is desired to affect people's rights by means of such notification, the sooner the Act is properly complied with the better it will be.

That being so, I am not of opinion that the accused in Rule No. 600 have been guilty of any offence under the Forest Act at all, because it is reasonably clear that there is no notification which will base an offence under S 32. With regard to the persons who have been found guilty of rescuing from lawful custody of the Forest Officer, it appears that under S. 63 no arrest is authorised for any act which is an offence under Chapter IV of this Act and this offence is a breach of S. 29 (a) which is made an offence by S. 32, which is part of Chapter IV. There was no valid notification under S. 29 (c), and what was done was not within that clause. It is not possible to say that the custody was lawful custody under S. 63. The notification being bad, was not an offence at all. But in any case the custody cannot be asserted under S. 63 of this particular Act.

In these circumstances, it does not appear to me that any of the offences of which the petitioners in Rule No. 599 have been convicted can be sustained. In my judgment both these Rules must be made absolute. The convictions and sentences should be set aside, and the petitioners in both these Rules, if they are on bail, will be discharged from their bail bonds.

**Duval, J.**—I agree.

R.D. *Rules made absolute.*

---

## ✻ A. I. R. 1927 Calcutta 518

GREAVES, J.

*Mitchell* and *others*—Plaintiffs.

v.

*McNeill* and *Co.*—Defendant.

Suit No. 938 of 1926, Decided on 20th August 1926.

(a) *Originating summons — Claim by creditor of estate—Decision as to—Proper course is suit and not summons.*

The procedure by originating summons is not applicable to a contentious matter of the nature of a claim by a creditor to recover from the estate of the deceased whose estate is under administration. The procedare would be by suit. [P 518, C 2]

✻ (b) *Income Tax Act* (1922), *S.* 2 (2)—*Estate of deceased person is not liable.*

There is no provision in the Act for the assessment to income-tax or to super-tax of the estate of any deceased person. [P 520, C 1]

✻ (c) *Income Tax Act* (1922), *S.* 30 (2)—*Appeal may be entertained after* 30 *days.*

Section 30 uses the word "ordinarily" and thus there is nothing to prevent the authorities entertaining an appeal preferred after the expiration of 30 days. [P 520, C 1]

✻ (d) *Contract Act, S.* 69—*Firm dissolved by death of partner—Surviving members paying super-tax in respect of profits of the deceased partner—Payment is voluntary and cannot be recovered from estate of the deceased—Income Tax Act* (1922), *S.* 56 *Proviso.*

A partner of a firm died and his interest therein ceased from his death. The surviving member was charged super-tax in respect of the profits of the deceased partner computing the total income as under Proviso to S. 56. The partner made the payment and sought to recover it from the estate of the deceased partner.

*Held*: that the payment was voluntary and thus not recoverable. [P 520, C 1]

*L. P. E. Pugh*, *Surita* and *Boren Bose*—for Plaintiffs.

*Pankridge*—for Defendant.

**Greaves, J.**—This is an originating summons taken out by the administrator with the Will annexed of the estate of Donald Fraser Mackenzie, deceased, and by the executors of his Will which has been proved in England to determine a question which arises in the administration of his estate. The question is as to the liability of the estate to pay to McNeill & Co., a certain sum of money paid by them in circumstances which I will presently state. In my view the procedure by originating summons is not applicable to a contentious matter of this nature which is really a claim by McNeill & Co., to recover from the estate the sum in question. The procedure should have been by suit but as all parties agree to the matter being decided on originating summons I propose to decide it.

The facts which I take from the plaint are not, I understand, in dispute. Donald Fraser Mackenzie died on the 14th June 1924. At the date of his death he was a partner in the firm of McNeill & Co., but on his death his interest in that firm ceased as from the 31st March 1924. His income from the firm for the financial year 1923-24 was assessed to income-tax,

and income-tax has been paid on that sum. A return for the purposes of income-tax was made to the revenue authorities by the administrator on the 14th March 1925. On the 20th March 1925 the revenue authorities purported to assess Donald Fraser Mackenzie's estate to super-tax for the year 1924-25. The assessment was made on Donald Fraser Mackenzie's estate, c/o Messrs. McNeill & Co., under S. 29 of the Indian Income Tax Act (XI of 1922), and a notice was issued under the said Act. By Cl. 5 of the notice the assessee was informed that an appeal might be presented under S. 30 (1) of the said Act within 30 days.

Details of the assessment were given at the end of the notice and they were described as "details of super-tax assessment for 1924-25."

The administrator wrote demurring to the assessment on the 11th May 1925 on the ground that the estate took no interest in the profits of the firm for 1924-25. The revenue authorities replied that the assessment for 1924-25 was made on the income of the previous year ending the 31st March 1924, which income was received by Donald Fraser Mackenzie or by his estate.

Tha plaint states that the executors intended to contest the claim on the following additional grounds to that stated in the latter, namely, (1) that the assessment was invalid as not having been made on any individual, (2) that the Act does not provide for making an assessment on a dead man's estate, and (3) that the income of a dead man was not income of his executors.

Thereafter the revenue authorities demanded payment of the amount from McNeill & Co., who paid the sum on the 19th September 1925. No assessment was made on that firm in respect of this sum.

Under these circumstances McNeill & Co., have demanded repayment to them of this sum from Donald Fraser Mackenzie's estate.

The following questions are raised by the summons:—(1) Whether the plaintiffs as representing the estate are liable to pay the said sum to McNeill & Co.? (2) Whether the payment was a voluntary payment? (3) Whether the plaintiffs, as administrators and executors, were legally bound to pay the said sum? (4) Whether the assessment was a valid assessment? (5) Whether McNeill & Co. had any interest in the payment? (6) What are the respective legal rights and liabilities in respect of the said sum?

"Assessee" is defined in the Indian Income Tax Act, 1922, as a person by whom income-tax is payable. S. 3 provides that where any Act of the legislature enacts that income-tax shall be charged for any year at any rate or rates applicable to the total income of an assessee, tax at that rate shall be charged for that year in accordance with the provisions of the Act in respect of all income, profits and gains of the previous year. S. 22 deals with the making of a return and provides for service of notice on a person required to make a return. S. 26 provides that when any change occurs in the constitution of a firm, the assessment shall be made on the firm as constituted at the time of making the assessment. S. 30 fixes the time of appealing against the amount or rate of assessment or against liability for assessment ordinarily as 30 days from the notice of demand. S. 44 provides that when any business has been discontinued, every person who was a member of a firm at the time of discontinuance shall be jointly and severally liable for the amount of the tax payable in respect of the profits and gains of the firm.

Chapter IX of the Act deals with super-tax. S. 55 provides that in addition to the income-tax charged for any year there shall be charged, levied and paid for that year in respect of the total income of the previous year of any individual, unregistered firm, Hindu undivided family or company an additional duty of income-tax at the rate or rates laid down for that year by Act of the Indian legislature.

Section 56 provides that the total income for super-tax is to be the total income assessed for income-tax, and a proviso to that section provides that in computing the total income of a member of a registered firm (which is defined) in S. 2 (14) where any change occurs in the constitution of the firm, the profits or gains of the firm during the previous year shall be deemed to have been received in that year by the members of the firm as constituted at the time of the making of the assessment to super-tax in proportion to their shares in the firm at that time. S. 57 (1) provides

that in case of an assessee who is a member of a registered firm and whose share is liable to super-tax residing out of British India, the remaining members of the firm are jointly and severally liable to pay the super-tax due from the non-resident member.

Section 58 (1) makes all the provisions of the Act applicable to super-tax except (inter alia) S. 3, and sub-S. (2) of that section provides that super-tax is payable by the assessee direct except as provided in S. 57.

Now, nowhere in the Act can I find that any provision is made for the assessment to income-tax or to super-tax of the estate of any deceased person, and S. 55 which imposes super-tax expressly provides that it shall be charged, levied and paid on the total income of the previous year of any individual, unregistered firm, Hindu undivided family or company. Consequently in my opinion .it was not within the competence of the incom-tax authorities to assess Donald Fraser Mackenzie's estate to super-tax and there was no liability on the estate to pay such tax. It is true that the assessment was made and not appealed against within the 30 days fixed by S. 30, but that section uses the words "ordinarily" and there was nothing to prevent the authorities entertaining an appeal preferred after the expiration of 30 days.

This being so, as the estate was under no liability to pay the tax, the payment by McNeill & Co., was a voluntary payment so far as the estate is concerned and does not fall within the provisions of S. 69 of the Indian Contract Act. Some point was made that McNeill & Co., made the payment without any assessment being made as the surviving members of the firm, but I think that nothing turns on that as under the proviso to S. 56 they could not have escaped from payment and doubtless this was known to them when they made the payment, and it may have been in their interest to make the payment on the assessment made on Donald Fraser Mackenzie's estate rather than await an assessment on themselves which possibly would have involved a higher payment if Donald Fraser Mackenzie's share of profits for 1923-24 was aggregated with their own shares of profit for that year and super-tax at a higher rate thereby became payable on such aggregated income.

In the view I take it is not necessary for me to decide whether the super-tax in question was payable in respect of the profits of 1923-24 or whether such profits were only taken as a measure of taxation for the tax imposed for 1924-25.

I answer the first question raised by the summons in the negative and the second in affirmative so far as the estate of Donald Fraser Mackenzie is concerned. I answer the third question in the negative as also the fourth, but of course I have had no opportunity of hearing the income-tax authorities on this question. Questions five and six require no answer.

The plaintiffs can retain and pay their costs out of the estate as between attorney and client. I make no order as to the costs of McNeill & Co.

D.D. *Order accordingly.*

---

## A. I. R. 1927 Calcutta 520

SUHRAWARDY AND CAMMIADE, JJ.

*Dibakar (Bene)*—Accused—Petitioner.

v.

*Saktidhar Kabiraj*—Complainant—Opposite Party.

Criminal Revision No. 1136 of 1926, Decided on 20th January 1927, from the order of the Dist. Mag., Bankura.

(*a*) *Criminal P. C., Ss.* 236 *and* 237—*Scope.*

If on the facts proved of which the accused may be taken to have notice, another offence appears to have been committed by him and if on those facts it seems doubtful as to which offence the accused has committed, he may be convicted under Ss. 236 and 237 of the other offence. [P 521, C 2]

(*b*) *Criminal P. C., S.* 423 (*b*) (2)—*Appellate Court may alter conviction if accused is not prejudiced—Charge and conviction under S.* 379 *Penal Code—Alteration to conviction under S.* 143, *Indian Penal Code by appellate Court—Accused is prejudiced.*

If the prosecution establishes certain acts constituting an offence and the Court misapplies the law by charging and convicting an accused person for an offence other than that for which he should have been properly charged, and if notwithstanding such error the accused by his defence endeavoured to meet the accusation of the commission of these acts, then the appellate Court may alter the charge or finding and convict him for an offence which those acts properly constitute, provided the accused be not prejudiced by the alteration in the finding. Such an error is one of form rather than of substance. But where the accused is charged under S. 379, Indian Penal Code, and the appellate Court alters the conviction to one under

S. 143, Indian Penal Code, the accused is prejudiced: 26 *Cal.* 363, *Rel. on.*

[P 521 C 2, P 522 C 1]

(c) *Penal Code, S.* 143—*Going to particular place armed with lathis with more than five persons is not offence.*

The mere fact that the accused went to a particular place armed with lathis with more than five persons will not ordinarily constitute an offence under S. 143. [P 522 C 1]

*Debendra Narain Bhattacharjee* and *Narendra Krishna Basu*—for Petitioner.

*Bir Bhusan Dutt* and *Durgadas Roy*—for Opposite Party.

**Judgment.**—The accused in this case was convicted by the trial Magistrate of an offence under S. 379, Indian Penal Code, and sentenced to pay a fine of Rs. 60. On appeal the District Magistrate set aside the conviction under S. 379, but convicted the accused under S. 143, Indian Penal Code, maintaining the sentence. This Rule has been obtained on the ground that the procedure followed by the District Magistrate is not correct in law and the petitioner having been convicted under S. 379, Indian Penal Code, on the findings arrived at by the appellate Court, he should have been acquitted. The view that where a person is charged under one offence and convicted of a different offence by the appellate Court with which he was not charged, it is beyond the power of an appellate Court under S. 423 (b) (2), has long prevailed in this Court. A case which is exactly in point is the case of *Jatu Singh* v. *Mahabir Singh* (1). There too the accused were convicted of theft and that was the only charge which they were called upon to answer. In appeal the District Magistrate held that no theft had been committed but he convicted them for being members of an unlawful assembly. It was held that the accused were called upon to answer only the charge of theft and as they were never called upon to answer any other charge, they could not be convicted on appeal of an offence of an entirely different character. This view was subsequently followed in the case of *Yakub Ali* v. *Lethu Thakur* (2), where the accused were originally convicted of rioting, which conviction was changed by the Sessions Judge on appeal to one under Ss. 448 and 323, Indian Penal Code. A similar view was expressed in *Sita Ahir* v. *Emperor* (3) in which the further question that was not considered in the previous cases, namely, whether the defect was cured under S. 535 or 537 (a), Criminal P. C., was considered. The learned Judges held that the irregularity complained of was not curable under those sections.

This point of view has now been, in our opinion, modified to some extent by the recent decision of the Judicial Commitee in the case of *Begu* v. *King-Emperor* (4). In that case the accused were charged under S. 302, Indian Penal Code, only but they were ultimately convicted under S. 201, Indian Penal Code, for concealing the body of the deceased. Their Lordships held on the construction of S. 237, Criminal P. C., that the conviction was justified in law. It is, therefore, correct to say that the law as it stands at the present moment is that if on the facts proved of which the accused may be taken to have notice, another offence appears to have been committed by him and if on those facts it seems doubtful as to which offence the accused has committed, he may be convicted under Ss. 236 and 237, Criminal P. C., of the other offence. But we have to consider in each particular case as to whether the procedure followed by the Judge, though it may be strictly correct in law, is one which should be adopted in that case. The correct view seems to us to have been laid down in the case of *Lala Ojha* v. *Queen-Empress* (5), where the law is thus stated:

> If the prosecution establishes certain acts constituting an offence and the Court misapplies the law by charging and convicting an accused person for an offence other that that for which he should have been properly charged, and if notwithstanding such error the accused by his defence endeavoured to meet the accusation of the commission of these acts, then the appellate Court may alter the charge or finding and convict him for an offence which those acts properly constitute, provided the accused be not prejudiced by the alteration in the finding. Such an error is one of form rather than of substance.

Applying the law as enunciated there to the facts of the case, we find that the accused was convicted by the Court of first instance on the allegation that the tree which he is said to have carried away did not belong to him. The trial

(1) [1900] 27 Cal. 660.
(2) [1902] 30 Cal. 298.
(3) [1912] 40 Cal. 168=16 I. C. 161=13 Cr. L J. 593.
(4) A. I. R. 1925 P. C. 130=6 Lah. 226=52 I. A. 191 (P.C.).
(5) [1899] 26 Cal. 863=3 C. W. N. 653.

Court did not come to any distinct finding with regard to the ownership of the tree, but relying upon the settlement record he held that it must have belonged to the complainant. The lower appellate Court has found that the accused and his men were under the bona fide belief that the tree belonged to their tenant and therefore they could not be convicted of theft. But as they had gone to the spot armed, they ought to be convicted under S. 143, Indian Penal Code. We cannot say that in the present case the accused has not been prejudiced by the alteration of the conviction to one under S. 143, Indian Penal Code. The defence in the two cases must be distinct. In the case under S. 379 the accused has only to establish his bona fides. In a case under S. 143, Indian Penal Code, he has to establish that the number was not more than five or that the object was not unlawful and that he did not attempt to enforce a lawful object by unlawful means. In this case the learned vakil for the petitioner says that he is in a position to prove that the persons who went armed with him were labourers who went to cut the tree and carry it. These are matters which could have been properly raised and tried if the original charge was under S. 143, Indian Penal Code. It is doubtful if the irregularity like the one in the present case cannot be cured under S. 535 or 536, as it is only a matter of omission to frame a charge or a defect in the charge. But as we have found that in this case the accused has been prejudiced in his defence by his not being called upon in the trial Court to meet a case under S. 143, Indian Penal Code, we hold that the conviction is not justified.

There is also another point in the case namely, that on the findings of the learned District Magistrate, the conviction under S. 143, Indian Penal Code. cannot be sustained. His finding is that the accused bona fide believed that he had a right to the tree; but he with others committed an offence for being members of an unlawful assembly because he went there with more than five persons armed with lathis. The mere fact that he went there armed with lathis with more than five persons will not ordinarily constitute an offence under S. 143, Indian Penal Code. It is said that when the accused went to the spot there was no one there, so his object was not to use criminal force to get possession of the tree, but his object may, on the other hand, be to resist any aggression by the other party. In the view that we take of these questions we are of opinion that the rule ought to be made absolute and we order accordingly. The conviction and sentence are set aside. The fine, if paid, will be refunded.

R.D. *Conviction set aside.*

---

## * A. I. R. 1927 Calcutta 522

MUKERJI AND GRA HAM, JJ.

*Nobin Chandra Bhattacharyya Chowdhuri*—Judgment-debtor—Appellant.

v.

*Debendra Sen* and *others*—Respondents.

Appeal No. 81 of 1926 and Rule No. 820-M of 1926, Decided on 7th January 1927, against the Appellate Order of the Dist. J., Mymensingh, D/- 21st December 1925.

* (a) *Civil P. C., S.* 65—*Purchaser in execution of his own money decree between date of decree nisi and decree absolute in a mortgage-suit is entitled, if he takes without notice of mortgage to have the mortgage decree satisfied out of properties not sold to him first—Civil P.C., O.* 21, *R.* 64, *and O.* 34, *R.* 4.

In a case of a sale of some of the mortgaged properties by a third person in execution of his money decree against a mortgagor, between the passing of the decree nisi and decree absolute in a mortgage suit it is not a question of absolute right but rather a question of justice or injustice to be determined in view of the fact that on the one hand the mortgagee is entitled to have his dues satisfied out of the mortgaged properties and on the other that the purchaser may have bought without notice of the mortgage and paid not merely for the equity of redemption but for an absolute interest in the property. The mortgagee is not the master of the situation. On the other hand it cannot be said that the Court has got an absolute discretion in the matter. What has got to be considered is the question as to the respective equities which arise in favour of the parties. So far as the mortgagee is concerned, his rights extend only to the realisation of his dues, and if he can satisfy the Court that by the sale of the properties in the order which the Court proposes to lay down for the sale he would be prejudiced in the enforcement of his rights, the Court will have to accede to the request which the mortgagee will make. On the other hand, if the Court finds that the purchase by the stranger was made bona fide and although at a Court sale but without notice of the mort-

**gage and on payment not merely of the value of the equity of redemption but the value of the absolute interest in properties, then the Court will have to make such provisions as regards the order of sale as would work no injustice to the purchaser. If the purchase by the stranger was a collusive one or if he paid only for the equity of redemption, no such equity will arise in his favour:** *(Case law considered).*

[P. 523, C. 2]

*Jogesh Chandra Roy, Kali Kinkar Chakravarti* and *Satindra Chandra Khasnavis*—for Appellant.

*Gunada Charan Sen* and *Annoda Charan Karkoon*—for Respondents.

**Mukerji, J.**—This appeal arises out of an order passed by the District Judge of Mymensingh on the 21st December 1925 reversing an order which had been passed by the Subordinate Judge of that District on the 21st October 1925. The appellant before us held a decree for money, dated the 10th September 1923, against a certain judgment-debtor. That judgment-debtor had prior to the date of the said decree mortgaged certain properties in favour of the decree-holder respondent in this appeal. The mortgagee instituted a suit on his mortgage on the 22nd December 1924 and obtained a decree nisi on the 15th April 1925. A final decree was subsequently passed on the 16th May 1925. Between these dates, that is to say, on the 20th April 1925 the appellant in execution of his own decree for money purchased some of the mortgaged properties, that is to say, lots Nos. 1, 2 and 5 and some dags of lot No. 8. The mortgagee after obtaining the final decree and in execution thereof advertised all the mortgaged properties for sale. An application was thereafter made on behalf of the appellant praying that the mortgaged properties with the exception of those which he had purchased in execution of his money decree should be sold first and if the proceeds of that sale were not sufficient for discharging the decretal debt due to the mortgagee, then the properties which he had purchased might be put up to sale. The learned Subordinate Judge on the 21st October 1925 passed an order to the effect that lots excepting Nos. 1, 2 and 5 should be sold first and if that sale was not sufficient for satisfying the mortgagee's decree, then lots Nos. 1, 2 and 5 should also be sold. Against this order the mortgagee decree-holder preferred an appeal to the District Judge and the learned District Judge being of opinion that the mortgagee decree-holder had an absolute right to determine the order in which the properties should be sold and relying upon the authority of the decision of a case, *Khirodhar Singh* v. *Gajadhar Lal Mahto* (1), to which reference will be made hereafter, allowed the appeal, set aside the order of the Subordinate Judge, dated the 21st October 1925, and directed that the properties would be put up to sale in the order chosen by the mortgagee decree-holder. Against this order the present appeal has been preferred to this Court.

Two extreme positions have been taken up by the two parties before us in this appeal. On behalf of the appellant it has been contended that the Court has an absolute discretion in determining the order in which the properties have to be sold, and inasmuch as the learned Subordinate Judge in the exercise of that discretion passed an order to the effect that the properties other than lots Nos. 1, 2 and 5 should be sold first, the learned District Judge ought not to have interfered in appeal with that order. On behalf of the respondents, the mortgagee decree-holders, it has been urged that the mortgagee decree-holder is the person who has got the absolute right to lay down the order in which the properties that are mentioned in his decree should be sold and that the Court has no discretion to interfere with the order in which the mortgagee decree-holder desires the sale to take place. I may say at the very outset that the question as to whether all the properties mentioned in the mortgage decree should be advertised for sale or not does not arise in the present case and in fact the proceedings in the Court below passed that stage at which such a question might arise.

Now, on behalf of the appellant, reliance has been placed upon the terms of the mortgage decree which, it may be mentioned, strictly follows the words of O. 34, R. 4 of the Civil Procedure Code, it being stated therein that the mortgaged property or a sufficient part thereof should be sold in default of the defendant paying the amount under the decree, as suggesting that the Court has a discretion in determining the order in which the properties are to be sold. Reliance has also been placed on behalf of the appel-

(1) A. I. R. 1925 Pat. 484.

lant upon a number of decisions to which I shall now refer. The first case relied upon is that of *Syed Mahommad Saddik* v. *Ram Lal Mandar* (2). In that case two properties had been mortgaged by one deed and subsequent to the said mortgage the mortgagor sold one of the properties to a third person. The mortgagee thereafter brought a suit on the mortgage and got a decree against the mortgagor as well as the transferee, and then applied for execution against both the properties, but the Court ordered that the execution should proceed against the property which still belonged to the mortgagor. On that order being passed, the mortgagee had the petition for execution dismissed and thereafter made a fresh application for execution against the property which the judgment-debtor had transferred in favour of the third party. This Court in dealing with that case made certain observations which are to the effect that the discretion as to the order in which execution should issue is vested in the Court alone and the decree-holder cannot be allowed to fetter the hands of the Court by suggesting a particular order in which the properties should be sold.

The next case to which reference has been made is the decision of *Raj Keshwar Prosad* v. *Mahommad Khalil-ul-Rahman* (3). In that case it was laid down that ordinarily the right of selling property in execution of a mortgage decree in a particular order rests with the decree-holder, but that a subsequent mortgagee who has purchased a property in execution of a decree on his own mortgage is entitled to compel the prior mortgagee to proceed against properties not included in the subsequent mortgage before proceeding against the properties included in his own mortgage, even though at the time of his purchase, although not at the date of his mortgage, he was aware of the existence of the prior mortgage.

The next case to which our attention has been drawn is that of *Bhagwan Chandra Das* v. *Dharam Narayan Das* (4), where it was broadly laid down that the holder of a decree on a mortgage is entitled in execution of the decree to have all the mortgaged properties advertised and put up to sale even though a part of the property had been purchased by a stranger, but that it is entirely in the discretion of the Court to direct in which order the properties should be sold. The learned Judges in their judgment in that case purported to follow the decision of this Court in the case of *Syed Mahommad Saddik* v. *Ram Lal Mandar* (2) to which I have already referred.

Nextly, the appellant has relied upon the Full Bench decision of the Madras High Court in the case of *Kommineri Appayya* v. *Mangala Rangayya* (5). In this case it was laid down that a bona fide purchaser, who purchases for value a portion of the mortgaged property without notice of such mortgage, has no right, in a suit by the mortgagee to enforce his mortgage, to insist that the portion which had not been sold to him must be proceeded against first and the portion purchased by him must be sold only if there is any balance due, but under Ss. 67 and 68 of the Transfer of Property Act, the mortgagee is entitled to an order that the mortgaged property or a sufficient part thereof should be sold on default of payment; but that it is competent to a Court under S. 88 of the Transfer of Property Act to order a sufficient portion of the mortgaged property to be sold, and if the portion not sold by the mortgagor is sufficient, and if the mortgagee will not be prejudiced, the Court may, by its decree, direct such unsold portion to be sold first, and if the decree directs the sale of the whole property, the Court, in execution, may first bring to sale the portion unsold and, if the sale proceeds be sufficient, stop the sale of the portion sold by the mortgagor.

On the other hand, the respondents have relied upon a number of decisions, the facts in connexion with some of which no doubt are distinguishable from the facts in the present case but from which, it is said, certain general principles follow which go to support the contention that has been but forward on their behalf. A good deal of reliance has been placed on behalf of the respondents and naturally so upon the decision, on the authority of which the learned District Judge purports to have arrived at his decision. That is the case of *Khirodhar Singh* v. *Gajadhar Lal Mahto* (1), where on a consideration of a large

(2) [1910] 15 C. W. N. 80=7 I. C. 4.
(3) A. I. R. 1924 Pat. 459=3 Pat. 522.
(4) A. I. R. 1924 Pat. 802=3 Pat. 962.
(5) [1907] 31 Mad. 419=18 M. L. J. 229.

number of authorities bearing upon the question the learned Judges held that the executing Court ought not ordinarily to fetter the discretion of the mortgagee decree-holder to put to sale whatever property he wishes to sell first and in a case where the applicant before the Court had purchased subject to the mortgage, there is no equity in his favour and, therefore, the mortgagee should be allowed to sell the properties in any order he pleased. This decision undoubtedly supports the view which the respondents contend for, but in the application of this decision here there is some difficulty as I shall presently point out. But before doing so it would be convenient to refer to the other cases upon which the respondents have relied in the course of their argument.

There is a decision of this Court, to which our attention has been drawn, in the case of *Kristodas Kundu* v. *Ram Kant Roy Chaudhuri* (6). In that case there was a contest between a mortgagee and an attaching creditor who held certain money decrees against the mortgagor and it was observed by this Court that the mortgagee had undoubted rights with which the Court would not interfere at the instance of the attaching creditor. The next case is the decision of this Court in *Lala Dilawar Saha* v. *Dewan Balakiram* (7), where an owner of a certain property mortgaged it to one person and then a portion of it to another and in a suit that had been instituted for a declaration that the properties in the hands of the latter person were liable to sale in execution of a decree on the mortgage, it was held that it was not incumbent on the mortgagee in suing to enforce his mortgage to proceed first with that portion of his property which had not been sold by the mortgagor. Our attention has also been drawn to the cases of *Magniram* v. *Mehdi Hossain Khan* (8), *Amir Chand* v. *Bakshi Sheo Prosad Singh* (9) and *Tara Prosonna Bose* v. *Nilmani Khan* (10), but they have very little bearing upon the present question. They are cases in which such questions arose as are involved in Ss. 56, 81 and 82 of the Transfer of Property Act.

(6) [1881] 6 Cal. 142=7 C. L. R. 396.
(7) [1885] 11 Cal. 258.
(8) [1903] 31 Cal. 95=8 C. W. N. 30.
(9) [1906] 34 Cal. 13 =4 C. L. J. 573.
(10) [1914] 41 Cal. 413=25 I. C. 118.

It is necessary just to refer to one other case that has been relied upon on behalf of the respondents and that is the case of *The Midnapur Zemindary Co., Ltd.* v. *Abinas Chandra Mitter* (11). There it was held that if three properties are equally liable in the hands of the mortgagor for a mortgage executed by him and during the subsistence of that mortgage they passed into other hands, they remain stmilarly liable; but the owners of those properties who have acquired rights by such transfers are entitled to have their liability apportioned rateably amongst themselves, but that was a right between the holder of the properties inter se and it did not affect the mortgagee's right to enforce his right against all or any of the properties. In the last place reliance has been placed on behalf of the respondents on a passage in Sir Rash Behari Ghose's Law of Mortgage, Fifth Edition, Vol. 1, p. 389, where the learned author after citing two decisions, one in the case of *Nowa Kowar* v. *Abdul* (12) and the other in the case of *Ram Dhun* v. *Mohesh* (13) proceeded to observe as follows:

> These cases can be supported only on the ground that the purchasers bought without notice of the mortgage, and paid not for the equity of redemption but for an absolute interest in the property; as there can be no question that ordinarily where the purchaser under an execution acquires merely the equity of redemption in a part of the mortgaged property he cannot compel the mortgagee to proceed first against the portion of the property which has not been sold for a purchaser who buys under an execution cannot set up the defence of a bona fide purchase for value without notice of the encumbrance. But a purchaser claiming under a conveyance executed by the mortgagor occupies a very different position, as the vendor prima facie conveys to the purchaser not simply the equity of redemption, but the property itself free from any liability to contribute to the mortgage debt.

The contention of the respondents, as based on this passage, is that under no circumstances can a purchaser at an execution sale force the mortgagee to realise his decretal dues in the first instance from out of the properties which still belong to the mortgagor, while a purchaser under a private conveyance from the mortgagor may have such a remedy.

(11) [1919] 23 C. W. N. 308=50 I. C. 790=29 C. L. J. 297.
(12) [1864] W. R. 374.
(13) [1882] 9 Cal. 406=11 C. L. R. 565.

The learned author has relied upon a number of decisions which are quoted in support of it and on examining some, though not all, of them, it is clear to my mind that the passage does not bear the interpretation which the learned advocate appearing on behalf of the respondents contends for. It means to lay down that there is a difference between the title acquired by a purchaser under a conveyance and that acquired at a Court sale because in the first place the Court sells only the right, title and interest of the judgment-debtor subject to all existing equities against the properties and the certificate of sale, though it may not disclose the existing incumbrances, cannot enlarge the scope of that sale or pass a higher title than what the judgment-debtor really has and that it is otherwise with a conveyance executed by the judgment-debtor which prima facie conveys what it purports to do, and, nextly, because there is a presumption that the incumbrances were duly disclosed in the sale proclamation. The passage means that ordinarily there is a distinction between the two classes of purchasers; but if the purchaser at an execution sale can establish that as a matter of fact he purchased without notice of the mortgage and paid not for the equity of redemption but for an absolute estate, this distinction vanishes. In such a case the principles laid down in the two decisions which are referred to immediately before this passage may be applicable. In the case of *Nowa Kowar* v. *Abdul* (12) one of the estates in mortgage having been sold under an execution levied by an unsecured creditor, the purchaser resisted the attempt of the mortgagee to enforce his security against the property purchased by him without in the first instance proceeding against the properties which still belonged to the mortgagor, and this defence was allowed, the Court observing as follows:

> The sale does not release that estate from the mortgage but it forces the plaintiff to take measures in the first place to recover the amount due to him from the remaining estates included in his mortgage deed. If any balance remains after he has realized all he can from these two remaining estates, he can then return to the third estate to recover the balance. No injustice is done to the plaintiff by requiring him to take satisfaction out of the funds which are within his power for this purpose, while, on the other hand, very great injustice might be done to other parties by allowing the plaintiff to proceed against the estate which has already been sold.

A similar principle was adopted in the other case, viz., that of *Ram* v. *Mohesh* (13).

I am of opinion that in a case of this description it is not a question of absolute right but rather a question of justice or injustice to be determined in view of the fact that on the one hand the mortgagee is entitled to have his dues satisfied out of the mortgaged properties and on the other that the purchaser may have bought without notice of the mortgage and paid not merely for the equity of redemption but for an absolute interest in the property. I am of opinion that the view taken by the learned District Judge that the mortgagee is the master of the situation cannot be supported. On the other hand, I do not think that it can be said that the Court has got an absolute discretion in the matter as the Subordinate Judge seems to have thought.

What has got to be considered is the question as to the respective equities which arise in favour of the parties. So far as the mortgagee is concerned, his rights extend only to the realisation of his dues, and if he can satisfy the Court that by the sale of the properties in the order which the Court proposes to lay down for the sale he would be prejudiced in the enforcement of his rights, the Court will have to accede to the request which the mortgagee will make. On the other hand, if the Court finds that the purchase by the stranger was made bona fide and although at a Court sale but without notice of the mortgage and on payment not merely of the value of the equity of redemption but the value of the absolute interest in properties, then the Court will have to make such provisions as regards the order of sale as would work no injustice to the purchaser. If the purchase by the stranger was a collusive one or if he paid only for the equity of redemption, no such equity will arise in his favour. In this view or the matter the decision in the case of *Khirodhar Singh* v. *Gajadhar Lal Mahto* (1), in my opinion, lays down the law correctly. The difficulty, however, in the present case is that neither of the Courts below has arrived at any finding on the questions whether the appellant's purchase was a bona fide one or not, or whether he paid for the equity of

redemption only or for an absolute interest in the property.

The order of the learned District Judge, therefore, will have to be set aside and the case will be sent back to his Court so that he may now go into the question aforesaid in the light of the observations made above and then deal with and dispose of the case in accordance with law. If the learned District Judge thinks that it will be necessary for the ends of justice to have further evidence, it will be quite open to him to pursue that course and allow the parties to adduce such evidence.

Costs of this appeal which we assess at two gold mohurs will abide the result.

The Rule is discharged.

**Graham, J.**—I agree.

R.D. *Case sent back.*

---

## A. I. R. 1927 Calcutta 527

SUHRAWARDY AND MITTER, JJ.

*Harbhajjan Sao*—Accused—Petitioner.

v.

*King-Emperor*—Opposite Party.

Criminal Revision No. 1220 of 1926, Decided on 27th January 1927, against an order of Addl. Chief Presidency Magistrate, Calcutta, D/- 8th December 1926.

(a) *Criminal P. C., Ss. 102 and 103—Bengal Excise Act* (1909).

Ss. 102 and 103, Criminal P. C., do not apply to the search made under the Bengal Excise Act. [P. 527, C. 2]

(b) *Evidence Act, S. 25—Police Officer.*

An Excise Officer is not a Police Officer within S. 25 of the Evidence Act : 46 *Cal.* 411, *Foll.* [P. 528, C. 2]

*Mrityunjay Chatterjee* and *Basanta Kumar Mukherjee*—for Petitioner.

*Santosh Kumar Pal*—for the Crown.

**Judgment.**—This rule has been obtained on the grounds, two of which relate to the legality of the search made by the excise officer and the third to the reception in evidence of an alleged confession made by the accused petitioner. The case for the prosecution is that the petitioner lived in premises No. 57/2 Baloram Ghose's Lane. On receipt of certain information the Excise Sub-Inspector raided the house and found in two rooms excisable articles such as French liquor and cocaine. He held the search in the presence of three witnesses two of whom have been examined in the case. These witnesses deny that they were present during the whole search or that certain articles said to have been found in the different places were found in those places in their presence. The learned Presidency Magistrate has suspected the veracity of these witnessess and has convicted the petitioner for an offence under S. 46 of the Bengal Excise Act (V of 1909), and sentenced him to three months' rigorous imprisonment. The Magistrate in his explanation has submitted that he did not rely either upon the search or upon the confession of the petitioner, but the articles were found in the premises which was for the time being in possession of the petitioner and under S. 47 of the Excise Act the petitioner having failed to account for such possession he was convicted as aforesaid.

Now with regard to the grounds upon which this rule has been issued, as to the search not having been in accordance with Ss. 102 and 103, Criminal P. C., it is contended on behalf of the Crown that these sections do not apply to the search made under the Excise Act. We think that there is a great deal to force in this contention. S. 1, Cl. (2), Criminal P. C., says that nothing in the Code shall affect any special or local law now in force, or any special jurisdiction or power conferred. S. 5 (2), says all offences under any other law (other than the Penal Code) shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into etc, etc. In view of these provisions, if we find that there is a special provision in the Excise Act, relating to search made under the Act it is clear that the provisions of Ss. 102 and 103 do not apply to searches under the Excise Act.

In the first place, the search under the Excise Act can be made by persons other than police officers. Chap. IX of

the Excise Act details the powers of different persons to make the search. It enables an officer or person empowered under the Excise Act to inspect and search any persons or any vessel, vehicle, etc., in which he may reasonably suspect any excisable articles to be. Then again the collector or any excise officer may institute a search without a warrant in emergent cases and for that purpose enter or search any place by day or night and may seize anything found therein which he has reason to believe to be liable to confiscation under the Act.

There is nothing in this section to show that the search must be made under the provisions of the Criminal Procedure Code. S. 16 of the Opium Act (1 of 1878) expressly says that a search made under S. 14 or S. 15 of that Act shall be made in accordance with the provisions of the Criminal Procedure Code. The absence of any such provision in the Excise Act, lends great support to the argument that it was not the intention of the legislature to extend the special provisions relating to search under the Criminal Procedure Code to searches held under the Excise Act. But it is usual that the excise officers making searches under the Act try to observe the procedure laid down in the Criminal P. C., to secure evidence, and in this case the excise officer took with him three witnesses to witness the search. Now, if these witnesses in Court deny that they saw the entire search, the mere fact of such denial does not matter if the Magistrate believes that it was properly held.

Two witnesses have been examined in the case. They signed the search list in which it is mentioned what articles were found in which places. In Court they denied that they saw these articles having been discovered in the places mentioned in the list. The Magistrate has the right to disbelieve the witnesses and to hold that there was a search in which those articles were found. In his statement the petitioner said that he came into the house at 12 noon. the search having been held at 2-30 p. m. on that day. He did not know how the liquor and the cocaine came to be there. The Magistrate on a review of the evidence has found, and we think correctly found, that the story that the petitioner came on that day is false and that he was there for sometime before the date of the search. Having found this, the only conclusion arrived at by him is that the petitioner was in possession of the articles found in the house and he having failed to account for such possession was liable to conviction.

Now, with regard to the other point, namely, that the confession of the petitioner was wrongly admitted in evidence, the petitioner in his statement says that he made the confession under a threat by the excise officer that if he did not say to whom the things belonged his wife would be dragged to the police-station. One of the search witnesses supports him in this statement. The Magistrate in his explanation has said that he attached no value to the alleged confession and it appears from his judgment that he has not even referred to it when discussing the evidence for the prosecution. It seems that when the excise officer was examined he spoke of this statement by the accused to him and it was rightly admitted in evidence because, as has been held in the case of *Ah Foong Chinaman* v. *Emperor* (1), an excise officer is not a police officer, and, therefore, S. 25, of the Evidence Act, does not apply; and it was admitted in evidence before any evidence was given or statement made about the alleged threat. So the Magistrate was not wrong in admitting the confession in evidence and he was right in not considering it in coming to his conclusions.

All the grounds having failed this Rule must be discharged. The petitioner will surrender to his bail and serve out the remainder of the sentence.

D.D. *Rule discharged.*

---

(1) [1918] 46 Cal. 411=28 C. L. J. 105=48 I. C. 504=22 C. W. N. 834.

## A. I. R. 1927 Calcutta 529

RANKIN, C. J., AND MUKERJI, J.

*Official Assignee of Calcutta*—Appellant.

v.

*Ramratan Das Bagree* and *others*—Respondents.

Appeal No. 97 of 1926, Decided on 19th November 1926, from the original Order of C. C. Ghose, J.

*Insolvency Rules (Calcutta), R.* 178—*Sale by Assignee of charged property—Assignee is not entitled for commission on sale proceeds.*

The insolvent, prior to the insolvency, executed certain deeds of hypothecation over certain assets which exceeded the value of the assets; suits were filed on the hypothecation bonds by the creditors thus secured; subsequently, Official Assignee with the consent of one of the creditors sold the charged assets and claimed commission, in an application by the other secured creditor.

*Held*: that the Official Assignee is not entitled to commission.

*N. N. Sircar* and *B. K. Ghosh*—for Appellant.

*A. K. Ray*—for Respondents.

**Rankin, C. J.**—The question in this case is whether the Official Assignee is entitled as against the firm of Ramratan Bagree to retain by way of commission to him under the Insolvency Rules of this Court a sum which appears to amount to some 62 Rupees.

The insolvent, one Dwijendra Nath Sen, was adjudicated on the 9th of June 1925. Prior to the insolvency, namely, on the 15th of February 1924, and the 14th of January 1925 he had executed certain deeds of hypothecation over his stock-in-trade, book-debts and certain other assets, in favour of a firm which I shall refer to as Mathura Das. He had also on the 25th of march 1925 executed a deed of hypothecation over the same assets in favour of the present respondents—the firm of Ramratan Das Bagree. It appears that the Official Assignee took possession of the assets at a time when he had no notice of the respondent's claim to a security thereover but that immediately thereafter the respondent firm objected to the Official Assignee proceeding to sell the stock-in-trade and other assets comprised in the alleged security. The Official Assignee had become responsible for rent of the premises in which these goods were and he was not at the moment in a position to deal finally with the claim of either of the two firms whom I have named to be secured creditors. He obtained consent of the firm of Mathura Das to his proceeding with the sale but the respondent firm stoutly objected and maintained that they would take steps to prevent the Official Assignee from selling these assets at his own hand.

In fact, the respondent firm on the 16th of June, very shortly after the adjudication, commenced a suit on the Original Side for enforcement of their security. They originally brought the suit against the insolvent, but on the 22nd of June the Official Assignee was added as a party; and apparently at or about that time the Official Assignee made an arrangement with the respondent firm. The arrangement was in substance this that it was in the interest of all the parties that the goods should be sold at once and that the respondent firm would waive their objection to the Official Assignee proceeding with his sale provided that the sale proceeds would be retained by the Official Assignee pending the decision of the questions of lien and priority which were arising from the claims of these two firms to be secured creditors. The sale was held on the 23rd of June and it appears that the result of it was that the gross proceeds were Rs. 3,702 and that a sum of Rs. 256 and another of Rs. 34 were costs and charges of the actual sale, and the question with reference to the Official Assignee's commission is a question in all of Rs. 185-1-11 pies. So far as the firm of Mathura Das is concerned, no objection is raised to the Official Assignee retaining two-thirds of that sum which otherwise would come to that firm. The real question in dispute is as regards one-third of that sum, i. e., a sum of some 62 Rupees.

What happened was that the respondent firm proceeded with their suit, and in November 1925 the Official Assignee admitted the claim of the respondent firm in respect of two sums amounting altogether to Rs. 3,700 and on the 1st of December 1925 a decree was obtained by the respondent firm in the presence of the Official Assignee declaring that that sum formed a charge upon the goods—the stock-in-trade and the outstandings of the insolvent. I would pause here to observe that that decree is in one res-

pect extremely erroneous and absurd. Whether it is a slip on the part of the learned Judge or on the part of some one in the drawing up of the decree I do not know, but the decree actually says that

> the Official Assignee do, out of the estate and effects of the insolvent defendant, pay to the plaintiffs the sum of Rupees three thousand and seven hundred with interest thereon.

Anything more improper than that a person with a security which he is proposing to realize should get a judgment of that sort against the Official Assignee it would be difficult to imagine. His right of course was to have his charge declared and enforced and to have it declared that he was at liberty to prove for a dividend out of the general assets on the ordinary terms, namely, to prove for the balance after realising his security or to value his security and take a dividend on the balance. The judgment in this respect is one which I should have thought the Official Assignee or some one on his behalf would never have allowed to pass without objection. That, however, does not affect the present case.

There was another suit commenced by the firm of Mathura Das to which apparently the respondent firm were parties and in that suit which appears to have been for enforcement of the plaintiff's security the parties in the end arrived at a settlement. The Official Assignee, to put the matter shortly, was satisfied that both these firms were secured creditors and that there was nothing left out of the sale proceeds to come to the general estate of the insolvent and it was arranged that the proceeds should be divided between these two rival claimants who were secured creditors in the ratio of 2 to 1. I do not know that the amount of the debt of the firm of Mathura Das appears from the paper book, but I do not understand it to be disputed that their claim was larger than the claim of the respondent firm. This, no doubt, explains why the ratio should be 2 to 1. Be that as it may, the sale proceeds after deducting the costs of the sale were insufficient to pay in full even the claim of the respondent firm and it is now abundantly clear that in the subject matter of the various deeds of hypothecation the Official Assignee, on behalf of the general creditors, had no beneficial interest.

The question which now arises is not whether by virtue of Insolvency Rule No. 178 the Official Assignee is entitled to say that he must, out of the general assets and at the expense of unsecured creditors, receive a commission of 5 per cent upon the total amount fetched by the goods on their sale but whether he is entitled as against these secured creditors—the respondent firm—to claim to deduct a portion of that 5 per cent out of their actual security itself. Some difficulty has arisen in considering this matter from the fact that the actual deeds of hypothecation are not before the Court. I will dispose of this case on the basis that it may well be that the nature of the security given to the firms of Mathura Das and Ramratan Das Bagree was a mere charge i.e, to say, that it was not in substance equivalent to an absolute assignment or complete transfer of what in English law would be called the legal estate. The principle which governs the question whether a property goes to the Official Assignee at all in cases of this class is as follows; I am quoting from a statement of the law which appears in a note to section 38 of the English Bankruptcy Act in the well-known book Williams' "Bankruptcy Practice."

> Secondly, there is a class of trusts where although the bankrupt did not acquire the absolute legal ownership for the purpose of an express trust yet, he, though retaining the legal property has divested himself of the whole or part of his beneficial interest. In this class of trusts, if the bankrupt has parted with the whole of his beneficial interest (as where a bankrupt has sold a debt or mortgaged it to secure a debt of an amount greater at the time of the bankruptcy than the debt mortgaged) and become a bare trustee, the legal interest of the bankrupt will not pass to the trustee in bankruptcy, but remain in the bankrupt: but if any beneficial interest remains in the bankrupt, whether the extent of such beneficial interest be ascertained or not, the legal interest will pass to the trustee in bankruptcy, subject, of course, to the performance of the trust.

In my judgment it matters nothing in this case whether the nature of the security was a mere charge or was something more. So long as it is established that the insolvent has no beneficial interest in the property I do not think that the property itself is in any way to be regarded as a part of the general estate. There is no difficulty in equity in regarding a person who is in possession of property which is subject to a charge

which he himself has created as being in the position of a trustee. Now in these circumstances it has to be remembered that it is a fundamental principle of Insolvency Law that as regards his security a secured creditor cannot be forced into the Insolvency Court at all. He can stand outside the Insolvency Court and proceed, as these creditors were proceeding, to enfroce his rights outside the Insolvency Court altogether. That being the position, it is a matter for very careful consideration whether a rule made by this Court under its jurisdiction to make Insolvency rules could validly be made so as to appropriate a part of the property of a mere third party and it is necessary to scrutinize very carefully the terms of any rule which is said to have that effect. It is quite clear in this case that the firm of Ramratan Das Bagree were doing their best to keep intact and unprejudiced all their rights under their deed of hypothecation. Rule 178 says that

> the Official Assignee shall be entitled to retain as a remuneration for the duties to be performed by him, *inter alia*, a commission of 5 per cent on the principal amount or value of the assets collected by him in each estate.

So far as the present question is concerned, it is reasonably clear that these are the words which must govern this case. There is in that rule an explanation which has no direct bearing on this case but which may parhaps, require to be considered in so far as it may be thought to throw some light upon the expression in the rule itself "the principal amount or value of the assets collected by him in each estate." That explanation, as it now stands, is in these terms :

> For the purpose of this rule the amount to be paid in pursuance of a composition or scheme of arrangement and also any amount realized under the Second Schedule to the Act shall be deemed to be assets collected by the Official Assignee.

In interpreting that explanation I will assume that an amount realized under the Second Schedule to the Act is to be deemed to be an asset collected by the Official Assignee not only for the purpose that the Official Assignee's commission is to be computed at the expense of the general creditors upon the total sum but that it is to be deducted from that part of the amount realized which has to go to the secured creditors. I will assume that but I am very far from deciding it. Even so, however, it has to be remembered that under Rule 18 of the Second Schedule to the Presidency Towns Insolvency Act no mortgagee can be compelled to have his security realized under that schedule in any case. Steps can only be taken either by the mortgagee or with his consent and it may not, therefore, be totally unreasonable in these circumstances to impose a condition that the commission has to be paid even at the expense of the security that is realized. It is another matter altogether to say because of those words in the amended explanation that in a case where certain assets are charged for a sum that greatly exceeds their value the total amount realized by those assets on sale is to be regarded as assets collected by the Official Assignee in the estate for the purpose of levying upon a secured creditor a part of the commission. The word "assets" in the Calcutta Insolvency Rules may be found also in Rule 60 where the rule says that

> the assets in every matter remaining after payment of the actual expenses incurred in realizing any of the assets of the insolvent shall, subject to any order of the Court, be liable to the following payments which shall be made in the following order of priority ;

and second in the list of the payments in this :"Any fees payable to or costs, charges or expenses incurred or authorized by the Official Assignee." Looking at the rule as a whole it seems to me that the purpose of Bankruptcy Rule No. 178 is to say that the remuneration of the Official Assignee is to be computed on the amount that he collects for the estate. This is very different from the rule that obtained under the previous Insolvency Act—the Imperial Statute—where it had to be computed on the amount available as dividend which of course is a very different thing because the expense of administration has come out of the general estate before there is any dividend.

In the present case I feel reasonably clear that the intention of the arrangement between the firm of Ramratan Das Bagree and the Official Assignee was that that firm would raise no objection to the Official Assignee selling as he wanted to sell but that they were not by that arrangement to be understood as in any way bringing themselves into the Insolvency administration but on the contrary would proceed with their suit for enforcement of their security as indeed their

right was. The learned Judge takes in this matter substantially the same view which I venture to think is correct.

Some comment has been made on the fact that the learned Judge ordered the Official Assignee to pay the costs personally. If he was to order the Official Assignee to pay costs at all he must order him to pay the costs personally as it is quite clear that this consequence cannot be visited upon the unsecured creditors. The correspondence immediately proceeding the launching of this motion does not induce me to think that the learned Judge would have been right in leaving each party to bear its own costs, and I for one am not disposed to interfere with his discretion in that matter. With regard to this appeal there can be no question that the Official Assignee having lost, must pay the costs of the respondents.

**Mukerji, J.**—I agree.

R.D. *Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 532

RANKIN AND DUVAL, JJ.

*Sattar Ali*—Petitioner.

v.

*Afzal Mahomed*—Opposite Party.

Criminal Revision No. 671 of 1926, Decided on 19th August 1926, from the order of the S. J., Sylhet and Cachar, D/- 3rd June 1926.

*Criminal P. C., S. 517—Elephant seized by police from accused's custody—Accused tried for and acquitted of abetment of theft of the elephant—Elephant should be made over to him.*

A certain elephant was seized by Police from the accused on a charge of abetment of theft of elephant, the accused, on his claiming to be the purchaser of certain shares in the animal, was acquitted.

*Held*: that the animal should have been made over to the accused on failure of the case against him and not to complainant.

[P. 532, C. 2]

*Nuruddin Ahmed*—for Petitioner.

*Paresh Lal Shome*—for Opposite Party.

**Rankin, J.**—In this case a certain elephant which was in the house of the present petitioner was, on a certain night, seized by the police. It appears that the complainant said it was his elephant, and that it had been quite recently stolen. The petitioner's case was that it had been in his possession for a very long time, since the previous October. When the case came on trial before the Magistrate it appeared that the elephant had at one time been purchased in the name of the complainant on behalf of the joint family of the complainant and his brothers. The present petitioner's case was that a certain share in the elephent went to a lady, as the widow of a brother, and that on partition of the joint family property the rest of the share, in the elephant, which had got something to do with the timber business, also went to the lady. He says that he purchased first of all the right of another person to whom the lady purported to sell her share, and secondly 14 annas so as to entitle him to 14 annas 8 gandas of the elephant. So far from that case being rejected by the Magistrate, the present petitioner was acquitted by the Magistrate of the charge of abetment of theft upon which he was tried.

When the learned Magistrate came to deal with the question what, in these circumstances, he should do with the elephant he appears to have gone wrong because the correct order was to say that this elephant was found in the petitioner's house, and should go back to the petitioner, having been taken by the police compulsorily from him. Instead of that the Magistrate made an order handing it over to the complainant until the civil Court should adjudge to the contrary, taking measures to preserve the elephant during the period limited for an appeal from his order. In my judgment that is a wrong decision. The elephant having been taken from the present petitioner's possession, on the failure of the case against him it should have gone back to the present petitioner from whom it had been taken. On these grounds I think this rule should be made absolute, the order complained of should be set aside, and an order made in lieu thereof, that the elephant be handed back to the present petitioner.

**Duval, J.**—I agree.

R.D. *Rule made absolute.*

---

## A. I. R. 1927 Calcutta 533

SUHRAWARDY AND DUVAL, JJ.

*Banshidhur Marwari* and *others*—Petitioners.

v.

*Secretary of State for India*—Opposite party.

Civil Rule No. 815(m) of 1926, Decided on 9th November 1926, from the order of the Dist. J., Burdwan, D-/ 10th January 1925.

*Land Acquisition Act* (1894 *amended* 1921), *S.* 54—"*In any proceeding*"—*Order dismissing application for restoration of application dismissed for default is not appealable.*

The addition of the words "in any proceeding" in S. 54 by the amending Act does not extend the right of appeal under S. 54 so as to include an order of the Land Acquisition Judge dismissing an application for restoration of a previous application dismissed for default : 39 *Cal.* 393, *Foll.*; 43 *Cal.* 665 & 46 *Cal.* 861, *Ref.*

[P 534, C 1]

*Bankim Chandra Mukerjee* and *Purna Chandra Chatterjee*—for Petitioners.

*Surendra Nath Guha* and *Ambika Pada Chowdhury*—for Opposite Party.

**Suhrawardy, J.**—This is an application for extension of time under S. 5, Limitation Act, for filing an appeal to this Court against an order of the Land Acquisition Judge dismissing the petitioner's application for restoration of his previous application dismissed for default. It appears that on a reference by the Collector the matter came up before the Land Acquisition Judge and on the 21st May 1924 it was dismissed for default in the absence of the petitioner. On the 11th June 1924, the petitioners applied under O. 9, R. 9, for restoration of the case. This application was also dismissed for default on the 10th January 1925. On the 6th March 1925, the petitioners applied before the Land Acquisition Judge for review of his order, dated the 10th January 1925 That application for review was dismissed on the 26th June 1926.

The petitioners thereafter presented a memorandum of appeal to this Court on the 30th July 1926 directed against the order of the 10th January 1925 and almost simultaneously made the present application for extension of time under S. 5 of the Limitation Act. If there were no objection to the maintainability of the appeal I would have felt disposed to excuse the time covered by the proceedings for review of judgment in the Court below. But the learned Government Pleader who appears on behalf of the opposite party argues that the order against which the petitioners seek to appeal to this Court is an order from which no appeal lies under the Land Acquisition Act to this Court. Our attention has been drawn to S. 54 of the Land Acquisition Act. That section says that an appeal from an order of the Land Acquisition Judge shall only lie to this Court from the award or any part of the award. The learned Advocate who appears for the petitioners argues that the wording of that section is wide enough to include an appeal from an order such as the one from which he is appealing ; and he bases his contention on the introduction of the words "in any proceeding" into the section by the Act of 1921. The section as it stood before 1921 read as follows :

Subject to the provisions of the Code of Civil Procedure applicable to appeals from original decrees, an appeal shall lie to the High Court from the award or from any part of the award of the Court in any proceeding under this Act.

The amendment or alteration of the section by the Act of 1921 simply amplifies its provision by making it explicit and adding the right of appeal from the High Court to the Privy Council. On a comparison of the wordings of the repealed section and of the present section it seems that the present section is more stringent in its provisions as it indicates that an appeal shall lie only from the award or any part of the award. The addition of the word "only" after appeal must be taken to signify that the Legislature intended that an appeal should not lie from any order unless such an order can be construed as an award.

"Award" has not been properly defined in the Act ; but what is or may be supposed to be an award has been sufficiently indicated in several sections of which reference may be made to S. 11. S. 26 also indicates as to what an award should be. Under that section an award shall specify the amount awarded under S. 23. The order against which the petitioners want to appeal cannot be said to be an award within the meaning of S. 26 of the Act. This view was taken in the case of *Hasun Molla* v. *Tasiruddin* (1) where it was held that no appeal lay

(1) [1911] 39 Cal. 393=15 I. C. 925.

from an order of the Judge refusing to restore a case by setting aside the decree passed ex parte for default of the petitioner; and it was there observed that under S. 54 an appeal would lie only against an award or any part of an award. It is however argued that the addition of the words "in any proceeding" in the section by the amending Act extends the right of appeal under S. 54 so as to include the present order. We do not think that the words "in any proceeding" were calculated to convey any such meaning. These words were added as at one time doubts were expressed as to certain orders of the Land Acquisition Judge being considered as awards, such orders having been described as "decisions of Court." Whatever the reason for the introduction of those words may be, it is clear that they do not give the right of appeal against any order which cannot strictly be called an award. The view taken in *Hasun Molla's* case (1) has been after the amendment in 1921, followed and adopted in *Dul Chand Singhi* v. *Secretary of State* (2) and *Sarat Chandra Ghose* v. *Secretary of State* (3) though the latter case in construing the particular order involved therein differed from the decision in *Dul Chand Singhi* v. *Secretary of State* (2). We are accordingly of opinion that no appeal lies from the order passed by the Land Acquisition Judge on the 10th January 1925 dismissing the petitioners' application for restoration of his previous application dismissed for default. It will therefore serve no useful purpose to allow the petitioners extension of time to file the appeal.

In this view this rule fails and is discharged with costs five gold mohurs.

**Duval, J.**—I agree.

R.D. *Rule discharged.*

---

(2) [1916] 43 Cal. 665=37 I. C. 11.
(3) [1919] 46 Cal. 861 = 50 I. C. 732 = 23 C. W. N. 378.

## * * A. I. R. 1927 Calcutta 534

MUKERJI AND GRAHAM, JJ.

*Sarat Krishna Bose*—Petitioner.

v.

*Bisweswar Mitra* and *others*—Opposite Party.

Civil Revision No. 353 of 1926, Decided on 21st December 1926, from an order of the Sub-J., Faridpur, D/- 15th December 1925.

* * (a) *Civil P. C., O. 9, R. 9—R. 9 does not apply to set aside dismissal of application under R. 9—S. 141, Civil P. C., does not authorise such procedure—If second applicatton is in time, it may be treated as application to restore suit itself —If not in time, S. 151 may be invoked.*

Section 141, Civil P. C., does not make O. 9 applicable to proceedings under O. 9. When an application under O.9, R.9, for restoration of the suit is dismissed for default under R. 4 of that order, no application lies under O. 9 R. 9, for setting aside that order of dismissal and for restoration and re-hearing of the former application under O. 9, R. 9, but the second application may be treated as an application to restore the suit itself and not to restore the first application, and if it is within time, there can be no bar to its being dealt with an application under O. 9, R. 9 Civil P. C. If it is not within time, S. 151 may be invoked in proper cases to restore the suit: *A.I.R.* 1924 *All.*503, *Foll.*; 44 *Cal.*950, *Diss. from*; 17 *All.* 106 (*P.C.*) *Rel. on.* [P 535 C 1, P 536 C 1]

* (b) *Civil P. C., S. 151—No proper remedy provided but no prohibition provided—S. 151 is to be invoked.*

Where there is no provision in the Code expressly providing for a remedy and none which prohibits a remedy being administered and such remedy is called for in order to do that real and susubstantial justice for the administration of which it exists, the provision of S. 151 may and should be resorted to: *A. I. R.* 1925 *All.* 773 and 21 *C. W. N.* 769, *Ref.* [P 536 C 2]

*Asita Ranjan Ghose* and *Abinash Chandra Ghose*—for Petitioner.

*Kshetra Mohan Ghose*, *Mohendra Kumar Ghose* and *Biraj Mohan Majumdar*—for Opposite Party.

**Judgment.**—The petitioner had instituted a suit in the first Court of the Subordinate Judge of Faridpur on the 9th August 1924 for setting aside a revenue sale in respect of a certain taluk. The suit was dismissed for default, as the petitioner did not, or, as he says, was unable to, appear on the 5th August 1925. On the 4th September 1925 he applied under O. 9, R. 9, Civil P. C., for restoration of the suit. The Subordinate Judge ordered this application to be registered and ordered the petitioner to file talabana and processes on or before the 10th September 1925. This order was not com-

plied with. On the 10th September 1925 the case being put up, an application was made on the petitioner's behalf praying for a reasonable time to enable the petitioner's pleader to communicate with the petitioner who, it was said, was away at a distant place. The Subordinate Judge granted time by the following order : "On the prayer of the applicant time allowed till 12/9 next for filing talabana and processes." On the 12th September 1925 the application under O. 9, R. 9, Civil P. C., was dismissed for default as talabana and processes were not filed. On the 20th October 1925 another application was filed by the petitioner under O. 9, R. 9 for the setting aside of the aforesaid order of dismissal and for restoration of the aforesaid application under O. 9, R. 9, Civil P. C. This application was dismissed by the Subordinate Judge on the 15th December 1925, he having held that such an application did not lie. The material portion of his order runs as follows :

> He (meaning the petitioner) now applies for an order to set aside the order dismissing his application under O. 9, R. 4 for default. In my opinion O. 9 does not apply in this case. The Miscellaneous proceedings to which S. 141 applies are matters such as applications for probate, certificate of guardianship etc., which, when contested, partake of the nature of suits, and not miscellaneous cases of this description. I, therefore, reject this application.

It is the validity of this order which is in controvery in this Rule.

The contention of the petitioner is that by virtue of the provision contained in S. 141, Civil P. C. O. 9 is applicable to all miscellaneous proceedings including a proceeding under O. 9 and when his application under O. 9, R. 9 for restoration of the suit was dismissed for default under R. 4 of that order, an application lay under O. 9, R. 9 for setting aside that order of dismissal and for restoration and re-hearing of the former application under O. 9, R. 9. The authority which directly supports the petitioner's contention is the decision of this Court in the case of *Bepin Behary Shaha* v. *Abdul Barik* (1). The learned Judges who decided that case relied upon the reason of the Rule in *Diljan Nichha Bibi* v. *Hemanta Roy* (2), in which an application for setting aside a sale under O. 21, R. 90, Civil P. C., had been dismissed for default and it was held that O. 9 was applicable for setting aside that order of dismissal. They proceeded to observe as follows :

> In this case also, in a similar way, the application for restoration of the case under O. 9, Rr. 4 and 9 may be treated as an original application although no fresh parties are interested in the case. The proceeding is initiated by an application which has to be numbered as a separate miscellaneous case and decided upon evidence.

It was further suggested that this application under O. 9, R. 9 might also be treated as an application for review as O. 47, R. 1 which applies to all orders of the Court that may be reviewed under certain circumstances : but with this matter we are not concerned for the moment.

An elaborate research into the history of S. 141 and an exhaustive analysis of the case-law bearing on it will be found in the recent judgment of Page, J., in the case of *Basarutulla Mean* v. *Reazuddin Mean* (3). Now amidst the hopelessly conflicting mass of judicial decisions which have clustered round S. 141 and S. 647 which stood in its place before, the solid bed-rock on which it is safe to take one's stand is the decision of the Judicial Committee in the case of *Thakur Prasad* v. *Fakirullah* (4). Their Lordships' decision makes it perfectly plain that the section does not apply to applications for execution, but only to "original matters in the nature of suits, such as proceedings in 'probates, guardanships and so forth." The expression "so forth" must, in my opinion, be read as meaning proceedings ejusdem generis with the instances that precede it, and include such proceedings as in divorce, in insolvency, for succession certificate and the like, and the expression "original matters" in my opinion confirm that view as meaning matters which originate in themselves and not those which spring up from a suit or from some other proceeding or arise in connexion therewith. The criterion of originality as indicated in *Bepin Behary Shaha* v. *Abdul Barik* (1) in the passage quoted above is not what is meant. This passage has been construed by the learned Judges of the Allahabad High Court as meaning that the second application might be treated as an original application for restoration of the suit itself [*Pitamber Lal* v. *Dodi*

(1) [1916] 44 Cal. 950=21 C. W. N. 30=35 I. C. 618=24 C. L. J. 446.
(2) [1915] 19 C. W. N. 758=29 I. C. 395.
(3) A. I. R. 1926 Cal. 773=53 Cal. 679.
(4) [1894] 17 All. 106=22 I. A. 44=6 Sar. 526 (P. C.).

*Singh* (5) ]; but with all respect I am unable to agree that that is what the passage means. I think the true meaning of the passage is that, in the opinion of the learned Judges, a proceeding which originates in a new application which has to be numbered as a separate miscellaneous case and decided upon evidence satisfies the requirements laid down in the decision of the Judicial Committee. In this view I am unable to concur. On the other hand, I entirely agree with the learned Judges of the Allahabad High Court in the view expressed in the case of *Pitambar Lal* v. *Dodi Singh* (5) that if the fresh application is treated as an application to restore the suit itself and not to restore the first application, and is within time, there can be no bar to its being dealt with as an application under O. 9, Civil P. C.

The foundation of the decision in *Bepin Behary Shaha* v. *Abdul Barik* (1), therefore is in my opinion, wrong, and after the shock it has received in numerous authoritative decisions of several Courts can no longer be relied upon. I have already referred to the case of *Basaratullah Mean* v. *Reazuddin Mean*(3) in which the authorities are collected. I may specially mention also the decisions of the Patna High Court in *Bhubaneswar Prasad Singh* v. *Tilakdhari Lal*(6) and *Ram Gulam Singh* v. *Sheo Deonarain Singh* (7) and that of the Allahabad High Court in *Pitambar Lal* v. *Dodi Singh* (5) to which I have already referred. The last two of the aforesaid cases directly dealt with an application which arose out of the dismissal of a suit as in the case now before us. The Madras High Court also appears to have taken the same view as has been adopted in Patna and in Allahabad.

I am accordingly of opinion that the learned Subordinate Judge is right in the view he has taken and that the petitioner's application in so far as it purported to be one under O. 9, R. 9, Civil P. C., was not competent. At the same time, however, I am of opinion that the duty of the learned Judge did not end in disposing of the application on that ground alone as he appears to have done. The Code has made no express provision for a case like this, and it is natural to suppose that there should be some way open to the petitioner to get rid of the order which was passed on the 12th September 1925 if he can show that his default was not due to his laches. The application which he presented on the 28th October 1925 cannot by reason of the bar of limitation be entertained as a second application for setting aside the ex parte decree. To meet cases such as this S. 151 of the Code was enacted, and where there is no provision in the Code expressly providing for a remedy and none which prohibits a remedy being administered and such remedy is called for in order to do that real and substantial justice for the administration of which it exists, the provision of S. 151 may and should be resorted to. This substantially is the view that has been taken of the applicability of this section in a matter of this kind in the cases of *Ganesh Prasad* v. *Bhagelum Ram* (8) and *Bharat Chandra Nath* v. *Yasin Sarkar* (9) and I am disposed to adopt in the present case the course that was followed in the last mentioned case. I would accordingly direct that the application of the petitioner, dated the 20th October 1925, will be treated by the Court below in the exercise of its inherent power *ex debito justice* to review the order of dismissal for default passed on the 12th September 1925. The Rule therefore will be made absolute in these terms, but in view of the facts of the case no order will be made as to the costs in the Rule.

D.D. *Rule made absolute.*

(5) A. I. R. 1924 All. 503=46 All. 319.
(6) [1919] 4 P. L. J. 135=49 I. C. 617=(1919) P. H. C. C. 75 (F. B.).
(7) [1919] 4 P. L. J. 287=51 I. C. 152.
(8) A. I. R. 1925 All. 773=47 All. 878.
(9) [1917] 21 C. W. N. 769=41 I. C. 586.

---

## A. I. R. 1927 Calcutta 536

PANTON AND MALLIK, JJ.

*In the matter of Satis Chandra Singha, Pleader.*

Civil Reference No. 7 of 1926, Decided on 1st March 1927, made by the Munsif, Vishnupur.

(a) *Legal Practitioners Act, S.* 14—*Allegations amounting to aiding or conspiring to commit criminal offence — Proceeding under S.* 14 *should not be taken but a criminal prosecution may be started.*

In a case where what was alleged against pleaders amounts to a charge of aiding and abetting or conspiring to commit a criminal offence, the correct procedure to be followed is that proceedings under the Legal Practitioners

Act should not be taken, but if it was thought necessary to take action, it should be by way of a criminal prosecution : *A. I. R.* 1926 *Cal.* 502, *Foll.* [P 537 C 2]

(*b*) *Legal Practitioners Act, S.* 14—*Recording evidence in contravention of S.* 14—*Procedure is defective.*

Where the evidence was not received and recorded as required by S. 14 upon the date on which the enquiry was held it is a substantial defect in procedure. [P 537 C 2]

**Judgment.**—This is a reference under S. 14 of the Legal Practitioners Act made by the Munsif of Vishnupur through the District Judge of Bankura. It relates to the alleged misconduct of Satis Chandra Singha, a pleader. What is reported against him is this that he, accompanied by a clerk, obtained from the officers of the Munsif's Court the record of a certain suit on the pretext apparently of examining it. While the record was thus in his custody, either he or the clerk interpolated in the plaint the Bengali word "Katak" which had the effect of materially altering the sense of that document. It appears that the matter was reported to the Munsif by Babu Bhavanipati Banerji, a clerk in charge of the records. This was on the 24th of August last. The learned Munsif thereupon investigated the matter, and he appears to have taken the statements of Bhavanipati, Sriram Mahapatra, a clerk, Abdul Ali Khan, a peon, and Satis Chandra Chaudhuri, a copyist, who are said to have borne out the allegations against the pleader. The learned Munsif then called upon the pleader to show cause why his conduct should not be reported to this Court and fixed the 18th September for the hearing of the matter. On the application of the pleader, the hearing was adjourned till the 25th September and on that date he put in a petition asserting his innocence. The hearing was then adjourned to the 20th November and then again to the 22nd November, on which date one Makhan Pramanik was examined. Thereafter the learned Munsif made the report upon which these proceedings are founded. The Crown is unrepresented.

Several points have been taken on behalf of the pleader. In the first place, it is pointed out that the misconduct alleged against him is of a kind which would render him liable to criminal prosecution. That appears to be the case, for what is so alleged is that he committed forgery within the definition of that word in the Indian Penal Code or conspired to commit that offence. That being so, the decision of this Court founded upon earlier decisions of a similar character, in *In the matter of Rajendra Kumar Dutta* (1), is relevant. It was there pointed out that in a case where what was alleged against pleaders amounts to a charge of aiding and abetting or conspiring to commit a criminal offence, the correct procedure to be followed is that proceedings under the Legal Practitioners Act should not be taken, but that, if it was thought necessary to take action, it should be by way of a criminal prosecution. In view of that decision, we are of opinion that these proceedings should not have been taken and must fail. It is unnecessary therefore for us to go into the other points urged, but possibly it is better that we do so.

The second point is that the procedure adopted by the Munsif was in contravention of the provisions of S. 14 of the Legal Practitioners Act. It has been urged that he was wrong in recording the evidence of those clerks and the peon before framing his charge against the pleader. We do not see any substance in this objection. But the substantial defect in the procedure adopted is that the evidence of these persons was not received and recorded as required by S. 14 upon the date on which the enquiry was held. In other words, they were not examined in the presence of the pleader. As I have pointed out, the only person who was examined was Makhan Pramanik. Nevertheless, the learned Munsif formed his opinion to a very considerable extent upon the statements made to him by the clerks and the peon in the absence of the pleader.

The third objection taken is that putting aside the evidence of these persons which should not be used against the pleader, there remains only the statement of Makhan Pramanik, who, if the offence was committed, was an accomplice in its commission upon whose unsupported testimony the charge could not be established.

For these reasons we are of opinion that this reference must be rejected.

R.D. *Reference rejected.*

(1) A. I. R. 1926 Cal. 502.

## * A. I. R. 1927 Calcutta 538

B. B. GHOSE AND PANTON, JJ.

*Kshetra Nath Sikdar* and *others*—Defendants 3 and 4—Appellants.

v.

*Harasukdas Balkissen Das* and *others*—Plaintiffs—Respondents.

Appeals Nos. 169 of 1924 and 163 of 1925, Decided on 22nd December 1926, from the Original Decrees of the 2nd Sub.-J., 24 Pergannahs, D/- 24th March 1924.

* (a) *Evidence Act, S. 92—Contract reduced to writing—Rule excludiny any other evidence does not apply when there is complete oral contract before writing.*

The rule of evidence that where the terms of a contract have been reduced to writing, you cannot give any other evidence of the contract than the written document itself, applies only if the document was intended to be the embodiment in writing of the transaction and not if there was a complete oral contract before the writing was given and the document does not express and was never intended to express the whole agreement between the parties: 20 *W. R.* 150; *A. I. R.* 1923 *P. C.* 50 and 43 *Cal.* 895, *Rel. on.* [P 540 C 2]

(b) *Contract Act, S. 62—Creditor instead of actually being paid, taking renewed pronote receiving some consideration as increased interest—Old debt is not paid off—Whether new is substituted in place of old is a question of fact—Civil P. C., S. 100.*

Where a creditor has not been actually paid but he takes a renewed bill or promissory note for his debt in order to give time to the debtor and receives some consideration by way of increased interest or otherwise for his forbearance it can hardly be said that the old debt had been paid off by the acceptance of the renewed bill. [P 542 C 1]

Whether there was an agreement to substitute a new contract or not is a question of fact depending on the intention of the parties. The true rule is that one should look to the substance of the matter and not to mere form. [P 542 C 1]

(c) *Transfer of Property Act, S. 48—Mortgagee claiming priority will not lose his right unless estopped by his conduct.*

Ordinarily priority of rights created by different transfers is governed by S. 48, and a mortgagee claiming priority will not lose his right unless his conduct was such as to estop him from asserting it. [P 542 C 2]

(d) *Transfer of Property Act, S. 3—Equitable mortgage—Subsequent sale—Purchaser asking for title-deed—Vendor replying that he had not got it—Abstention from enquiry by purchaser amounts to notice.*

Abstention from enquiry for title deeds in a place where one knows that mortgages by deposit of title deeds are legal and usual amounts to notice of a mortgage under S. 3, especially when the purchaser has asked for the title deed and the vendor replied that he has not got it: *A. I. R.* 1923 *P. C.* 211, *Foll.* [P 543 C 1]

(e) *Registration Act, S. 17 — Mortgage by deposit of title-deeds—Part consideration paid to mortgagor for discharging previous mortgage by deposit of deeds—Mortgagor depositing the deeds—Letter confirming the deposit and acknowledging receipt of some more money paid to him on the date of the letter does not require registration—Transfer of Property Act, S. 59.*

Defendant approached the plaintiff and asked for a loan of Rs. 70,000 on the security of the property which was previously mortgaged by deposit of title-deeds. The plaintiff advanced Rs. 25,000 on condition to pay off the debt due to previous mortgagee, to get back the title-deed and deposit it with him for the loan of Rs. 70,000 which the plaintiff had agreed to make. The defendant subsequently made over the title-deeds to the plaintiff and the plaintiff made a further advance of Rs. 25,000 to defendant. On the same day, defendant drew up and signed a memorandum of the transaction already completed in the form of a letter addressed to the plaintiff as follows: "I applied to you for a loan of Rs. 70,000 which you agreed to advance as a deposit of the title-deeds. . . . I accordingly deposited with you the original conveyance from Pashupati Nath Deb in my favour . . . which is the only document I received from my vendor on purchase of the property. I never had any other title-deeds relating to the property. You have advanced to me Rs. 25,000 today on my assurance that there is no encumbrance affecting the property. The further sum of Rs. 20,000 will be advanced by you when required by me. Yours faithfully."

*Held*: that the letter is not the contract for the mortgage, nor the agreement to give a mortgage, but it is a statement made by the defendant of the fact that he had deposited the title deed of the property as the plaintiff had agreed to advance the money on the mortgage of the property and that it did not itself create any title and did not constitute the bargain between the parties and, therefore, does not require registration. [P 541 C 1]

*Sarat Chandra Basak, Dhirendra Krishna Roy* and *Rama Prosad Mukhopadhaya*—for Appellants.

*Brojo Lal Chakrawarti, Gopendra Krishna Banerji* and *Dinesh Chandra Ray*—for Respondents.

*Surjya Kumar Aich*—for Deputy Registrar.

**B. B. Ghose, J.**—These two appeals are against the preliminary decree and the final decree in the same suit which was brought for enforcement of a mortgage by deposit of title deeds in the town of Calcutta. The appellants are Defendants 3 and 4. The Defendant No. 1 purchased certain properties in the suburbs of Calcutta by a deed dated the 29th of September 1919 for Rs. 1,03,000. The area of the land purchased was 12 bighas odd. Out of this

he had sold to third parties about 2 bighas of land which is not the subject matter of the present litigation. The Defendant No. 1 subsequently borrowed a certain amount of money from one Torit Bhusan Roy by depositing the title deed with him. He afterwards approached the manager of the plaintiff firm and asked for a loan of Rs. 70,000 on the security of the property in question. The manager agreed. The plaintiff's case is that on the 21st of January 1920, the manager Kissen Gopal Bagri, advanced Rs. 25,000 which he made over to the attorney who was acting for Defendant No. 1 on condition that he would pay off the debt of Defendant No. 1 to Torit Bhusan Roy and after getting back the title deed deposit it with Kissen Gopal Bagri for the loan of Rs. 70,000 which Bagri had agreed to make on the mortgage of the property. The attorney got back the document and made over the title deed to Bagri under the direction of Defendant No. 1 on the 24th of January 1920, when Bagri made a further advance of Rs. 25,000 to the Defendant No. 1.

After getting the title deed of the Defendant No. 1, Bagri and Defendant No. 1 went to the office of the plaintiff's attorney Jatindra Nath Basu and a memorandum of the transaction already completed was drawn up by the attorney and signed by Defendant No. 1, Ganendra Krishna Mitter. The memorandum was in the form of a letter addressed to the firm. Further sums were advanced to the Defendant No. 1 on 29th January, 4th February and 12th February 1920, making up the total amount of Rs. 70,000 that was agreed to be secured by the mortgage. The money was advanced on hundis of which the Defendant No. 1 was the drawer as well as the acceptor. These hundis were not met on due dates but were renewed from time to time and the money thus advanced not having been paid the plaintiff has brought this suit for recovery of the sums due. The last series of hundis which the Defendant No. 1 drew are given at the foot of the plaint. Out of the 10 bighas of the property which remained with the Defendant No. 1 he sold to Defendants 5, 6 and 7, 2 bighas on the 24th of March 1920 for Rs. 47,500. On the 11th of May 1920 Defendants 5, 6 and 7 sold for Rs. 75,000 the entire quantity of land purchased by them from Defendant No. 1 to Defendants 3 and 4 who are the appellants before us. The Defendant No. 1 subsequently became insolvent and Defendant No. 2 is the Official Assignee in whom the interest of Defendant No. 1 is now vested.

Various questions were raised before the Subordinate Judge by Defendants 3 and 4 to the claim made by the plaintiff. The Defendant No. 1 did not appear to contest the suit. The Official Assignee also did not contest the suit. Defendants 5, 6 and 7 were not originally joined as defendants but they were added on the objection of Defendants 3 and 4. These defendants really contested the suit. In the Court below 15 issues were raised and the Subordinate Judge decreed the suit and directed that the plaintiff was entitled to the sum claimed with interest at the rate of 18 per cent per annum. There is some obscurity in the judgment with reference to the rate of interest. The plaintiff claimed 18 per cent interest in the plaint, but the Subordinate Judge observes that there was some claim for interest at an increased rate which he did not allow. No question, however, was raised as regards the rate of interest before us, or the amount found due in the final decree, so it is unnecessary to say anything further with reference to it.

Three points have been raised before us by the learned advocate on behalf of the appellants and these points are covered by Issues 5, 6, 11, 12 and 13. The first point urged is that the memorandum is the sole evidence of the contract of mortgage, and as the document is not registered it is not admissible in evidence. Reliance is placed in support of the contention that this memorandum is inadmissible in evidence for want of registration and that no oral evidence is admissible to establish the mortgage on the case of *Subramanian* v. *Luchman* (1). The argument of the learned advocate is that having regard to the oral evidence given on behalf of the plaintiff it should be held that the memorandum dated the 24th of January 1920 constituted the bargain between the parties, and that being so the document ought to have been registered under S. 17 of the Indian Registration Act and as it is not regis-

(1) A. I. R. 1923 P. C. 50=50 Cal. 338=50 I. A. 77 (P. C.).

tered it is inadmissible in evidence under the provisions of S. 49 (c) of the Indian Registration Act. It is contended on the other hand on behalf of the plaintiff-respondent that this document only referred to a transaction which had already been completed by the deposit of the title deed and the advance of the loan, and the agreement to make a further advance, the memorandum did not constitute the bargain between the parties, and consequently did not require registration. He was also entitled to give oral evidence in proof of the contract of mortgage which was effected previously by the deposit of the title deed. It was further contended on behalf of the respondent that looking at the language of the letter it will be evident that it did not create any interest in immovable property as required by S. 17 of the Indian Registration Act and registration was not compulsory. Oral evidence cannot be gone into in order to ascertain whether a certain document creates a title in immovable property, in order to bring a document within the provisions of S. 17 of the Registration Act, but only the document should be looked into.

It was further argued that the oral evidence does not show that the memorandum was the bargain between the parties as is contended on behalf of the appellants. In order to decide the question whether it was necessary to have the document registered on the authority of the case of *Subramanian* v. *Lutchman* (1) on which the appellant relies, the decision should be carefully examined. At page 82 of the report the contentions of the parties are thus stated : Respondents' counsel contended :

(1) that the original sub-mortgage was void inasmuch as it was effected by an instrument in writing which was admittedly not registered and relied upon Ss. 17 and 49 of the Indian Registration Act, 1908 ; and (2) that oral evidence was not admissible, as the memorandum of the 15th July 1908, constituted the contract between the parties. (S. 91, Law of Evidence, Act I of 1872), The appellants, however, contended that though the terms of the deposit were embodied in a written document that document was a mere memorandum of and did not constitute the contract and, therefore, did not require to be registered, and that on the same ground oral evidence was inadmissible to prove and explain the deposit.

It seems to me that in order to ascertain whether there was any contract apart from the transaction embodied in the document itself, when oral evidence might be admissible to prove and explain the deposit of title deeds, as contended for by the appellants their Lordships examined the oral evidence in the case, which in their Lordships' opinion, was conclusive that the memorandum of July 15, 1908, constituted the bargain between the parties. Their Lordships then examined the provisions of document which led to the same conclusion. The relevant portions of the document recited were these :

We hand you herewith title deeds &c..... This please hold as security, &c.....Please also hold this as further security.

From these terms their Lordships came to the conclusion that the memorandum in question was the bargain between the parties and that without its production in evidence the plaintiff could establish no claim, and as it was unregistered it ought to have been rejected. I am unable to accept the argument of the appellants that this case supports the proposition that in order to decide whether a document falls within the provisions of S. 17 of the Indian Registration Act, or no, oral evidence should be gone into for the purpose of finding whether the document creates an interest in immovable property as contemplated by that section. It is undoubtedly a cardinal rule of evidence that where the terms of a contract have been reduced to writing, you cannot give any other evidence of the contract than the written document itself. But this rule applies only if the document was intended to be the embodiment in writing of the transaction and not if there was a complete oral contract before the writing was given and the document does not express and was never intended to express the whole agreement between the parties. The law on the subject has been laid down in a series of cases, the leading case in our Court being *Kedarnath Dutt* v. *Sham Lall Khetry* (2). This case was approved by the Privy Council in *Subramanian* v. *Lutchman* (1) cited above. The law has also been laid down by the Privy Council in the case of *Pranjivandas Mehta* v. *Chan Ma Phee* (3). The question is within what class the transaction in this case falls. Sir Richard Couch in delivering the judgment in the case of

(2) [1873] 20 W. R. 150=11 B. L. R. 405.
(3) [1916] 43 Cal. 895=35 I. C. 190=43 I. A. 122.

*Kedarnath Dutt* v. *Sham Lall Khettry* (2) observed :

If this memorandum was of such a nature that it could be treated as the contract for the mortgage, and what the parties considered to be the only repository and appropriate evidence of their agreement, it would be the instrument by which the equitable mortgage was created and would come within S.17 of the Registration Act. But it was not a writing of that character. As I havd said, the equitable mortgage was created by the agreement which was evidenced by the loan and the deposit of the title deeds. The promissory note, whether given either at the same time or some hours afterwards in pursuance of the understanding between the parties, was evidence of the terms upon which the loan was made viz., that the interest should be at the rate of 24 per cent. But as regards the contract between the parties if there had been no memorandum at all on the promissory note, there would havs been a complete equitable mortgage. When we consider what the memorandum is, we find it is not the contract for the mortgage—not the agreement to give a mortgage for the Rs. 1,200—but nothing more than a statement by Woomo Churn Banerjee of the fact from which the agreement is inferred. It is an admission by him that he had deposited deeds upon the advance of the money for which the promissory note was given.

Now I shall recite the terms of the letter in this case. It runs thus :

I applied to you for a loan of Rs. 70,000 which you agreed to advance on a deposit of the litle deeds of No. 23 Paitpara Road. I accordingly deposited with you the original conveyance from Phashupati Nath Deb in my favour, dated the 29th September 1919 which is the only document I received from my vendor on purchase of the property. I never had any other title deeds relating to the property. You have advanced to me Rs. 25,000 already and are going to advance a further sum of Rs. 25,000 today on my assurance that there is no encumbrance affecting the property. The further sum of Rs. 20,000 will be advanced by you when required by me. Yours faithfully, Ganendra Kissen Mitter.

It seems to me that this letter comes directly within the observations made by Sir Richard Couch which I have cited above that it is not the contract for the mortgage, nor the agreement to give a mortgage, but it is a statement made by Ganendra of the fact that he had deposited the title deed of the property in suit as the plaintiff had agreed to advance the money on the mortgage of the property. The mortgage had already been effected by the deposit of the title deed and the letter did not itself create any title and did not constitute the bargain between the parties. The document, therefore, does not, in my opinion, require registration. (After considering evidence His Lordship proceeded). The contention raised on behalf of the appellants that this transaction cannot be proved for want of registration of the memorandum therefore fails.

The next contention on behalf of the appellants is that there has been a discharge of the debt which was incurred on the dates on which the first series of hundis were drawn by the renewal of the hundis. The different dates of renewal of the sums for which the renewed hundis were given will be found in the abstract prepared and printed at pages 114 and 116 of the third part of the paper-book. Reliance is placed on S. 62 of the Contract Act, and it is urged that the old debt having been substituted by the acceptance of the new hundis those debts had been paid off and the debt for which the mortgage was effected by deposit of title deed does not subsist ; and it is further urged that the date of the earliest of the hundis on which the suit is brought is 18th April 1920, which is posterior to the date of the purchase of the property by Defendants 5, 6 and 7 which was made on 24th March 1920, and the earlier debts having been paid off the vendors of the appellants obtained the property free from the plaintiff's mortgage. It is also urged that the plaintiff having entered in his books that the old hundis had been paid off for which new hundis had been drawn, he cannot now rely upon the old debt to enforce his mortgage. Reliance is placed upon the case of *Exp. Barclay* (4) and it is argued that in that case if the old bills had not been retained the Lord Chancellor would have held that the old debt had been discharged. With regard to that case it seems to me that it is hardly possible to maintain the contention of the learned advocate, as there is no expression of any opinion as to what would have been held if the old bill had not been retained, and the debt remained unpaid. The question is whether if a creditor without being paid takes a new promissory note from the debtor in order to extend the time for payment or for any other purpose but has not been actually paid, is it to be considered that the old debt is discharged ? This question arose in the case of *Alexander Stewart* v. *Delhi and London Bank, Limited* (5) where this Court on an appeal from the Original

(4) [1802] 7 Ves. 596.
(5) [1872] 17 W. R. 201.

Side affirmed the decision of the trial Judge. The relevant portion of the head-note which gives a correct summary of the law laid down in that case runs thus :

> Though a receipt on the back of a bill of exchange or promissory note prima facie imports that the bill or note has been paid, yet the receipt is capable of being explained and if it appears that the bill or note has not been paid, and that another bill or note was substituted for it, the Court will not be justified in concluding that the party who gave up the note in that way meant that the debt secured by the note was to be considered to have been paid.

The general rule in England may be cited from Leake's well-known work on Contract (7th edition) at page 671, where the following passage occurs :

> Whether a bill or note of the debtor is given and taken in satisfaction or as conditional payment is a question of fact as to the intention shown by the parties, the presumption being that it is conditional payment with a recourse to the original debt if the bill is not paid ; but if the bill is out standing in the hands of a third party the remedy of the creditor is still further suspended until the bill or note gets back to his hands.

In this case the notes all came back into the hands of the creditor. But it is contended on behalf of the appellants that S. 62 makes an alteration in the circumstances as stated above. The section runs thus : If the parties to a contract agree to subsitute a new contract for it or to rescind or alter it the original contract need not be performed. It is argued that a new contract was substituted in this case. The answer to this contention is that whether there was an agreement to substitute a new contract or not is a question of fact depending on the intention of the parties. The true rule seems to me that one should look to the substance of the matter and not to mere form. Where a creditor has not been actually paid but he takes a renewed bill or promissory note for his debt in order to give time to the debtor and receive some consideration by way of increased interest or otherwise for his forbearance, it can hardly be said that the old debt had been paid off by the acceptance of the renewed bill. In the circumstances of this case I am not prepared to hold that a new contract was substituted for the old debt. The second contention of the appellants must therefore, also fail.

The third point is urged as a question of priority, and it is contended that the plaintiff had parted with the title deed after the deposit, and the Defendants 5, 6 and 7 purchased the property after seeing the document in the possession of Defendant No. 1. The plaintiff should be held under the circumstance to have been guilty of gross neglect as provided in S. 78 of the Transfer of Property Act and he is not entitled to enforce his mortgage as against the appellants. The point appears to be not really one of priority but that the plaintiff is precluded by his conduct from enforcing his mortgage against the property in the hands of the appellants. Ordinarily priority of rights created by different transfers is governed by S. 48 of the Transfer of Property Act. The plaintiff would not lose his right unless his conduct was such as to estop him from asserting it. The Subordinate Judge has in his judgment given several reasons for holding that the story of Defendant No. 1 producing the title deed for inspection by the appellants-vendors is absolutely false. He also held that even if the facts were true, the handing over of the title deed for the purpose for which it was alleged to have been done does not amount to gross neglect and would not postpone the mortgage. I agree with his view, but it is unnecessary to go into the question in detail, because it is quite clear on the evidence that even if the title deed was shown by Defendant No. 1 to the vendors of the appellants, those vendors must be held to have notice of the plaintiff's mortgage. What is said on this question is in the evidence of Defendant No. 7. He says that on account of some mistake in the number of the holding as given in the Baynapatra which was executed by Defendant No. 1 in favour of two of the vendors, he wanted to see the title deed. He says :

> I then thought the copy of title deed which had been made over to us might be incorrect and called at Defendant No. 1's place to see the original title deed. The Defendant No. 1 said that he had not got the original title deed with him and promised to show us the original 4 or 5 days after.

In cross-examination he says :

> We never enquired of the Defendant No. 1 where the original title deed was and why it was not with him. It did not strike me that the title deed might have been with any mortgagee when the Defendant No. 1 said that he had not the deed with him. I did not speak of it to our pleader.

It would appear from the observations of their Lordships of the Judicial Committee in *Imperial Bank of India* v. *Rai Gyaw Thu* (6), that abstention from enquiry for title deeds in a place where one knows that mortgages by deposit of title deeds are legal and usual would amount to notice of a mortgage under S. 3 of the Transfer of Property Act. But in this case there was something more. The Defendant No. 1 on being asked to produce the title deed said that he had not got it. When the Defendant No. 1 could not produce the title deed one would naturally expect that the purchaser would enquire what had become of the deed. He did not do so and for this abstention from enquiry he must be fastened with notice of the mortgage which had been effected by the deposit of the deed, and he cannot be heard to say that he was induced to purchase the property as unincumbered on account of the gross neglect of the mortgagee in parting with the title deed. The plaintiff, however, has given very good evidence in support of his plea that he had never parted with the title deed, which was accepted by the Subordinate Judge and that Judge before whom the defendants examined their witnesses including the pleader has disbelieved their evidence. Some attempt was made to show that the pleader's evidence should be accepted. But that pleader was practising before the Subordinate Judge and he knew what sort of a person the pleader was, and he saw the witness in the box. His opinion cannot be upset by us on appeal on the mere ground that the witness was a pleader. It it unnecessary to comment on the evidence in detail. It is sufficient to say that we agree with the finding of the Subordinate Judge. I am of opinion that the mortgagee cannot be precluded from enforcing his mortgage against the whole of the mortgaged property, and the appellants purchased the property subject to the plaintiffs' mortgage.

On these grounds the appeals fail and are dismissed with costs to be paid to the plaintiff-respondents only. There will be one set of hearing-fee for the two appeals.

**Panton, J.**—I agree.

R.D. *Appeals dismissed.*

(6) A. I. R. 1923 P.C. 211=51 Cal. 86=1 Rang. 637=50 I. A. 283 (P. C.).

## * * A. I. R. 1927 Calcutta 543

RANKIN, C. J., AND C. C. GHOSE, J.

*Narendra Lal Das Chaudhury*—Plaintiff—Appellant.

v.

*Gopendra Lal Das Chaudhury* and *others*—Defendants—Respondents.

Privy Council Application No. 4 of 1927, Decided on 7th March 1927, from the judgment of the Calcutta High Court D/- 27th May 1926, in Appeal No. 145 of 1923.

* * *Civil P. C., S.* 110 — *Partition suit—Lower Court granting certain share—High Court on appeal increasing it—No further grievance left in that matter—Substantial question of law must be shown.*

If the two Courts, High Court and lower Court, are at one upon the matter which is to be in debate before the Privy Council, then it is a case of a decree which affirms the decision of the Court immediately below. [P 544 C 2]

Where the amount is a question in dispute, the fact that the Courts differ and that the higher Court differs in favour of the applicant, may not mean that the decision is one of affirmance, but where in a suit for partition, the lower Court granted certain share and High Court increased it further, so that the plaintiff has no further grievance in that matter, he cannot, without showing a substantial question of law, have a right to litigate upon other points upon which both the Courts have been in agreement; *A. I. R.* 1925 *P. C.* 60, *not Foll.*; 8 *C. W. N.* 294 (*P. C.*) *Foll.* [P 545 C 2]

*Gunada Charan Sen* and *Priya Nath Dutt*—for Appellant.

*Gopal Chandra Das*, *Satyendra Kishore Ghose*, *Birendra Kunwar De*, *Benoyendra Nath Palit*, *Nripendra Chandra Das* and *Nijunja Behari Roy*—for Respondents.

**Rankin, C. J.**—This is an application for a certificate that the case is a fit one to be taken on appeal to His Majesty in Council. The applicant is the plaintiff in the suit. The suit was brought for partition of a joint family property valued at 10 lacs of rupees and the suit itself has been going on ever since 1911. In the end, a preliminary decree was passed in 1923 and an appeal was brought to this High Court. That appeal was decided in May 1926 and it appears that the first question which arose was this that the plaintiff complained that the preliminary decree gave him a smaller share in the property than he was entitled to get. On that point the High Court was of opinion that the appellant was in the right and held at his instance that the share which should

go to him was what he had contended for. The plaintiffs, Defendant No. 2 and Defendant No. 3, were given 4/15ths share each. In that respect, the High Court reversed the finding of the trial Court. Other points were raised upon the correct way in which the accounts should be taken as against one of the defendants who had acted as karta of the family and in certain other capacities. The complaint of the plaintiff was really that he had had an insufficient opportunity of examining the accounts and on that point the High Court on appeal affirmed the judgment of the Court below and I am of opinion that there is no substantial point of law arising in connection with that point.

Another question was raised with regard to a reserve fund with regard to which the High Court took the same view as the trial Court. Here again, I am of opinion that no substantial question of law arises with regard to that point. The proposed appellant to England does not claim that he is entitled or has at any time claimed to be entitled to a greater share than 4/15ths. This is not a case where the trial Court gave him one share, the High Court gave him another share and his real claim is to have something further given to him. He has no pretence of any grievance as regards the matter of the share but the question is whether all the same he is not entitled to say that the wording of S. 110 of the Civil P. C., does not impose upon him the obligation of showing that there is a substantial question of law.

The cases that have raised this question in this Court from time to time have been referred to. The first case is the case of *Raja Sree Nath Roy* v. *Secretary of State* (1), where the Judge gave an award of compensation at a certain figure and the High Court increased that amount. The applicant desired to go to the Privy Council so that the amount might be further increased and it was held that the two Courts were at one upon the only matter which was going to the Privy Council, namely, on the question whether beyond the amount awarded by the High Court the applicant had any claim. That case is the origin of the doctrine that the language which now finds place in S. 110 of the Code is to be construed with reference to the subject-matter in dispute in appeal to the Privy Council. The basis of that case is that if the two Courts are at one upon the matter which is to be in debate before the Privy Council then it is a case of a decree which affirms the decision of the Court immediately below.

The next case is the case of *Langandeo Prosad Singh* v. *D. J. Reid* (2). There *A* was the person who had erected a dam across a river. *B* was the person who objected to this as a riparian owner. The view taken by the High Court and the trial Court was that *A* had no right to erect the dam, but whereas the trial Court had refused to grant *B* any damages the High Court granted him Rupees 5,000 for damages. The question was whether *A* was entitled to appeal to the Judicial Committee as of right and the High Court held that he was, pointing out that the case was not on the same footing as *Sree Nath Roy's* case (1) because in that case the decision from which the applicant desired to appeal was with reference to the balance of his claim whereas in the case then under consideration the High Court had varied the decision of the first Court to the detriment of the applicant for leave.

I do not think that the case of *Chaitanya Charan Sett* v. *Mohommad Yusuf* (3) or the case of *Uma Churn Sett* v. *Kanai Lal Sett* (4) need be referred to here but there are two cases of the Allahabad High Court which I desire to mention. One is the case of *Bhagwan Singh* v. *Allahabad Bank, Limited* (5). In that case, it is true that the decree of the Court below was modified by the High Court to the prejudice of the applicant for leave by nearly Rs. 8,000 and the application was opposed on the ground that the High Court decree was really one of affirmance. Reliance was placed upon *Sree Nath Roy's* case (1), it being contended that the two Courts were at one in respect of all other matters but had merely differed on the matter of amount. In that case the Allahabad High Court referred to a judgment by the then Judicial Commissioner Mr. Chamier, as he then was, where he dissented from the decision in *Raja Sree Nath Roy's* case (1) and appears to have taken the view that for the purposes of

(1) [1904] 8 C. W. N. 294.

(2) [1919] 23 C. W. N. 582=50 I. C. 760.
(3) A. I. R. 1922 Cal. 316.
(4) A. I. R. 1921 Cal. 81.
(5) A. I. R. 1921 All. 270=43 All. 220.

S. 110 a decree is either modified or affirmed and that if it is modified or varied then it does not come within the concluding words of S. 110. The learned Judges of the Allahabad High Court on their own account then went on to say:

> It can by no stretch of imagination be said that a decree which modifies the decree of the lower Court except perhaps in the matter of costs only . . . . is a decree of affirmance.

That view has certainly a great deal to be said for it but I find that in the following year in the case of *Kamal Nath* v. *Bithal Das* (6) one of the learned Judges who took part in that decision, took part in a decision which appears to me to be not consistent with some of the language which had already been used. That case was one where the plaintiff claimed a large sum on the basis of a mortgage. The main dispute was as to the validity of the mortgage. The Court of first instance decreed the plaintiff's claim on the mortgage in full. On appeal to the High Court that Court affirmed the decision of the trial Court about the factum and validity of the mortgage. It, however, reduced the rate of interest awarded against the appellant thus modifying the decree of the Court of first instance to the extent of some Rs. 300. That, however, was a modification in his favour. It does not appear that the applicant there was desirous of going to the Privy Council in order to contend that the amount of interest ought to have been reduced to a greater extent than Rs. 300. He was desirous of going to the Privy Council upon the question of the factum and validity of the mortgage and the learned Judges took this view:

> The modification of the decree was a modification in favour of the applicant, and as to this he certainly does not seek to appeal nor could he appeal. Therefore his application for leave to appeal relates in fact to the portion of the decree which was prejudicial to him, but which was a decree affirming the decision of the Court below and not modifying it. We have to look to the substance and see what is the subject-matter of the appeal to His Majesty in Council. In the present case the subject-matter of appeal to His Majesty in Council is, as pointed out above, that portion of the decree in respect of which the decree of this Court was a decree in affirmance of the decree of the Court below and not in modification of that decree. Therefore, in our opinion this is not a case in which the applicant is entitled as of right to appeal to His Majesty in Council.

(6) A. I. R. 1922 All. 89=44 All. 209.

The learned Judges go on to say that the case is distinguishable from the case of the previous year to which I have already referred and there can be no doubt that it was distinguishable, but this decision does not consist with some, of the observations made in the previous case.

Finally it is necessary to refer to the decision of the Judicial Committee of the Privy Council in the case of *Annapurnabai* v. *Ruprao* (7). In that case the junior widow and the person whom she said she had adopted as a son to her deceased husband applied for leave to appeal to the Privy Council. The position was that the person claiming to have been adopted by the senior widow brought a suit claiming the property. The Court decided in favour of the plaintiff on the question of adoption, but the junior widow claimed Rs. 3,000 per annum as widow's maintenance. The first Court gave her Rs. 800 per annum; the appellate Court increased that figure to Rs. 1,200 per annum, but in all other respects affirmed the decree of the first Court so that on the question whether or not the maintenance should be Rs. 3,000, Rs. 1,200, Rs. 800 or something else the two Courts were at variance. It was proposed to appeal to the Privy Council on the question of the amount of maintenance. That indeed was the only matter of substance in the appeal. The High Court, however, treated the case as one where the two Courts in India had been in agreement and refused leave to appeal. The Privy Council appears to have been clearly of opinion that that was not so and it does seem to me, therefore, that the particular application made in *Sree Nath Roy's* case (1) of the principle that you have to have regard to the subject-matter of dispute in appeal to the Privy Council must be taken as overruled.

The question is whether, on the strength of the only case before the Privy Council which we have for our guidance, the views hitherto adopted in this and other High Courts require to be further considered. The question is whether the judgment of their Lordships means that in every case where the decree of the High Court is not a mere decree dismissing the appeal or a mere decree affirming the order of the Court below in the case,

(7) A. I. R. 1925 P. C. 60=51 Cal. 969 (P. C.).

the necessity for showing a substantial question of law is done away with. It appears to me that the case of *Annapurnabai* v. *Ruprao* (7) is not in itself a sufficient authority to justify this Court in abandoning the principle which it has with other High Courts acted upon; that is to say, I do not think that it shows that it is an erroneous view that we have to look to the substance and see what is the subject-matter of the appeal to His Majesty in Council. I have, I confess, some doubt as to whether in the end even that principle would be found to be in accordance with the construction to be put upon S. 110, but this Court and other High Courts have for many years acted upon that principle and I am not prepared to accept the case of *Annapurnabai* v. *Ruprao* (7) as going further than this that where there is a dispute as to the amount of the decree or as to the amount of damages the reasoning of *Sree Nath Roy's* case (1) is not a correct application of that principle. We may take it, I think, that where the amount is a question in dispute, the fact that the Courts differ and that the higher Court differs in favour of the applicant does not mean that the decision is one of affirmance, but I am not, in a case of this kind, prepared to say that because on a totally different point, namely, a point about the share, the applicant has succeeded and succeeded altogether so that he has no further grievance in that matter, he can without showing a substantial question of law have a right to litigate upon other points upon which both the Courts have been in agreement.

I think, therefore, that this application for a certificate should be refused.

The application is dismissed with costs, hearing-fee six gold mohurs to be divided equally between the three sets of Opposite Parties who have appeared.

**C. C. Ghose, J.**—I agree.

D.D. *Application dismissed.*

---

## A. I. R. 1927 Calcutta 546

MUKERJI AND GRAHAM, JJ.

*Shyama Charan Ghose* — Defendant—Appellant.

v.

*Fakir Chandra Dutt*—Plaintiff—Respondent.

Appeal No. 139 and 140 of 1925, Decided on 14th December 1926, from the appellate decrees of the Sub-J., 2nd Court, Hooghly, D/- 30th May 1924.

(a) *Bengal Tenancy Act* (1885), *Ss.* 102 (*b*) *and* 50—"*Kaimi*" *added to* "*settled raiyats*" *in the entry—Entry is not bad—Bengal Tenancy Act, S.* 50.

The addition of the word "kaimi" to "settled raiyats" has not the effect of making the entry a bad entry, so as to bar the operation of S. 50, [P 547 C 1]

(b) *Bengal Tenancy Act, S.* 50 — *S.* 50 *inapplicable—Court can draw inference of fixity of rent from evidence — Uniform rate for twenty years is not itself sufficient to establish fixity of rent.*

The Court is not precluded from drawing the appropriate inference from the facts proved by evidence on the record because S. 50 has no application. Payment of rent at an unvarying rate for more than 20 years is not in itself sufficient to establish that the tenancies are held at fixed rate. [P 547 C 1]

(c) *Words—*"*Kaimi*" *does not connote fixity of rent.*

The word "kaimi" connotes nothing more than permanence of occupation and does not import fixity of rent. [P 547 C 1]

*Bijan Kumar Mukherji* — for Appellant.

*Bimal Chandra Das Gupta* and *Surya Kumar Aich*—for Respondent.

**Graham, J.**—These appeals, in which the defendant is the appellant, arise out of suits for enhancement of rent on the ground of increase in the price of staple foodcrops. The plaintiff claimed that the tenancies in question are occupancy holdings and liable as such to enhancement under the provisions of S. 30 of the Bengal Tenancy Act.

The main defence was that the tenancies are holdings at fixed rate and are not liable to enhancement. The Court of first instance found in favour of the plaintiff and gave a decree. On appeal by the defendant that decision was affirmed by the learned Subordinate Judge, the appeals being dismissed and the cross-appeals of the plaintiff allowed with costs.

The defendant has now appealed to this Court and two points have been urged on

his behalf. The first contention has reference to Ss. 50, 102 (b) and 115 of the Bengal Tenancy Act, and it is argued that the entry in the Record of Rights describing the tenancies as kaimi settled raiyats' is not an entry in compliance with the provisions of S. 102 (b) of the Bengal Tenancy Act, and that that being so, the presumption arising under S. 50 of the Act is not taken away. I do not think there is any substance in this contention. One of the classes expressly specified in S. 102 (b) for record is that of 'settled raiyat,' and in view of the fact that the proceeding portion of the section authorizes the Settlement Officer to include 'other particulars,' it cannot, in my opinion be held that the addition of the word 'kaimi' has the effect of making the entry a bad entry, so as to bar the operation of S. 50 of the Act.

It was next contended that, even assuming the entry to be a good entry, and that the appellant is not entitled to the benefit of the presumption under S. 50, the Courts below ought in the particular circumstances of this case, and on the basis of the evidence furnished by certain rent receipts to have held that the tenancies were at fixed rate, and are not enhanceable. It was also urged in this connexion that the expression 'kaimi settled raiyat' imports fixity of rent as well as permanency and heritability. In my judgment, these contentions are not well founded. It is no doubt true, as was pointed out in the case of *Nityananda Pal* v. *Nanda Kumar Chowdhuri* (1) that it does not follow because S. 50 has no application that the Court is precluded from drawing an appropriate inference from the facts proved by evidence on the record. It would appear, however, from ground 5 of the grounds of appeal that the rent receipts referred to above merely show payment of rent at an unvarying rate for more than 20 years and that in itself would not be sufficient to establish that the tenancies are held at fixed rate.

As regards the expression 'kaimi settled raiyat' the meaning of the word 'kaim' has been considered in numerous reported cases of this Court and the view almost uniformly adopted has been that it connotes nothing more than permanence of occupation and does not import fixity of rent: see *Fazel Sheikh* v. *Keramuddi Sheikh* (2), *Gayratulla* v. *Girish Chandra Bhaumik* (3) and *Mehr Ali* v. *Kalai Khalashi* (4). We should not, I think, be justified in adopting any other interpretation. In the result the appeals fail and must be dismissed with costs.

**Mukerji, J.**—I entirely agree and wish to add a few words with regard to the second ground upon which this appeal has been pressed before us. The way I look at the matter is this: The word kaimi does not import fixity of rent but only permanence of occupation. This is well settled upon a series of decisions, some of which have been noticed by my learned brother in his judgment. There is one decision of this Court which has been cited before us on behalf of the appellants, as suggesting a different view, namely, the case of *Dwarka Nath Banerji* v. *Rash Behari Guha* (5).

In that case the word 'kaimi' appears to have been used with reference to what was found to be a tenure and it, therefore, imported permanency of the tenure; but the entry said nothing about the fixity or otherwise of the rent as it should have. In that case it was held that the tenant was entitled to prove uniform payment of rent for the statutory period and to rely upon the presumption under S. 50 of the Bengal Tenancy Act in support of their case that the tenure bore a fixed rental. It was held that the word 'thereafter' in S. 115, Bengal Tenancy Act, was not to be understood as suggesting that the payment could not be proved to show that at the time when the entry was made the presumption arose and that it was that presumption which led to the entry being made in that particular form. This is how I understand the judgment in that case. S. 115, Bengal Tenancy Act, does not, in my opinion, exclude such evidence of uniform payment of rent, but only precludes the application of the presumption to a tenancy after the particulars in respect of that tenancy have been finally recorded in the record of rights. The evidence is relevant, and may be used for explaining the entry in the record of rights or proving any fact apart from the presumption. Using the evidence for such purposes, the defendant gets very little in the present case;

(1) [1911] 13 C.L.J. 415=10 I.C. 163.

(2) [1902] 6 C.W.N. 916.
(3) [1908] 12 C.W.N. 175.
(4) [1915] 19 C.W.N. 1129=29 I.C. 461=27 C.L.J. 579.
(5) A.I.R. 1923 Cal. 365.

for apart from the aid of the statutory presumption the evidence of such payment does not go far enough to establish that the rent is fixed.

G.B. *Appeals dismissed.*

---

## A. I. R. 1927 Calcutta 548

MUKERJI AND GRAHAM, JJ.

*Dwijendra Krishna Dutta*—Petitioner.

v.

*Surendra Nath Nag Choudhury* and *others*—Opposite parties.

Civil Rule No. 1120 (M) of 1926, Decided on 14th December 1926, against the order of the Sub-J., 3rd Court, 24 Parganas (Alipore).

*Contempt of Court—Receiver appointed by High Court in its appellate jurisdiction—Obstructing receiver in his duty is contempt—High Court has power to punish—Wilful disobedience of an order to be punishable, order must be personally served.*

The receiver is an officer of the Court and the Court must protect him while discharging his duties and interference with or disturbance of a receiver appointed by the Court is a contempt. When a receiver is appointed by the High Court in its appellate jurisdiction, pending an appeal in that Court the High Court has ample jurisdiction to deal with matters relating to the receiver including proceedings for contempt and so also when the appeal itself has been disposed of but the receiver has not been discharged: 28 *Cal.* 790, *Rel. on.* [P 551 C 2]

Wilful disobedience to a judgment or order requiring a person to do any act other than the payment of money or abstain from doing anything is a contempt of Court punishable by attachment or committal. But in order to found an application for attachment or committal for disobedience of an order, service of the order alleged to have been disobeyed has to be proved as a *sine qua non*. Obstruction to receiver in respect of property on the ground that it was wrongly included in the decree is no defence. But a person cannot be held to be responsible for a breach of an undertaking not made by him personally but by his pleader. [P 551 C 2, P 552 C 1 & 2]

*Hemendra Chandra Sen* and *Satindra Nath Mukherji*—for Petitioner.

*Bankim Chandra Mukherjee* and *Rupendra Kumar Mitter* and *Nabadweip Chandra Shaha*—for Opposite Parties.

**Judgment.**—A sale which took place in execution of a mortgage-decree in respect of the properties mortgaged having been set aside under O. 21, R. 90, Civil P. C., by the Subordinate Judge, Third Court, 24 Parganas, the decree-holders have preferred an appeal to this Court being appeal from Original order No. 200 of 1926, and the said appeal is yet pending. After preferring the appeal the decree-holders applied for the appointment of a receiver in respect of the mortgaged properties. By orders passed on the 17th and 19th August 1926 this Court appointed a receiver to continue in office till the disposal of the appeal. As the result of further orders to which it is not necessary to refer Mr. Dwijendra Krishna Dutt, a Vakil of this Court, was finally appointed as such receiver with all the powers provided for in O. 40, R. 1, Cl. (d) of the Civil P. C., and a writ of appointment was issued in his favour on or about the 28th September 1926. The writ directed "that the said receiver do at once take possession of the mortgaged properties for discharging his duties as such receiver."

The properties, we are told, are comprised within three Touzis, being Touzis Nos. 614, 633 and 1825, the first two being governed by a cutchery at a place called Sobaria and the last one, a cutchery at a place named Chaita. The principal amount secured by the mortgage which is dated somewhere about 1915, was Rs. 1,95,000, the amount of the mortgage-decree is Rs. 3,95,000 of which Rs. 25,000 has since been paid off by the mortgagors and at the sale which took place in execution of the said decree and which has been set aside and the validity of which forms the subject matter of the appeal, the decree-holders themselves purchased the properties for Rs. 2,25,000.

For our present purposes it is not necessary to narrate the experiences of Mr. Dutt in connexion with the work to which he was appointed; it is sufficient to say that they are not very happy and it is clear that he is labouring under considerable difficulty and disadvantage in his endeavours to manage the estate and meet its dues and demands and to save it from being sold away. He submitted a report dated 10th November 1926, from which the following facts may be gathered. He appears to have attempted to serve personally through an officer of his, notices on Surendra Nath Nag Chowdhury, Satyendra Nath Nag Chowdhury and Jitendra Nath Nag Chowdhury, three of the judgment-debtors, calling upon them to supply him with collection papers of the estate.

These notices were not accepted. He then sent the notices through registered post, when they were accepted by Satyendra Nath Nag Chowdhury and Jitendra Nath Nag Chowdhury but refused by Surendra Nath Nag Chowdhury. Not being able to get any collection papers he went out to do as best as he could in the matter of making collections from the tenants. He went to the cutchery at Sobaria to take possession of it, but was resisted by one Amode Kumar Nag Chowdhury, a son of Surendra Nath Nag Chowdhury, and his officers and Durwans. He had to take the assistance of the Police but even then the said Amode Kumar Nag Chowdhury, and one Nibaran Chandra Nag, one Nani Gopal Bose, officers of the said Surendra, Satyendra and Jitendra, refused to give him possession of the cutchery and, on the other hand, went on making collection from the tenants on receipts bearing back dates. The police appears to have reported to the Magistrate who thereupon issued prohibitory notices. Attempts to serve these notices proved futile as in the meantime the aforesaid persons left the place locking up the cutchery and some of them persisted in making collections on giving antedated receipts. In one of the mouzahs, namely, Narayanpur the said Nibaran Chandra Nag, one Fani Bhusan Bose and one Monbahar Singh, employees of the said three judgment-debtors, openly went on dissuading the tenants from paying rent to the receiver.

On this report being received by this Court a rule was issued on the 18th November 1926, calling upon Surendra Nath Nag Chowdhury, Jitendra Nag Chowdhury and Satyendra Nath Nag Chowdhury, the three opposite parties, to show cause why they should not be committed to jail for contempt of Court in connexion with their conduct as disclosed in the receiver's report, dated the 10th November 1926, or why such other orders should not be passed as to this Court may seem proper. The Court issuing the rule directed that the notices upon Surendra Nath Nag Chowdhury would be served upon Babu Rupendra Kumar Mitter, who appeared on his behalf on that day, and the other notices would be served by registered post. It appears that the notice on Jitendra Nath Nag Chowdhury which was sent out by the office of this Court came back refused by the addressee.

The rule came on for hearing on the 26th November 1926. All the three persons appeared to oppose it. An affidavit sworn to by the above-named Nani Gopal Bose, who described himself as the Sudder Naib of Jitendra and Satyendra, as well as an affidavit of one Surendra Nath Banerji, who described himself as the Superintendent of the estate of Surendra, both dated the 24th November 1926, were filed in opposition and an affidavit in reply on behalf of the receiver sworn to by his officer Rajendra Nath Chowdhury on the same date was also filed. The Court on the 26th November 1926, passed an order which concluded in the manner following:

> We are accordingly of opinion that the receiver has the right to immediate possession of the cutchery bari and the opposite parties named above are guilty of unlawfully obstructing him in the discharge of his lawful duties We, however, do not think that we should pass the order we propose to pass as we intend to give another opportunity to the opposite party to carry out the order of this Court.
>
> With regard to the collection papers the respective lawyers for the opposite party No. 1 and opposite parties Nos. 2 and 3 undertake to supply the receiver with a set of current collection papers within 10 days from date to enable him to collect rent from the tenants. We, therefore, order that the opposite party do supply the receiver with collection papers within 10 days from date; and we further direct that the opposite party do offer no resistance or obstruction to the receiver in his taking possession of the cutchery bari at Sobaria. If these orders are not carried out the law will take its course.
>
> Let this matter come up before us Monday week.

On the expiry of the period of 10 days mentioned in the aforesaid order the matter has come up before us. An affidavit sworn to by one Soroshi Bhusan Chowdhury, an officer of the Receiver, on the 7th December 1926, has been filed on his behalf and counter-affidavits sworn to by Surendra Nath Banerjee, Superintendent of the estate of Surendra, on the 7th December 1926 and by Bepin Behari Dutt, officer of Satyendra and Jitendra, on the 8th December 1926, have also been filed. It appears that possession of the cutchery at Sobaria has been given to the receiver. It appears that of the collection papers all that have been tendered to the receiver and have now been filed before us are: (1) Certain papers which are called 'karchas' for 1333 B. S., in respect of all the three

Touzis (2 copies, evidently prepared from the same original) one set being filed by Surendra and the other by Satyendra and Jitendra; (2) some counterfoils (1 book) for 1331 B. S. in respect of Touzis Nos. 614 and 633 filed by Surendra; (3) some counterfoils for 1333 B. S., in respect of Touzi No. 614 (1 book) and No. 633 (3 books) filed by Satyendra and Jitendra. The 'karchas' show the names of the tenants, their lands and the rental thereof and are mere copies which have been evidently prepared for being produced as aforesaid and it is said they have been so prepared from the books of 1316 and 1317 B. S., which are in existence. All the parties, namely the decree-holders, the three opposite parties and the receiver, have appeared before us and we have heard what they have submitted.

It will be convenient to deal here with one question which arises for consideration, namely, whether the opposite party have sufficiently complied with the undertaking which their lawyers gave to this Court on the 26th November 1926, and upon which the order of that date was passed, or in other words whether they have supplied the receiver or produced all the current collection papers. (The judgment then discussed the evidence and proceeded.) The conclusion at which we have arrived, so far as the collection papers are concerned, is that they are available, and that the current collection papers, for the last 3 years, that is to say, from 1330 up to now are in the possession and control of the opposite party and are quite within their power to produce. We are clearly of opinion that the explanation offered in the affidavits to which we have referred is absolutely false and that it does not bear examination for a moment. We regret that the opposite parties have thought fit to withhold these papers notwithstanding the undertaking given by their lawyers on the 26th November 1926, and they have flagrantly disobeyed the Court's order with the object of hindering the receiver in his management of the estate. In our opinion there is no extenuating circumstances nor any redeeming feature, for it is clear that the Court's authority is being trifled with and recourse is being had to deliberate and wilful perjury in order to deter the due administration of justice.

The question then is, what is the action that we should take in the matter? To answer this question we have got to look at the circumstances from two distinct view points: 1st, whether the opposite parties have been guilty of contempt by reason of the obstruction that was offered to the receiver in his attempt to take possession of the Sobaria cutchery; and 2nd, whether the opposite parties have been so guilty because of their failure to hand over the collection papers to the Receiver.

So far as the first of these matters is concerned, this Court has already in its order, dated the 26th November 1926, found that "the opposite parties named above are guilty of unlawfully obstructing him "(that is to say the receiver) in the discharge of his lawful duties." We may add that on considering the materials on the record and hearing all that has been submitted to us in the course of the arguments we feel no hesitation in affirming the view that a most flagrant defiance was offered to the receiver and, therefore, to the authority of this Court. The obstruction that was offered to the receiver and the attempt that was made to intercept and prevent the payment of rents to him amounted clearly to an interference with the Court's possession and the persons who were concerned therein were guilty of contempt of Court. There is no question as regards the powers of this Court to punish those who were guilty of such contempt. In the case of *Governor of Bengal* v. *Moti Lal* (1), Sir Lawrence Jenkins, C. J., on an elaborate discussion of the whole law on the subject observed thus:

> Now this Court is a Court of record in all its jurisdictions and it thus has power to commit for any contempt in relation to any of those jurisdictions: *In re Abdool and Mahtab* (2). Thus I have no doubt that were there to be an interference with the due administration of justice by a Division Bench in relation to a criminal appeal (for the case then before the Court was one in which a criminal appeal to this Court was likely to be filed) pending before it, and that interference amounted to an offence, this Court on its Crown Side would have power to punish it as a contempt on a summary proceeding.

In the same case at page 252 (41 *Cal.*) Mookerjee, J., dealt with the distinction

(1) [1913] 41 Cal. 173=17 C. W. N. 1253=20 I. C. 81=18 C. L. J. 452.
(2) 8 W. R. Cr. 32.

between civil and criminal contempt and observed thus :

The distinction between criminal and civil contempt is of a fundamental character, though it has been sometimes overlooked. A criminal contempt is conduct that is directed against the dignity and authority of the Court. A civil contempt is failure to do something ordered to be done by a Court in a civil action for the benefit of the opposing party—therein. Consequently in the case of a civil contempt the proceeding for its punishment is at the instance of the party interested and is civil in its character, in the case of criminal contempt, the proceeding is for punishment of an act committed against the Majesty of the law and the primary purpose of the punishment is the vindication of the public authority, the proceedings conform as nearly as possible to proceedings in criminal cases. It is conceivable that the dividing line between the acts constituting criminal and those constituting civil contempts may become indistinct in those cases where the two merge into one another. But, in ordinary cases the line of demarcation is not difficult to determine.

In the case of *In the matter of Amrita Bazar Patrika* (3), Mookerjee, J., as a member of the Special Bench observed as follows :

The power to punish for contempt is inherent in the very nature and purpose of Courts of Justice. It subserves at once a double purpose, namely, as an aid to protect the dignity and authority of the tribunal and also as an aid in the enforcement of civil remedies. The power may consequently be exercised in civil or criminal cases or independently of both, and either solely for the preservation of the authority of the Court or in aid of the rights of the litigant or for both these purposes combined. By reason of this two-fold attribute, proceedings in contempt may be regarded as anomalous in their nature, possessed of characteristics which render them more or less difficult of ready or definite classification in the realm of Judicial Power.

Again :

The view deducible from these decisions is in general agreement with what is indicated above, namely, a proceeding to punish for contempt has the essential qualities of a criminal proceeding, whether the proceeding is initiated primarily to vindicate the Court's authority or solely as a coercive and a remedial measure to enforce the rights of the litigant or for both these purposes combined. This must be so, since it necessarily results from the nature of the power to punish for contempt that whatever the primary purpose of such a proceeding may be, it is always within the power of the Court to make its judgment, in part, at least punitive or vindicatory in its character ; in other words, where the sole purpose sought by initiating the proceeding is to secure the coercive and remedial action of the Court against a party, the Court may nevertheless, in its discretion, add a punishment by way of fine or imprisonment, for the failure of the person in contempt to obey its mandate.

Contempt by obstructing an officer of the Court is punished, not for the purpose of vindicating the dignity or the person of the officer, but to prevent undue interference with the administration of justice [*Helmore* v. *Smith* (4) and *In re Johnson* (5).] Then receiver is an officer of the Court and the Court must protect him while discharging his duties, and interference with or disturbance of a receiver appointed by the Court is a contempt. When a receiver is appointed by this Court in its appellate jurisdiction, pending an appeal in this Court, this Court has ample jurisdiction to deal with matters relating to the receiver including proceedings for contempt ; and so also when the appeal itself has been disposed of but the receiver has not been discharged. [*Grey* v. *Woogramohun Thakur* (6)]. There is, however, a difficulty which to our mind, seems insuperable in dealing with the opposite party so far as this matter is concerned. The opposite parties do not appear to have personally done anything which may be said to have amounted to obstruction to the receiver or interference with the Court's authority. A number of names are mentioned in the receiver's report ; those persons must have acted either under the express orders or at least with the connivance of the opposite parties or at least of some of them, and certainly for the benefit of them—all. But the facts lie only within the region of probability, and unless reasonable certainty is attained, no punishment can possibly be awarded. The defence that Sobaria Cutchery was not included in the mortgage, even if bona fide or well-founded, would not afford any justification for the obstruction for the order must be construed as meaning that the appointment was being made in respect of the mortgaged properties as mentioned in the decree and if that order was wrong the Court, by which it was made, should have been moved to set it right. As matters stand, however, it is not possible to punish the opposite parties or any of them for the obstruction that was offered to the receiver.

Then as regards the collection papers.—No order for delivery of the collection papers to the receiver was passed by the Court, at any time before the 26th November 1926. The receiver, no doubt,

(3) [1918] 45 Cal. 169=26 C.L.J. 459=45 I.C. 338=21 C.W.N. 1161 (F.B.).

(4) [1886] 35 Ch. D. 449=35 W.R. 157=56 L. J. Ch. 145=56 L.T. 72.

(5) [1888] 20 Q.B.D. 68=57 L.J. Q.B. 1=36 W.R. 51=52 J.P. 230=58 L.T. 160.

(6) [1901] 28 Cal. 790.

was perfectly justified in asking for them, but the opposite parties were under no obligation to comply with his demand. The rule, we are dealing with, was issued on the 18th November 1926, when there was no order upon the opposite parties relating to the collection papers. On this simple ground they cannot be dealt with for there could be no contempt in respect of an order which was not in existence on that date. Wilful disobedience to a judgment or order requiring a person to do any act other than the payment of money or abstain from doing anything, is a contempt of Court punishable by attachment or committal. Formerly, in the Court of Chancery, a man was attached for neglecting to do an act ordered to be done and committed for doing a prohibited act [*Callow* v. *Young* (7)]. Attachment and committal are now alternative remedies whether the order to be enforced is mandatory or prohibitory [*Harvey* v. *Harvey* (8), *D.* v. *A.* & *Co.* (9)], and both are modes of execution available for enforcing judgments and orders. In order to found an application for attachment or committal for disobedience of an order, service of the order alleged to have been disobeyed has to be proved as a *sine qua non*. The rules as to service are very stringent under the English Law, and personal service is insisted on except in certain excepted or special cases. Personal service may be dispensed with if it is shown that the person to be served has evaded service [*Kistler* v. *Tettmen* (10)], and the fact that the person ordered to do the act was actually in Court when the order was made is not a ground for dispensing with such personal service. [*In re Tuck, Murch* v. *Loosemore* (11)]. In the present case far from there having been any service of the order, the order itself was not in existence. Can we deal with them for breach of the undertaking which their lawyers gave, presumably on their behalf, on the 26th November 1926, and on the basis of the order that was passed on them on that day for supplying those papers to the receiver within 10 days?—The answer must, in our opinion, be in the negative for this order also was never served on the opposite parties personally. Moreover, the hearing that has taken place before us was not in relation to any proceedings for contempt for non-compliance with that order but only on the footing whether they have sufficiently atoned for their guilt in respect of the obstruction to the receiver by giving him the collection papers that they were ordered to give. For these reasons, therefore, it is not possible to punish them for their non-compliance in this respect.

The rule issued on the 18th November 1926, must accordingly be discharged. The receiver, however, will be entitled to his costs for these proceedings as against the opposite parties because it was the obstruction offered by their men which necessitated the proceedings. We assess the hearing-fee in this rule at 10 gold mohurs.

Though the rule is thus disposed of we cannot let the matter rest here. We have already expressed our view as regards the collection papers and we think we shall be failing in our duty if in the present case we do not make further orders which are, in our opinion, necessary in order to place the receiver in more effective possession of the estate and to obviate his difficulties in the management of it and to enable him to make the collections which he must make at once if the estate is to be saved from being sold for its demands. We accordingly order that the opposite parties Surendra Nath Nag Chowdhury, Satyendra Nath Nag Chowdhury and Jitendra Nath Nag Chowdhury do within four days deliver to the receiver all cheque, counter-foils, jamawasilbakis, jamabandis, karchas, sehas and jaripi chittas and all such other papers as they may have in their possession, control or power, for and relating to the years 1330 to 1333 B. S. in respect of Touzis Nos. 614, 633 and 1825.

Copies of this our order will be served by the proper officer of this Court on each of the opposite parties at once. Every effort should be made for effecting personal service of this order and if that be found impossible then the service should be made in the manner prescribed by law for substituted service. A proper

(7) [1887] 56 L.J. Ch. 690=56 L.T. 147.
(8) [1884] 26 Ch. D. 644=48 J.P. 468=33 W. R. 76.
(9) [1900] 1 Ch. 484=48 W.R. 429=82 L.T. 47=69 L.J. Ch. 382.
(10) [1905] 1 K.B. 39=74 L.J. K.B. 1=92 L. T. 36=21 T.L.R. 24=53 W.R. 230.
(11) [1906] 1 Ch. 692=75 L.J. Ch. 497=22 T. L.R. 425=94 L.T. 597.

report of the service will have to be submitted to this Court as soon as it is effected. The receiver will report to this Court on the expiry of four clear days from the date of the said service whether this order has been complied with by the opposite parties or not. The Court will then proceed to take such action as, in its opinion, may be necessary, just and proper.

G.B. *Rule discharged.*

---

## A. I. R. 1927 Calcutta 553

RANKIN, C. J., C. C. GHOSE AND BUCKLAND, JJ.

*In the matter of the Assessment of Behari Lal Mullick.*

Civil Reference, Decided on 17th February 1927, by the Commissioner of Income-Tax, Bengal.

(a) *Income-Tax—Assessment for a year, in which source of income, which existed in the previous year is non-existent is valid.*

An assessment for a year is valid in law when the source of income is non-existent in that particular year but was existent in the previous year. [P. 553, C. 1 ; P. 557, C. 2]

(b) *Income-Tax—Explained.*

*Rankin, C. J.*—The income-tax is one tax and not an aggregate of different taxes. [P. 555, C. 2]

(c) *Income-Tax Act* (1922), *S.* 9—*House property income—Interest due on a mortgage though not actually paid is allowable.*

An amount of interest due on a mortgage debt but not actually paid is an allowable item of expenditure under head "house property income under S. 9." [P. 558, C. 1]

*Langford James* and *H. R. Pankridge*—for Income-Tax Commissioner.

*M. N. Kanjilal*—for Assessee.

**Rankin, C. J.**—This is a Reference made under S. 66 of the Indian Income Tax Act of 1922 by the Commissioner of Income-Tax, Bengal. Two questions are referred to us and I will take them separately. The first question is as follows :

Is an assessment for a year valid in law when the source of income is non-existent in that particular year ? Is not S. 3 itself a bar to making an assessment in such a case ? Is not the phrase 'of which he is the owner' in S. 9 a bar to making an assessment in the case of house property ?

The assessment in the course of which this question of law arises was the assessment made upon one Behari Lal Mullick for the income-tax year 1924-25. The assessee was owner of a house property and land owner living apparently at 8 Durpa Narain Tagore Street in Calcutta—a dwelling-house in which he had a one-third share. The "previous year" with which we have to deal is 1923-24 and the assessee in his "statement of total income during the previous year" declared the amount of profits or gains or income during the previous year as having accrued to him from two sources numbered respectively 4 and 9 in the form provided by Rule No. 19 of the Rules made by the Board of Inland Revenue under S. 59 of the Act. In respect of "property" as shown in detail in Sch. A, he declared the income to have been Rs. 3,116. Two items of property are included in this : (a) certain house property at 191, Harrison Road, which was let out to tenants and for which in 1923-24 the assessee actually received as rent Rs. 3,900 : and (b) the dwelling-house in Durpa Narain Tagore Street, the annual letting value being put down as Rs. 1,724. These two items when certain deductions have been made account for the figure Rs. 3,116. The source No. 9 in the form was declared to have yielded in 1923-24 an income of Rs. 8,306. This was ground-rent received by the assessee for certain bustee lands at 14 Mechuabazar Street, let out to tenants.

The claim made by the assessee was that the house property at Harrison Road and the bustee land at Mechuabazar Street had been mortgaged by him and that although in the "previous year," i.e., 1923-24, he had derived income therefrom as aforesaid he had in the year of assessment, i.e., 1924-25, received no income therefrom in fact by reason that a mortgage suit had been brought against him and the properties were sold on the 16th of August 1924. He claimed accordingly that in 1924-25 he had no source of income and was not liable to be assessed for the income-tax year 1924-25.

The learned advocate who appears before us on behalf of the assessee contends in effect that the principle of the decisions under the English Income Tax Acts in *Brown* v. *National Provident Institution* (1) and *Whelan* v. *Henning* (2) is applicable to the Indian Income-Tax Act of 1922 with the result that if an

(1) [1921] A. C. 222.
(2) [1926] A. C. 293.

assessee has no income in the year of assessment from a particular source, no income-tax is due from him notwithstanding that in the "previous year" he did, in fact, derive an income from that source.

The income-tax authorities who have dealt with the case do not appear to have examined into the facts or come to a final and definite conclusion as to whether in respect of (a) the dwelling-house, (b) the house property, or (c) the bustee lands the assessee is really entitled to say that he had no income whatever in the year of assessment. They reject the contention that the principle of *Brown's* case (1) applies to the Indian Act of 1922 and at the request of the assessee have referred this question to the Court framing it at the assessee's request in the terms stated above.

Ordinarily a case for the opinion of a Court of law should be stated on the basis of a careful finding of facts. In this way only is it possible to avoid the raising of questions, academic or misleading, and in this way only is it possible for a Court of law to deal usefully or correctly with any questions of law. In the present case, however, it is apparent from the form of the return prescribed by Rule No. 19 that on the view taken by the income-tax authorities, they are not bound or entitled in any year of assessment to make an enquiry into the income of any year save the "previous year" and that they cannot be called upon to conduct an enquiry into the income of two years with a view to ascertain what sources of income persisted throughout both the years.

Learned counsel for the Board of Inland revenue is anxious to have a determination from us upon the question whether the principle of *Brown's* case (1) applies in India under the present Act and he is prepared to admit with reference to this particular assessment upon this particular assessee whatever facts are necessary to raise this highly important question. I will assume accordingly to take the clearest case that whereas in the "previous year," i. e., 1923-24, the assessee received an income from ground-rent of the bustee lands, he has in the year of assessment derived no income whatever from that source.

For the purpose of understanding the law upon this question under the English Acts prior to the Finance Act 1926, it makes no difference whether we examine the Act of 1842 (5 and 6 Vict., Chap. 35) or the Act of 1918 (8 and 9 Geo. V, Chap. 4). Upon a true construction of either Act the tax for each income-tax year was charged upon the income of that year. The assessee had to make his return and the assessment upon him had to be made at a time when a large portion of that year had still to run. To ascertain the amount of future receipts many rules were provided. What the assessee in England had to return as the true figure upon which he was liable to pay was a national or statutory income computed with reference to any one source in a way which might depend upon special circumstances. Save in one special type of case (which may be shortly referred to as case 3 of Sch. D) it never was—and on the face of the English statute it could not well be—doubted that the statutory income upon which assessment in any particular year was made was an income which the legislature deemed the assessee to have received in the year of assessment. On the words of the English Acts, it is in almost every case as plain as express language can be that the legislature imputed the statutory income to the assessee by way of computation or measurement of his income for the year of assessment. Accordingly the English Acts and the rules of computation which they applied to the various possible sources of income were construed upon the principle that in no year of assessment did the legislature intend to impose the tax in respect of income derived in previous years. If in the year of assessment the assessee had derived some income from a particular source, the amount for purposes of taxation might have to be computed at least provisionally by reference to his income from that source in one or more of the years immediately preceding. If, however, the assessee in the year of assessment derived no income from a source which in the previous years had yielded income, the statutory rules as to computation of the present and future by reference to the past did not apply so as to impute to the bar of assessment an income which did not exist at all. The

basis and subject-matter of the tax was the income in the year of assessment. As a matter of law this is true because it is the true construction of the English statutes and for no other reason. In *Brown's* case (3), Rowlatt, J., put this matter in the simplest words :

> There is no doubt that the general scheme of the income-tax is that it is payable in respect of a source of income existing in the year of assessment, though the amount is often measured by the results of previous years.

The contention of the Board of Inland Revenue before us upon this reference is that in 1922 the Indian legislature, which in previous Income-tax Acts had clearly followed the English Acts in the general scheme and in the principle of putting the tax upon the income derived during the year of assessment, intentionally departed from that principle and determined in each year to levy the tax not upon the income of the year of assessment, i. e., the current year, whereof a part is unexpired at the time of assessment, but on the income of the previous year; and that under the Indian Act of 1922 the income of the previous year appears not as a standard by which the next year's income is to be computed, nor as a measure nor as an element is one average, but as being itself the subject-matter of the tax. However familiar one may be as lawyer or as patient with the English principles, one cannot profess in either capacity that there is anything absurd, impossible or unjust in levying income-tax upon the actual receipts of a completed year in the year which follows. One can see readily enough that there may be grave difficulties in changing from the one system to the other, difficulties too in combining taxation of a simply retrospective nature in respect of the profits of the preceding year with a system of deduction as the source in the year of assessment at the rate imposed for that year : also that, as Rowlatt, J., pointed out in the case already cited [*Brown's* case (3)],

> a postponed tax like this has the inconvenience of letting the tax-payer go in the year when he has the income, and taxing him when he has parted with it, perhaps by bankruptcy, or of losing the tax altogether when the tax-payer has escaped by death.

It may be on the other hand, that the Indian legislature has seen its way to impose the income-tax directly upon actual receipts to get rid of national or statutory incomes altogether, to avoid so far as possible the labour of subsequent adjustments and the inconvenience of refunds of tax by a scheme which gives to the taxpayers a substantial time between the end of the year the income of which is charged and the time at which they are required to pay.

These considerations, of course, are for the legislature, and the only question for the Court is as to the meaning of what the legislature has said. I refer to them, in the first place, because they are matters on which it is specially necessary that the Income-tax Act of 1922 should be carefully scrutinized, and in the second place, because it is desirable to notice that until it is first decided whether or not the tax is a retrospective tax on the past year nothing can be gained by the reflection that the income-tax is a tax on income or that a non-existent income cannot be charged or made to yield revenue. There is, however, one principle often appealed to in the English cases which is even more clearly applicable to the Indian than to the English Acts, namely, that the income-tax is one tax and not an aggregate of different taxes.

For the present purpose the proper starting-point is the Indian Income Tax Act (7 of 1918). By S. 14 sub-S. (2) it was provided that :

> there shall be levied in respect of the year beginning with the first day of April 1918, and in respect of each subsequent year, by collection in that year and subsequent adjustment as hereinafter provided income-tax upon every assessee in respect of his taxable income in that year at the rate specified in Sch. I.

The amount of the taxable income of an assessee was determined by the machinery described in S. 17 which provided for a return to be made in a prescribed manner of the total income during the previous year. By S. 18 the collector, if satisfied that such return is correct and complete, was directed to assess :

> the sum payable by the assessee for the year in which the return is made on the basis of such return.

By S. 19 when the collector had ascertained the total income actually received by or accrued to the assessee in the previous year, he was to compute the income-tax which would have been payable if it had been levied in such

(3) [1919] 2 K. B. 497.

previous year with reference to the amount of the income so ascertained and the law then in force; and the difference between the sum so computed and the aggregate of the sums already paid by or on behalf of the assessee in respect of income-tax for such previous year was to be paid by or refunded to the assessee. This system of adjustment involved a running account between the Government and the tax-payer, a provisional assessment being first made on the income of the preceding year and the assessment being adjusted and corrected when the income in the year of assessment had been ascertained. There, can, therefore, be no doubt that the tax was laid upon the income of the year of assessment and the principle affirmed in *Brown's* case (1) was given full effect. Ss. 5 to 11 inclusive correspond roughly to the schedules of the English Acts. They state the classes or heads or income to which the Act applies and make provision in respect of each for specific allowances or exclusions.

Now, the Act of 1922 (11 of 1922) purports to consolidate and amend the law relating to income-tax and super-tax. Strictly speaking, it does not of itself impose the tax at all. This is to be done by the Finance Act of the year. S. 7 of the Finance Act (12 of 1922) provides:

> Income-tax for the year beginning on the first day of April 1922 shall be charged at the rates specified in Part I of the Third Schedule.

and specifies that "total income" in this schedule means "total income" as defined in Cl. (15) of S. 2 of the Indian Income-tax Act, 1922. The third Schedule gives rates of income-tax specifying different rates:

> When the total income is Rs. 2,000 or upwards, but is less than Rs. 5,000: when the total income is Rs. 5,000 or upwards, but is less than Rs. 10,000.

and so forth; in other words, it provides a graduated scale according to the amount of the "total income." Provision having been made by the Finance Act in this manner, S. 3 of the Income-tax Act is attracted. S. 3 is as follows:

> Where any Act of the Indian Legislature enacts that income-tax shall be charged for any year at any rate or rates applicable to the total income of an assessee, tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act, in respect of all income, profits and gains of the previous year of every individual company, firm and Hindu undivided family.

It will be noticed that the tax to be charged "for" any year is "in respect of" the income of the previous year. Ss. 6 to 12 have the same function as Ss. 5 to 11 in the Act of 1918. They state the heads of income which are chargeable and authorize specific allowances or exclusions. It will be observed that the words "total income" which occur in the Finance Act are defined as the total amount of income, profits and gains from all sources to which this Act applies continued in the manner laid down in S. 16, and it is clear that S. 16 which deals with certain specific exemptions has meaning only with reference to the amount of the income of the "previous year." S. 18 which deals with deductions as the source on "salaries" and "interest on securities" provides by its fifth clause that credit is to be given to person from whose income the deduction was made for that deduction in the assessment, if any, made for the following year. S. 22 which imposes the duty of making a return prescribes that it is to be a return of the total income during the previous year. There is nothing in this section which suggests that it is any part of the duty of the income-tax officer to make enquiry into the receipts or probable receipts of the assessee during the current year. S. 25 deals with the case where any business, profession or vocation is discontinued. It differentiates strongly between such businesses according as they were commenced before or after the commencement of the Act. As regards the latter the first clause empowers the income-tax officer to accelerate the ordinary course of things and to make an assessment on the profits of the period beween the end of the previous year and the date of discontinuance without waiting until the following year. In such a case the assessee may at once be charged not only with the tax in respect of the profits of the previous year, but also with the tax in respect of the profits of the broken period. When, however, a business was in existence and paying tax prior to the Act of 1922, we find it provided that the assessee need pay no tax on the profits of the broken period and may further claim, if it suits him, to escape tax upon the profits of the previous year by paying tax upon the profits of the broken period only. The reason why a different treat-

ment is given to businesses commenced before 1922 which are discontinued after that year is because such businesses will really have paid income-tax twice on the profits of the year 1921-22, or, to put the matter in other words, they would have, apart from special provision, to pay tax on the profits of one year more than the previous system. This section, like S. 3, uses the words" in respect of" which are also the crucial words in Ss. 7 to 12 inclusive. In my opinion, S. 25 is incapable of being interpreted otherwise than as a provision to prevent injustice being caused by the tax being made for the first time a simply retrospective tax. The absence of all provisions for adjustment (see S. 68) and a complete avoidance of any phrase which would suggest that the purpose of the Act is to measure or compute finally or provisionally the amount of the income received during the year of assessment produces a striking contrast between the Indian Act of 1922 and English Acts.

It is quite true that the sections which describe the heads of income reproduce the language of the Act of 1918 without changing from the present to the past tense. The language of Ss. 6, 7, 10 and 11 of the Act of 1918 affords little room for any such change. But just as in the Act of 1922 agricultural income continues to be defined as rent or revenue derived from land which is used for agricultural purposes, so the property to be taxed is still described as property "of which he is the owner" (S. 9) and allowance under the head business is made for rent paid for the premises in which such business is carried on (S. 10). So too by S. 14 the tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family. It seems to me to be reasonably clear in Ss. 9 and 10 that though the present tense is used throughout, the sections are to be applied to the state of facts in the "previous year" or in the case of an exceptional assessment under S. 25 (1) a completed portion of the year of assessment. They afford no reasonable ground for a contention that the particular sources numbered (*iii*) and (*iv*) must persist throughout two years in order to be chargeable. It is here that it is important to remember that the income-tax is one tax as S. 3 shows it to be.

There are doubtless some difficulties in this view with reference to the tax on "salaries" which is payable by deduction at the source. If the Finance Act of any year imposes a tax upon the income of the previous year, then in these cases the tax seems to be deducted before it is authorised or imposed. Section 18 says it is to be "leviable in advance by deduction at the time of payment." The draftsman does not seem to be in sight of the difficulty. Leviable in advance of what? In advance of its imposition? The tax is to be deducted apparently at the rate laid down by the current Finance Act. In respect of the income of this year the Finance Act of next year may impose quite different rates or (theoretically) no income-tax at all. Section 18 uses the words

> in respect of income chargeable under the following heads : (i) salaries and ; (ii) interest on securities.

When any given Finance Act is passed it is too late to levy in advance income-tax "in respect of" such income of the previous year. What seems logically necessary is an addition to S. 3 to make it read in effect :

> Where any Act of the Indian legislature enacts that income-tax shall be charged for any year at any rate or rates applicable to the total income of an assessee,
>
> (1) tax at that rate or those rates shall be charged for that year in accordance with and subject to the provisions of this Act in respect of all income, profits and gains of the previous year of every individual company, firm and Hindu undivided family ;
>
> (2) tax at that rate shall be deducted in accordance with and subject to the provisions of this Act from all salaries payable in that year on account of the income-tax, if any, to become chargeable in respect thereof for the following year ; and
>
> (3) tax at the maximum rate shall be deducted in accordance with and subject to the provisions of this Act from all interest upon securities payable in that year on account of the income-tax, if any, to become chargeable in respect thereof for the following year.

Still, however, one may criticise the language of S. 18. This is the only meaning which in my judgment can be given to it having regard to the language and the scheme of the Act. In my judgment the first question put to us for our opinion must be answered in favour of the Inland Revenue and against the assessee.

As the facts of the present case have not been fully investigated, it may be well to add that this judgment is not to be taken as an opinion that the assessee has no grievance. If he was the owner

of the house property and bustee lands before 1922 and paid tax thereon under the Act of 1918, then in 1922-23 he paid tax for the second time on the income of 1921-22, and if he has to pay for the year 1924-25 it may therefore be that he is paying for one year more than he would have done under the 1918 Act. This will be so if in 1924-25 he received no income from these sources. If he has lost his property by a mortgage sale in 1924, then although neither S. 25 nor any other section of the Act of 1922 protects him, the case may be a very hard one and he may have special claim to some consideration at the hands of the Inland Revenue authorities.

The second question is stated as follows:

> Is an amount of interest due on a mortgage debt but not actually paid an allowable item of expenditure under head ' house property income ' under S. 9 of the Act.

In my opinion this question should be answered in the affirmative, i. e., in favour of the assessee. Apart from the consideration that a taxing statute should be construed, if possible, by confirming oneself to the ordinary meaning of the words used and that there is special objection to any construction which puts a burden upon the subject when the intention of the legislature to impose it is not clear, I think that Ss. 9 and 10 of the Act of 1922 must be construed on the footing that when the legislature means "paid" it says "paid." In S. 10 there is a special definition of the word for the purposes of that section. In S. 9 certain "allowances" are authorized by way of deduction from "the bona fide annual value" of the property—itself a hypothetical figure. The first two allowances have reference to repairs and do not depend upon proof of any actual expenditure. The third and the fourth are expressly made to depend upon what has actually been paid. The sixth is defined only by a limit and the seventh is left to the discretion, as regards amount, of the income-tax officer. In this context I am of opinion that the absence of the word "paid" in the fourth clause is not without significance. I am not satisfied that the legislature has intended to charge on the basis of the sum which a hypothetical tenant would give save upon the assumption made in favour of the assessee that the real income of an incumbrancer is the difference between the yearly value and the interest. Though I desire in no way to pronounce upon the policy, convenience or equity of the matter, I cannot ignore the fact that there may be many reasons for making this assumption. If this be the right construction of the statute, I do not think that any exercise of the rule-making power conferred by S. 59 can affect the question: still less do I think that the headings to Sch. A of the form prescribed by R. 19 are to be taken as rules.

In my opinion the assessee is entitled to the allowance in respect of interest on the mortgage.

As we were asked by counsel for the Inland Revenue to treat this as a test case and as the assessee has succeeded on one of the two questions, I think that the assessee's costs before us should be paid by the Inland Revenue.

**C. C. Ghose, J.**—I agree.

**Buckland, J.** — As I am in entire accord with the learned Chief Justice as to the effect of the more general aspects of the matter which he has discussed and of the sections of the Income-tax Acts to which he has referred, I propose to limit myself to an examination of the sections which bear directly upon the question which we have to decide.

The essential point of difference between the contentions advanced on behalf of the assessee and the Crown respectively lies in the questions whether the amount of tax payable in the current year has to be computed by reference to the assessee's income for the previous year though payable in respect of the assessee's income for the current year, or whether it is payable in respect of the assessee's income for the previous year though payable in the current year. In the former case the previous year's income is but a basis of computation which gives rise to the contention that if in the current year the assessee has no income, no tax is payable. The view put forward on behalf of the Crown makes it immaterial whether the assessee has any income in the current year. If the Crown's view prevails, the assessee, though he must pay the tax in the current year for which he is assessed, pays in respect of his income for the previous year and the state of his income for the current year is negligible.

But for such resemblances as are to be found between the Indian Income-tax Acts of 1918 and 1922 and between the former of these and the Income-tax Act, 1918 (8 & 9 George V, Chap. 39), and were the assessee's Advocate limited to the Act of 1922, most of the materials upon which his argument has been founded would not be available to him.

There is no difference between the definition of " previous year " in the two Indian statutes The difference between the two Acts lies in the reference in the material sections of the Acts to the period so defined or, to state it otherwise, in the purpose for which the words " previous year " are introduced into such sections.

By S. 14 of the Act of 1918 it is provided that

> there shall be levied in respect of the year beginning with the 1st day of April 1918 . . . . income-tax upon every assessee in respect of his taxable income in that year ;

that is to say, income-tax must be paid " in respect of " the income for the current year.

Section 17 of the same Act requires a return of the assessee's income for the previous year, and under S. 18 the sum payable for the year in which the return is made may be assessed upon the basis of such return. Nothing could be clearer than that the previous year's income is introduced solely as a means of ascertaining by reference to it the amount of tax payable in the current year in respect of the income of the current year. It would be a careless form of expression to say that the income for the current year is estimated by reference to the income of the previous year, but the notion of an estimate is not altogether absent, for the result is that the amount of tax payable in respect of an unascertained income is arrived at by reference to an income, the amount of which is ascertainable.

Section 3 of the Act of 1922 provides :

> Where any Act in the Indian legislature enacts that income-tax, shall be charged for any year . . . . tax . . . . shall be chargad for that year . . . . . in respect of all income, profits and gains of the previous year . . . .

This takes no account of the income of the previous year as a basis of assessment only, for not only cannot that be imported into the use of the words " in respect of " as suggested in the course of argument, but the words " in respect of " as denoting that which is to be taxed have been used frequently both in English and Indian statutes. The words involve nothing in the least degree obscure, and they cannot have one effect in S. 14 of the Act of 1918 and another in S. 3 of the Act of 1922. It is to be observed that the section provides that income-tax shall be charged, not in respect of the income of that year, i. e., the current year, as one would have expected to find had the legislature intended to express that which the assessee contends it has expressed, but " for " that year. It is unnecessary to say that " in " must be read for " for ;" either word would produce the same result.

It is impossible upon an analysis of S. 3 to hold that the previous year's income is but the basis of assessment on which the tax has to be paid in respect of the income for the current year. Fundamentally the determination of the question rest exclusively upon the construction of that section, for there is no other which deals with it directly.

Comparing the result attained with that under the Act of 1918 to which I have referred, one finds that under the Act of 1922 the income by reference to which the amount of tax payable in the current year has to be ascertained and in respect of which such tax when ascertained is payable are one and the same and being income for the previous year is an income the amount of which is ascertainable. Any notion of an estimate is absent, indeed there is no reason for it.

I agree as to the answers to be given to the questions submitted to us for revision.

R.D. *Questions answered.*

---

## A. I. R. 1927 Calcutta 559

DUVAL AND MITTER, JJ.

*Dharanidhar Boral* — Defendant 2— Appellant.

v.

*Panchanan Saha* and *others*—Plaintiff Defendants—Respondents.

Appeal No. 2054 of 1924, Decided on 17th December 1926, from the appellate decree of the 3rd Sub-J., Hooghly, D/- 19th July 1924.

(a) *Civil P. C., S. 97—Final decree passed—Appeal from preliminary decree already filed and dismissed—Right to second appeal is not barred by the passing of the final decree.*

It is established that an appellant has certainly a right to have his appeal from preliminary decree heard even after passing of final decree, so long as it is lodged in the first appellate Court before the final decree is passed, and there is no reason why if the right to prosecute the appeal can thus continue before the first appellate Court after the final decree is passed, the right to second appeal provided by the Civil P. C., from the first appeal can possibly be barred ; *A. I. R.* 1925 *Cal.* 218, *Ref.* [P 560 C 2]

(b) *Transfer of Property Act, S. 91—Purchaser of equity not impleaded in mortgage suit can sue for redemption without setting aside the mortgage decree and sale thereunder.*

If a purchaser of equity of redemption has not been made a party to a suit in which the mortgagee obtained a decree, the purchaser is entitled in a subsequent suit to occupy the position which he would have had had he been a party. He can sue for redemption and it is not essential for him first to proceed to get the mortgage-sale set aside before he can bring a suit for redemption. [P 561 C 1]

*Bijan' Kumar Mukerji* and *Sarasija Palit*—for Appellant.

*Bireswar Bagchi* and *Mani Lal Bhattacharya*—for Respondents.

**Judgment.**—In this case the plaintiff brought a suit for redemption. His case was that the predecessor of Defendant No. 4 owned Plots Nos. 1 to 8 and that Defendant No. 3 owned Plot No. 9 : and that they two morgaged these nine plots to Defendant No. 1 on the 11th June 1898. The predecessor of Defendant No. 4, however, sold Plots Nos. 2 to 8 to the present plaintiff on the 18th August 1898. Defendant No. 1 in the year 1910 sued on his mortgage without making the present plaintiff a party. He obtained a decree on the 1st February 1911, which in due course became final and the mortgaged property was put to sale on the 8th October 1912, and then Defendant No. 1 purchased Plot No. 9 and Defendant No. 2 the other plots. Subsequently, there appears to have been criminal proceedings. This suit was then brought by the plaintiff on the ground that he being the purchaser of the equity of redemption has not been affected by the sale in the year 1921. The first Court gave the plaintiff a decree holding that he would be entitled to redeem by paying the amount of the mortgage-decree and that the sum decreed would be taken as the whole debt and as the price of the mortgaged lands. An appeal was preferred against that preliminary decree which was passed on the 24th July 1922, by Defendant No. 2 to the District Judge, on the 3rd August 1922. On the 13th September 1922, the Commissioner appointed having apparently submitted his reports, the decree of the first Court was made by that Court final. No further appeal was lodged against that decree. The appeal, however, to the District Judge, which was finally heard by the Subordinate Judge, was not disposed of until 19th July 1924, and from that appeal against the preliminary decree a second appeal was preferred to this Court on the 3rd November 1924. On the appeal coming up for hearing before us the learned vakil for the respondent raised a preliminary objection that this appeal is now incompetent. The first point as I gather is that though no doubt an appeal to the District Judge, made before the decree final is passed, could be heard even after the final decree was passed a second appeal will not lie because by the time the Subordinate Judge dismissed the appeal the final decree had already been drawn up. We are not prepared to accept this contention. It appears to us, though there may be some earlier rulings which may throw doubt as to whether when there has been a final decree an appeal against the preliminary decree can continue, to be now established that an appellant has certainly a right to have his appeal heard so long as it is lodged in the first appellate Court before the final decree is passed. In this connexion we may refer to the case of *Nanibala Dasi* v. *Ichhamoyee Dasi* (1). Now, if the right to prosecute the appeal can thus continue before the first appellate Court after the final decree is passed, speaking for myself I do not see how the right to second appeal provided by the Code of Civil Procedure from the first appeal can possibly be barred. In my opinion, therefore, this appeal is still competent to be heard.

As to the merits of the appeal it appears that in the first appellate Court the only point argued was whether the plaintiff had his right of redemption or not. The argument urged both in that Court and in this Court is that as the plaintiff took no proceedings to set aside the mortgage sale he cannot redeem.

(1) A. I, R. 1925 Cal. 218.

Reliance has been chiefly placed for this contention on the case of *Ganpat Lal* v. *Bindabasini Prashad Narayan Singh* (2). There the decision arose out of a sale held in September 1902, that is to say, when Ss. 85 to 90 of the Transfer of Property Act were still in force. It was there held that so long as the sale under the decree stood the right to redeem was extinguished but that at the time of the revision of the Code of Civil Procedure in 1908, these sections were repealed and O. 34 of the Code substituted and the words of S. 89 of the Transfer of Property Act 'and thereupon the defendant's right to redeem and the security shall both be extinguished' were not carried into O. 34. This was pointed out by the Judicial Committee in the case of *Sukhi* v. *Ghulam Safdar Khan* (3) where it was held that where a puisne mortgagee has not been made a party to a suit in which the prior mortgagee has obtained a decree the puisne mortgagee is entitled in a subsequent suit to occupy the position which he would have had had he been a party. This is also the case with a purchaser in the present state of the law and, therefore, it must be held that it is not essential for the plaintiff first to proceed to get the mortgage sale set aside before he can bring a suit for redemption.

The second point raised is as to the terms on which the redemption should be allowed. Now the learned Munsif set out certain terms and they were on the basis of the mortgage-decree and it does not appear that this order was at all attacked in appeal or in the first Court, and in the grounds of appeal before us we were only asked to give Court interest at 12 per cent. instead of at 6 per cent on the general ground not to find that the basis on which the redemption has been allowed is erroneous. In view of the fact that this was not raised before and that in the case coming before us for hearing there was no suggestion that the basis on which the Munsif has allowed the redemption was wrong we are not prepared at this stage specially in view of the fact that Defendant No. 2 was only a purchaser and was not one of the original mortgagees to vary this order of the Munsif which was not assailed in the appeal before the Subordinate Judge.

The result, therefore, is that the appeal is dismissed with costs.

D.D. *Appeal dismissed.*

(2) [1920] 47 Cal. 924=56 I. C. 274=47 I. A. 91 (P. C.).

(3) A. I. R. 1922 P. C. 11=43 All. 469=48 I. A. 465 (P. C.).



---

## A. I. R. 1927 Calcutta 561

DUVAL AND MULLIK, JJ.

*Raja Sati Prasad Garga Bahadur* and *others*—Plaintiffs—Appellants.

v.

*Mahesh Bhunia*—Defendant—Respondent.

Appeal No. 2065 of 1924, Decided on 5th January 1927, from the Appellate Decree of the 2nd Sub-J., Midnapore, D/- 5th August 1924.

(a) *Land tenure—Chakran lands — Wages paid in addition—Lands are still Chakran.*

The fact that some wages are paid to the tenant in addition, would not change the chakran character of the holding. [P. 562, C. 1]

(b) *Land tenure—Service tenant refusing to serve or denying title—Notice to eject is not necessary.*

If a service tenant renounces his character as a service tenant and denies the title, of the landlord to resume the land, the lease to him determines and no notice is necessary to eject him : 25 *C. L. J.* 332, *Foll.* [P. 562, C. 1]

(c) *Landlord and tenant—Service tenant.*

Where a grant came into existence long before the Transfer of Property Act came into force ;

*Held* : that no notice to eject a service tenant is necessary. [P. 562, C. 2]

*Amarendra Nath Bose* and *Probodh Ch. Chatterji*—for Appellants.

*Apurba Charan Mukerji*—for Respondent.

**Mullik, J.**—The plaintiffs brought a suit for the resumption of certain lands on eviction of the defendant on the allegation that the lands were chakran and that the defendant had refused to render service for which the chakran grant had been made. The defence was that the lands were not chakran but niskar lands. The trial Judge decreed the suit holding that the lands were chakran. The defendant came up on appeal and the lower appellate Court disbelieved the story of absolute niskar and also held that the defendant and his people for the service rendered got wages in addition to diet money and on these findings the lower appellate Court allowed the appeal and dismissed the suit

with costs. The plaintiffs have come up before as on second appeal.

The principal contention raised before us is that the lower appellate Court on the findings arrived at by it ought to have dismissed the appeal. This contention seems to us to be well founded and must therefore prevail. The case was whether the lands were chakran or niskar. The learned Subordinate Judge rejected the story of absolute niskar. He did not disbelieve the findings of the Court of first instance to the effect that the lands were chakran. The finding arrived at by him was tantamount to this: that the defendant was for the service rendered by him allowed to hold the land without paying any rent and he was allowed some wages also in addition. The fact that some wages were paid in addition would not in our opinion change the chakran character of the holding and that being so, and the defendant refusing to render service, we do not see how the prayer of the plaintiff for the resumption of the lands on eviction of the defendant therefrom could be successfully resisted. In this view of the matter we are suported by the ruling contained in *Ramnath Seal* v. *Siba Sundari* (1), where it has been laid down that if a service tenant renounces his character as a service tenant and denies the title of the landlord to resume the land, the lease to him determines and no notice is necessary to eject him.

In the circumstances we do not see how the judgment of the lower appellate Court can be upheld. In the result the appeal is allowed with costs in all Courts. The decree of the lower appellate Court will be set aside and that of the Munsif restored. No order is necessary on the application as the parties have already been added.

**Duval, J.**—I agree. The finding of the lower appellate Court does not amount to a finding that the land was niskar. It finds that it was chakran though it was not the entire profit which the defendant would receive for carrying palanquin for the zamindars. The evidence shows that the finding is that the defendant has refused to serve. It may be the case that he quarrelled over the diet .money or cash payment. But that can make no difference in the chakran character of the homestead, and as was pointed out in the case of *Radha Pershad Singh* v. *Budhu Doshad* (2) when there is a grant for private or personal service, the zamindar is entitled to resume when the service, is not required or when the grantee refuses to render him service.

As to the failure to prove the issue of notice it appears that this grant came into existence long before the Transfer of Property Act came into force in this province and no notice is necessary. I agree that this appeal must be allowed and the Munsif's decree be restored with costs in all Courts.

The defendant is allowed three months from this date in which to remove his hut.

R.D. *Appeal allowed.*

(1) [1915] 25 C. L. J. 332=40 I. C. 348.

(2) [1895] 22 Cal. 933.

---

## A. I. R. 1927 Calcutta 562

RANKIN, C. J., AND C. C. GHOSE, J.

*Jnanendra Mohan Bhaduri* and *another*—Appellants.

v.

*Sm. Annapurna Debi* and *another*—Respondents.

Appeal No. 124 of 1926, Decided on 1st February 1927, from an order of Greaves, J., D/- 12th July 1926.

(a) *Arbitration Act—Award under, upheld by Court becomes enforceable as a decree—Court is not to pass a decree as in one under Civil P. C., Sch. 2, para. 20.*

Where an award filed under the Act is upheld by the Court as a good award, it is enforceable as if it were a decree of the Court; in other words, although it was not a decree and not a judgment of the Court, execution can be taken out on it in the same manner as though it were a decree and the Court is not to pronounce a judgment and decree as under Civil P. C., Sch. 2, para. 20. [P. 563, C. 1]

(b) *Arbitration Act—Powers of arbitrator.*

No arbitrator can give to anybody any right to apply to the Court for any direction. [P. 563, C. 2]

(c) *Arbitration Act—Motion is not available under the Act for administration of an estate.*

If persons want to administer an estate, they can bring an administration suit, or if they want a partial administration in certain circumstances, they can do so by originating summons, but the Court has no right to do it on a motion under the Indian Arbitration Act or to do it without properly bringing in the parties either by a suit or by an originating summons. [P. 564 C. 2, P. 565, C. 1]

*Lingford James* and *B. Roy Chaudhuri*—for Appellants.

*N. N. Sircar* and *N. C. Chatterjea*—for Respondents.

**Rankin, C. J.**—This is an appeal from an order made by Mr. Justice Greaves upon a motion on notice, dated the 12th of July 1926 headed "In the matter of an arbitration and in the matter of the estate of Babu Rajendra Lal Goswami." It appears that Rajendra Lal Goswami died in August 1917 and that he left a Will which was proved on the 19th of December of that year. By that Will he left various items of immovable property to various persons and made very complicated provision for the discharge of certain monies which were owing by him more particularly to persons who had money with him on deposit. Disputes and complications having arisen, there was an arbitration under the Indian Arbitration Act by Mr. Byomkesh Chakravarti. He filed his award which is dated the 29th of July 1918.

Now, according to the procedure provided under the Indian Arbitration Act that award when filed could be challenged under the Act on various grounds, but if it was upheld by the Court as a good award, the position was that the award would remain filed in Court, and, by the terms of the fifteenth section of the Indian Arbitration Act, it would be enforceable as if it were a decree of the Court; in other words, although it was not a decree and not a judgment of the Court, execution could be taken out on it in the same manner as though it were a decree. What happened, in fact, was that that procedure was ignored entirely and a decree was pronounced by Mr. Justice Chaudhuri to the effect that

> this Court being of opinion that it would be for the benefit of the said infant respondent Rabindra Nath Chakravarti the following decree should be made: And the adult parties having agreed to the terms of settlement set forth in Schs. B and C it is declared by consent that the said award as modified by the said terms of settlement ought to be carried into effect and the same is ordered and decreed accordingly.

It may perhaps be desirable to explain that the award was attacked as invalid before the learned Judge. That was a matter over which the learned Judge had jurisdiction. It was within his power to decide whether the award was a good award or a bad award. That controversy was settled by agreement, and with certain modifications agreed upon, the parties were prepared to treat the award as a good one. I will assume, therefore, that it was possible and reasonable for the learned Judge acting under the Indian Arbitration Act to say that the award being modified by consent of the parties should stand as a good award: and if he had done that and filed it with the modifications I will assume that execution upon the award with the modifications would have been quite in order.

The learned Judge, and I think the arbitrator too, appears to have had in mind a procedure which is entirely unknown to the Indian Arbitration Act. They both proceeded on the analogy of the second schedule of the Civil Procedure Code, under which by R. 20 in the case of an award without the intervention of a Court, the Court shall, if it deems the award to be valid, order it to be filed, and having done that it has power to proceed to pronounce judgment upon the award. Whether that was the kind of confusion in the mind of the persons concerned or not, however, must be a matter of speculation. That award contained at its close a clause to the following effect:

> I further declare that the matters decided by me are matters of administration of the estate of the testator.

Pausing, there, for a moment, the matters were matters of administration of the estate of the testator. If they had not been, this declaration would have been of no effect at all so far as I can see; but they were matters of administration of the estate of the testator.

> Any of the parties hereto as also a member or members of the Managing Committee will be entitled and be at liberty to apply upon notice to all other parties interested from time to time to the Court for its direction as occasion arises and in particular for the appointment of a Receiver with necessary directions.

Well, there is no particular object to say in an award that nothing on it shall prevent parties from applying to the Court if they want to apply to the Court But I may point out that no arbitrator can give to anybody any right to apply to the Court for any direction; and as far as I can make out, that paragraph has been a source of a good deal of confusion in the minds of the parties to this litigation.

The award of the arbitrator did direct that certain sums of money were to be

charged upon certain properties which were to go to the different beneficiaries, and we are at the moment concerned with the rights of Rabindra Nath Chakravarti who, at the time of the award, was an infant. So far as he is concerned, the award declared that the properties to go to him should be such and such and they were to stand charged with a sum of Rs. 13,063. The award provided that when that had been paid off the properties should be handed over by the executors either to Rabindra Nath or to his natural guardian, as the case might be, as provided in the award.

The controversy which had arisen prior to the application to Mr. Justice Greaves was shortly this: Rabindra Nath wanted to be put in possession of his property by the executors. He wanted also an account of their dealings with his property for some ten years. The executors in the end said that they had no objection to handing over the property, but that in respect of the expenses of probate, the Gaya sradh of the testator and the first sradh of his widow they had been put to expenses, the share of Rabindra Nath in which amounted to over Rs. 3,000. They said Rabindra Nath ought to pay that money. The second matter of contest was over the account. The executors said that they kept books properly as the testator had done in his own lifetime; and that they offered inspection of them and gave all facilities to Rabindra Nath's accountant.

On the other hand, Rabindra Nath said that they did not keep proper books, they had not given proper materials to his accountant, and, as a matter of fact, he claimed that they did not discharge themselves of a considerable sum of money, amounting to some Rs. 10,000, as he guessed, which they ought to pay to him. In that state of things what Rabindra Nath did was that he launched a notice of motion under the Indian Arbitration Act and the matter has been dealt with upon affidavits by Mr. Justice Greaves. The learned Judge has directed that the properties which by the award were to go to Rabindra Nath shall be handed over to him. It turns out that all those properties are properties outside the original jurisdiction of this Court although belonging to the estate, but there is one property in the estate which is within the jurisdiction. The learned Judge has directed the executors to make over to Rabindra Nath all papers and documents and all moneys standing to the credit of Rabindra Nath's separate account and to furnish accounts and he has held that Rabindra Nath would be at liberty for the appointment of a Receiver.

The first thing that has to be examined is whether this procedure is one which can be countenanced and whether it is open to the applicant in such a manner to litigate the question which he seeks to litigate. I am of opinion that the procedure is entirely wrong and that this Court ought to refuse any order on any of the matters which have been dealt with by Mr. Justice Greaves. The award of the arbitrator having been filed, it was open to the Court to declare as to its validity and to put that award in the position of an award as to which the parties interested could ask for execution—execution in the ordinary way upon a tabular statement by transfer to any other Court or in any other manner known to law. But it is not the case that this Court has ever had brought before it an administration suit for the whole of the affairs of this testator Rajendra Lal Goswami. This Court has never at any time entertained an administration suit of his estate. It has no responsibility whatever for administering his estate and the idea that, because a wrong form of order was made at the time this award was dealt with under the Indian Arbitration Act or because of what the arbitrator had put in about the parties being at liberty to apply to the Court, therefore any party interested now has only got to launch a motion uuder the Indian Arbitration Act to get a partial administration of this gentleman's estate, is, I, think entirely erroneous. If persons want to administer this estate, they can bring an administration suit, or if they want a partial administration in certain circumstances, they can do so by originating summons. When they do that it is not to be doubted that this decree of Mr. Justice Chaudhuri will be perfectly good for the purpose of showing and establishing that the arbitrator's award, subject to the modifications, is a valid and binding arrangement. What is wanted is not a mere execution of that award as though

it were a judgment. If what is wanted is an administration of the estate on the basis of that award, then the Court must be approached properly. It has no right to do it on a motion under the Indian Arbitration Act or do it without properly bringing in the parties either by a suit or by an originating summons. I think it may very well be that persons might want to bring an administration suit about this estate in a Court other than the High Court. It would be competent for them to bring it to the High Court; but no person will be obliged to bring it to the High Court. Whatever Court it is brought in, the award would be just as valid or as invalid as if he had brought his suit in the High Court. We are dealing with a highly complicated Will, and a great deal of the property is scattered over different parts of the province. It is highly inadvisable to make orders as to immovable property where the very basis of our jurisdiction is open to challenge. We cannot undertake to administer this estate upon notices of motion brought under the Indian Arbitration Act, though of course under that Act execution can be had.

I do not propose to pronounce upon any one of the questions which have been agitated in Court. I have done my best in this family dispute to induce the parties to try to come to some arrangement and I am quite satisfied that learned counsel on both sides have done their best in that matter to assist the Court. It appears that their endeavour in that respect is entirely without any result. My conclusion is that if the parties want this matter to be fought out they must begin and fight out in the manner provided by law.

In my opinion, this appeal must be allowed and the order of Mr. Justice Greaves must be set aside. We do not propose to give any costs to either party either here or in the proceedings before Mr. Justice Greaves.

**C. C. Ghose, J.**—I agree.

R.D. *Appeal allowed.*

---

## A. I. R. 1927 Calcutta 565

GRAHAM AND MITTER, JJ.

*Rahimaddhi Matabbar*— Plaintiff—Appellant.

v.

*Naimaddi Howladar* and *others*—Defendants—Respondents.

Appeal No. 1333 of 1924, Decided on 1st April 1927, from the appellate decree of the Addl. Dist. J., Zillah Faridpur, D/- 20th March 1924.

*(a) Bengal Alluvion and Diluvion Act (Regulation 11 of 1825), S. 4—"Gain"—Land washed away and re-formed on old site is not gained—Tenure holder cannot claim such land as an accretion on payment of rent.*

Land washed away and afterwards re-formed on the old ascertained site, is not land gained by increment within the meaning of S. 4. Therefore, where land is re-formed upon the old site, which can be identified, such land remains the property of the original owner and in the absence of a contract to the contrary the tenure-holder is not entitled to claim it as an accretion to his land and hold it on payment of rent: *A. I. R.* 1922 *Pat.* 588 (*F. B.*), *Dist. and not Foll.*; 13 *M. I. A.* 467 (*P. C.*), *Rel. on and Case law cited.* [P 567, C 2; P 568, C 1]

*(b) Co-sharer — Co-sharer tenure holder's claiming land re-formed in situ as accretion on payment of rent amounts to denial of proprietary title—Other co-sharers can claim joint possession without partition.*

Where a co-sharer claims the re-formation in situ as an accretion to his tenure on payment of rent, that amounts to denying the full proprietary title of the co-sharer to whom such land belongs and he is entitled to a decree for joint possession without instituting a partition suit: 33 *Cal.* 1201, *Rel. on.* [P 573, C 2]

*(c) Practice—Precedents—A case is authority for what it actually decides.*

*Per Mitter, J.*—A case is only an authority for what it actually decides and it cannot be quoted for a proposition that would seem to follow logically from it: *Quinn* v. *Leathem*, (1901) *A. C.* 506, *Appl.* [P 572, C 2]

*Gunada Charan Sen, Ramani Mohan Chatterji* and *Nirmal Chandra Chakravarti*—for Appellant.

*Jogesh Chandra Roy* and *Prokash Chandra Majumdar*—for Respondents.

**Graham, J.**—This is an appeal by the plaintiff and arises out of a suit for ejectment. The facts appear to be shortly as follows: The plaintiff-appellant is owner of a 13 annas odd share in Estate No. 6592 of the Faridpur Collectorate, the remaining 2 annas odd belonging to Defendants Nos. 1 to 7. On the 22nd Chaitra 1300, B. S. corresponding to the 15th March 1894 a tenure was created in respect of the lands com-

prised in Sch. ka of the plaint in favour of the Defendants Nos. 1 to 4. At that time it appears that the lands of this schedule only were in existence, and that the lands of Schs. kha and ga came into existence at a subsequent date. The present suit was instituted on the 11th August 1920 and the case set up by the plaintiff was that he was entitled to get khas possession of the lands of plots kha and ga inasmuch as they are not covered by the tenancy created in 1894, and further that, as the lands in question are re-formations in situ of his estate, and are not accretions within the meaning of Cl. (4) of Reg. 11 of 1825, the tenants-defendants are not entitled to treat them as an addition to their tenancy.

Both the Courts below found that the lands of Schs. kha and ga were re-formations in situ. The tenants defendants, however, took up the position that notwithstanding this fact they are entitled to hold the lands as accretions to their tenure upon payment of rent.

The trial Court held that the lands were an accretion to the defendants' tenure, and that upon this ground as well as under the terms of the kabuliyat, the plaintiff was not entitled to khas possession, but was entitled to receive rent. It was further held that the tenants-defendants had acquired a limited tenancy interest in the lands of Sch. kha by adverse possession and that they had been recognized as tenants of these lands. A fair rent was accordingly decreed.

On an appeal being preferred by the plaintiff the learned Additional District Judge of Faridpur affirmed that decision. The plaintiff has now preferred this second appeal.

In so far as the lands of Sch. kha of the plaint are concerned we are confronted at the outset by the concurrent findings of fact arrived at in the Courts below both on the question of limitation and recognition, and there is no substance in the appeal and it must be dismissed so far as that plot is concerned.

In regard to plot ga, however, no question of limitation arises, as the land of this plot was not in existence at the time when the record-of-rights was prepared, and the tenants-defendants have not been in possession of these lands for over 12 years.

It becomes necessary, therefore, to consider the arguments that have been advanced on behalf of the appellant in regard to plot ga. These relate to the question of accretion and construction of the kabuliyat. The first point urged by the learned advocate for the appellant was that on a true construction of the terms of the kabuliyat of 1894 it ought to have been held that the defendants were not entitled to possess the lands at all without obtaining a fresh settlement from the plaintiff.

Secondly, it was contended that the lands in question having been found to be re-formations in situ cannot be held to be " gained " within the meaning of that word in S. 4 of Reg. 11 of 1825, and that that being so that section has no application and the tenants-defendants cannot claim thereunder to hold the lands as an addition to their tenancy.

In connexion with the first ground reliance has been placed upon a passage which occurs, towards the end of the kabuliyat (Ex. 1). The material portion of this passage has been given in the vernacular in the judgment of the trial Court, and in the translation, which has been placed before us, is translated as follows :

> I shall not be entitled to keep in my possession any land in excess of the land settled without fresh settlement from you.

The word used for settlement is " bandobust," a term commonly used when a fresh settlement is taken. The Courts below notwithstanding this passage have held that the intention was that the defendants would be entitled to hold excess lands, i. e., over and above the land originally let out to them, subject to payment of rent. Speaking for myself I do not think this interpretation of the passage in question is warranted. It seems the intention was, as stated in plain words, that, if any land should be possessed in excess of the area originally let out, a fresh settlement would be required. This is made the more clear when the passage earlier in the document is taken into account where it is stipulated that, so far as the land originally let out is concerned, if the lands were found on measurement to be in excess, additional rent would be paid, while, if they proved to be less, there would be a proportionate abatement of rent. Obviously the latter passage refers to a

different contingency. If the intention had been that the defendants were to be entitled to possess excess lands over and above the lands comprised in the kabuliyat on payment of rent for the same, that intention could easily have been expressed.

On a fair construction of the kabuliyat it appears to me that in the event of any land being occupied by the tenants over and above the area covered by the kabuliyat the plaintiff reserved his right to a fresh settlement. Admittedly, however, the defendants never applied for fresh settlement.

With regard to the second point the question involved is whether the tenants-defendants are entitled to hold the lands of Sch. ga (the plaintiff having lost his right to the land of Sch. kha) as an increment to their tenure. The answer depends upon the construction to be put upon S. 4 of Reg. 11 of 1825 known as the Bengal Alluvion and Diluvion Regulation. It is conceded that this is the only statute under which the defendants can claim the right asserted by them. Sec. 4 of that Regulation has five clauses. The material part of the first clause reads as follows :

IV. First.—When land may be gained by gradual accesssion, whether from the recess of the river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government by a zemindar or other superior landlord or as a subordinate tenure, by any description of under-tenant whatever.

The second and third clauses have no application in the circumstances of the present case.

The fourth and fifth clauses may, however, be quoted :

Fourth.—In small and shallow rivers, the beds of which with the jalkar right of fishery may have been heretofore recognized as the property of individuals, any sandbank, or chur, that may be thrown up, shall, as hitherto belong to the proprietor of the bed of the river, subject to the provisions stated in the first clause of the present section.

Fifth.—In all other cases, viz., in all cases of claims and disputes respecting land gained by alluvion, or by dereliction of a river, or the sea, which are not specifically provided for by the rules contained in this Regulation the Courts of Justice, in deciding upon such claims and disputes, shall be guided by the best evidence they may be able to obtain of established local usage, if there be any applicable to the case, or, if not, by general principles of equity and justice.

On behalf of the appellant stress has been laid upon the word "gained" in the first clause, and it was contended that, unless it can be shown that the land has been "gained" the defendants cannot have the benefit of the statute. It is an admitted fact in the present case that the lands in question are re-formation in situ, or in other words, that they form part of the estate of the appellant, who, as a consequence of the lands becoming submerged was temporarily deprived of their enjoyment. In these circumstances it is argued there has neither been any gain nor accretion, and the effect of the emergence of the land was simply that it was restored to the possession of the appellant. In support of this contention reference was made to the case of *Felix Lopez* v. *Muddun Mohun Thakore* (1), where their Lordships of the Privy Council held that land washed away and afterwards re-formed on the old ascertained site, is not land gained by increment within the meaning of S. 4 of Bengal Regulation 11 of 1825.

In two other cases decided by the Judicial Committee, viz., *Secretary of State* v. *Fahamidannessa Begum* (2) and *Arun Chandra Singh* v. *Kamini Kumar* (3), the word "gained" was similarly interpreted, the former of these cases relating, however, to Act 9 of 1847, which also deals with "lands gained from the sea and from rivers by alluvion or dereliction." Since we heard the arguments in this case a quite recent decision of their Lordships of the Privy Council, dated the 25th February last, in the case of *Keshava Prasad Singh* v. *Secretary of State* (4), has reached this country. That was a case of dispute between two riparian proprietors regarding certain land which emerged from a river not on the side where it had originally existed, but upon the opposite side as a result of fluvial action, and it was held that, as the land in question had re-formed on its old site and was identifiable as forming part of the plaintiff's estate, it was immaterial upon which side of the river it emerged, and that the plaintiff was entitled to the land.

(1) [1870] 13 M. I. A. 467=5 B. L. R. 521=14 W. R. 11 (P. C.).
(2) [1889] 17 Cal. 590=17 I. A. 40=5 Sar. 391 (P. C.).
(3) [1913] 41 Cal. 633=22 I. C. 317=41 I. A. 32 (P. C.).
(4) A. I. R. 1927 P. C. 89.

In the course of their judgment in this case their Lordships referred to a number of cases bearing on the subject including the case of *Felix Lopez* v. *Muddun Mohun Thakore* (1) referred to above. One of those cases was the case of *Nagendra Chundra Ghose* v. *Mahomed Esof* (5) where their Lordships said:

> Two observations arise on this statute:
> (1) That there is nothing to show that the first rule contemplates land other than that which commonly falls within the definition of 'alluvion,' viz., land gained by gradual and imperceptible accretion, the *incrementum latens* of the civil law.
> (2) No express provision is made for the case of land which has been lost to the original proprietor by the encroachment of the sea, or a river, and which after diluviation, re-appears on the recession of the sea or river. But on the other hand, there is nothing to take away or destroy the right of the original proprietor in such a case, which must therefore be determined by 'the general principles of equity or justice' under the fifth rule. That the right of the proprietors in the case last put exists and is recognized by law in India, is established by at least two cases decided at this Board.

These authorities support the view that where land is re-formed upon the old site, which can be identified, Reg. 11 of 1825 has no application, for, to quote the words of their Lordships in the case of *Felix Lopez* v. *Muddum Mohun Thakore* (1),

> Such lands remain the property of the original owner. The site is the property, and the law knows no distinction between a site covered by water and a site covered by crops, provided the ownership of the site be ascertained.

On behalf of the respondents reliance has been placed upon the case of *Khubi Mahton* v. *Mohant Luchmi Das* (6). That was a case of accretion to a raiyati holding from a river the bed of which belonged to the zemindar, and it was held inter alia that in the case of a claim by a subordinate holder the section applies even when the accreted lands belong to the superior landlord.

With great respect it seems to me to be difficult to reconcile this view with the Privy Council decisions referred to above. If land is "gained," that is to say, if it is in the true sense of the word an accretion—something that is added whether from the river or the sea, which had no previous existence—it can readily be understood that such an accretion would be for the benefit not only of the landlord but also of the subordinate tenure-holder. But where land merely re-forms on its old site, and there is no addition to that which already existed, no increase of the property by gradual natural additions, then the position is different. In that case, to again quote their Lordships of the Privy Council in *Lopez's* case (1), the owner of the land says:

> I had the property. It was my property before it was covered by the Ganges. It remained my property after it was submerged by the Ganges. When it emerged there was nothing that took it from me and gave it to any other person.

In like manner the appellant here, while he cannot and does not dispute the defendants' right to hold the lands of Sch. Ka leased out by the kabuliyat of 1894, claims that they are restricted to the possession of those lands only and that they have no right to possession of the accreted lands merely by reason of the fact that they happen to be adjacent to the land previously leased out by him. Nor does such a claim by the tenure-holder seem to be founded upon any good ground either of law or equity. By the kabuliyat of 1894 the appellant settled a definite area of land ascertained by measurement with the defendants. Presumably it was neither his desire, nor intention that that area should be extended under any circumstances. At all events the kabuliyat contains no clause to the effect that the tenants should be entitled to possess accretions upon payment of extra rent. In the absence of any such stipulation the position taken up by the landlord, and it seems to me that it is a justifiable position, is that he and he, alone, is entitled to the land, which was always his property and has been restored to his possession as a result of the recess of the water. There is moreover force in his contention that, if the tenant be allowed the benefit of accretion, he will thereby in effect be confiscating what is the property of the appellant. It is true that the tenant does not set his claim any higher than this: that he claims to possess the land on payment of rent. But even so there would be a confiscation, though only partial, of the rights of the owner, since the owner may prefer to keep the newly accreted land in his khas possession instead of letting it out. He has the right, which every owner has, of dealing with that which belongs to him in any manner that he pleases, and it is difficult to see why

(5) [1872] 12 M. I. A. 107=10 B. L. R 406=2 Sar. 358 (P. C.).
(6) A. I. R. 1922 Pat. 588=2 Pat. 18 (F. B.).

because merely by accident the land which has emerged happens to be adjacent to the land formerly leased out to him, the tenant should be deemed to be entitled to hold it as an accretion to his tenure. It follows moreover that, if he be held to be so entitled, he will keep the owner permanently out of possession of his land.

The only doubt which suggests itself to my mind as to the applicability of S. 4 of Reg. 11 of 1825 on the facts of this particular case arises from the language of the fourth clause of that section. It seems to me to be arguable that this covers the case of reformations in situ, and that the effect of this clause is that in small and shallow rivers, the beds of which may hitherto have been recognized as the property of individuals, any sand bank or chur thrown up shall as hitherto belong to the proprietor subject to the right of the subordinate tenure-holder to claim the land as an increment to his holding as laid down in the first clause of the section. It seems to me however, that the succeeding clauses must be read subject to the first clause, and that the section as a whole applies only in the case of accretions in the strict sense of the word. I am further of opinion that, although the Privy Council cases referred to above are almost all cases between rival proprietors and not as between proprietor and tenure-holder, the principle laid down in those decisions applies with equal force. That principle, as I understand it, is that where it can be demonstrated that a particular bit of land is the property of a particular person, if it should be submerged and then again re-appear, it is restored to the owner, or, to be more precise, it continues to remain his property. To allow a tenure-holder, where land happens to adjoin the land thus accreted, to claim the land thus formed as an accretion to his tenure would in my judgment be an infringement of the full proprietary right of the owner, and would go against the principle repeatedly laid down by the Privy Council. In my judgment therefore the appeal, so far as the land of Sch. ga is concerned, succeeds upon this ground also as well as upon the construction of the kabuliyat.

One other point which was argued requires notice. The learned Additional District Judge found that, as the defendants are also co-proprietors of the estate with the plaintiff, the plaintiff was not entitled to obtain khas possession without bringing a suit for partition. I do not think this view is tenable. It is clear that the act of the defendants in grabbing the land was an infringement of the proprietary right of their co-sharers. The right of the plaintiff has in fact been denied in this suit. In these circumstances the plaintiff must be held to be entitled to ask the Court to grant him joint possession along with his co-sharers.

In the result the appeal must be allowed in part, the decree of the Court of appeal below being affirmed with respect to the land comprised in Sch. kha of the plaint, while so far as the land of Sch. ga is concerned it must be reversed, and there will be a decree in favour of the plaintiff-appellant for khas possession jointly along with his co-sharers to the extent of his share therein. The appellant has been only partially successful in this appeal, and I think therefore the proper order as to costs will be that costs will be in proportion half and half.

**Mitter J.**—(After setting out the facts of the case his Lordship proceeded.) As already stated Mr. Sen raises three points in support of his appeal with regard to the lands of 'ga.' Schedule. It is argued in the first place that upon a true construction of the terms of the kabuliyat, dated 15th March 1894, the defendants ought to have been held as not entitled to 'ga' Schedule lands at all without a fresh settlement from the plaintiff. In the second place it is argued that S. 4 of Reg. 11 of 1825 has no application to the present case as the lands of 'ga' Schedule have been found to be re-formations in situ of the original lands of the estate which had been diluviated, and in support of this contention reliance has been placed on the case of *Lopez* v. *Muddun Mohun Thakore* (1) and *Secretary of State* v. *Fahamidannessa Begum* (2). It is argued in the third place that as there has been a denial of plaintiff's title to the reformed lands plaintiff is entitled to recover joint possession to the extent of his share with the Defendants Nos. 1 to 7 and that it is not necessary that plaintiff should bring a suit for partition before he can recover possession.

With regard to the first ground the view I take is that the terms of the

kabuliyat make it clear that defendants shall not be entitled to keep possession of any land which is in excess of the lands settled without fresh settlement from the plaintiff. The construction put on the kabuliyat by the Courts below to the effect, viz, that the defendants are entitled to hold possession of additional lands subject only to the payment of rent is not right. The words in Bengali are "dharijya jamir atirikta jami bina swatantra bandobast rakhite yariba na" which transtated means

I shall not be entitled to keep in my possession any land which is in excess of land settled without fresh settlement from you,

These words to my mind leave no room for doubt that the (defendants) appellants will not be entitled to retain possession of any land in excess of that settled without a fresh settlement. It is said that if this construction is accepted defendants will not be able to retain possession of lands which may be accretion to the tenure and this could never have been intended as it would be contrary to the express provisions of Reg. 11 of 1825 which declare such accretion to belong to the tenure-holder subject only to his liability to pay rent to the proprietor. It is argued on the other hand that the parties intended to contract themselves out of the statute and as this was a permanent tenure there was nothing to prevent the parties from entering into such a contract having regard to the provisions of S. 179 of the Bengal Tenancy Act. It is not necessary to determine in this case whether more express words were not needed if the parties intended to contract themselves out of the provisions of Regulation of 1825, for in this case no question of accretion arises. It is plain that by the kabuliyat in question parties clearly intended that if the defendants took possession of other lands which originally belonged to the estate and which had not been settled under the kabuliyat the defendants will not be able to take possession of those lands without a fresh settlement. The first ground taken before us therefore seems to be well founded and must prevail.

The second ground urged before us is equally well founded. The lands of the 'ga' Schedule having been found to be re-formations in situ of the original lands of the estate cannot be said to be lands "gained" from the recess of the river within the meaning of Cl. (1), S. 4 of Reg. 11 of 1825. see the case of *Ramanath Tagore* v. *Chundernarain Chowdhury* (7). In that case Sir Barnes Peacock observed :

We are of opinion that the word 'gained' in S, 4, Reg, 11 of 1825, does not extend to 'cases of land washed away and afterwards re-formed upon the old site which can bs clearly recognised.

The learned Chief Justice further observed in the same judgment

that Cl, (1), S, 4 applies only to cases of land gained, that is to say formed upon a site, which cannot bs recognised as that of any former proprietor.

In the case of *Lopez* v. *Muddun Mohun Thakore* (1), their Lordships of the Judicial Committee of the Privy Council cited with approbation this decision of Sir Barnes Peacock and observed as follows :

The very point came for consideration in India before a Court comprising Sir Barnes Peacock, Mr. Justice Bailey, and Mr. Justice Kemp ; and after full consideration, it was decided that lands washed away and afterwards re-formed on an old site, which could be clearly recognised, are not lands 'gained' within the meaning of S. 4, Reg. 11 of 1825.

In the case of *Secretary of State for India* v. *Srimati Fahamidannessa Begum* (2), their Lordships were dealing with Cl. 3 of Reg. 2 of 1819 which applied to all lands gained by alluvion since the period of the settlement and their Lordships of the Judicial Committee observed as follows :

Their Lordships cannot think that it was intended by such a provision as this to deal with the case of lands in permanent settlement which had become derelict of the sea or a river. They cannot be said to have been 'added' to the estate to which they already belonged. Considering the solemn assurance given by the Government to the owners of permanently settled estates that they should not be liable to further assessment in respect thereof, their Lordships find it impossible to hold that it was ever intended by this enactment to subject them to an added assessment in respect of land for which they were already assessed because they had had the misfortune to be practically deprived of it for a time by an incursion of the sea or river.

In the case of *Arun Chandra Singh* v. *Kamini Kumar Bardhan* (3), where lands forming part of the putni taluk had been washed away and had again re-appeared and the putnidar had obtained abatement of rent in respect of lands submerged, it was held that the putnidar, by obtaining remissions of rent in respect of land washed away, had not abandoned his right to the land when it

(7) [1864] W. R. Supp. 45.

was re-formed in situ, and that the chur formed part of the tenure created by the kabuliyat. The suit was brought by the zamindar to eject the putnidar from certain chur lands which formed part of the putni taluk but which had been washed away by the river and had subsequently re-appeared and re-formed in situ. The defendants who were putnidars had obtained abatement of rent in respect of lands which had been washed away by the river and that the plaintiff zamindar contended that these lands were accretions to his zamindari within the meaning of Reg. 11 of 1825.

Their Lordships of the Judicial Committee held that the lands do not come within the provisions of S. 4 of Reg. 11 of 1825 and cannot be claimed by either party as accretions to their respective property. The reasons underlying the decision seem to be that the lands could not be regarded as accretions to the zemindar's property as the lands were already his in proprietary right before diluviation and could not be said to have gained from the river within the meaning of the section. It could not be said to have been gained by the putnidar from the recess of a river as before diluviation the lands belonged to the putnidar in his putni right. This decision supports the contention of the appellant. The learned vakil for the respondents conceded that the decision on *Lopez's* case (1) would have governed the present case if the question arose between two rival proprietors. In other words, as I understand the argument of Mr. Jogesh Chandra Roy, he contends that the application of *Lopez's* case (1) must be confined to those where lands of one estate become annexed to lands of another estate, but it has no application to a case where the lands of one estate become annexed after emergence from the river to the lands of a tenure subordinate to the same estate. I can, however, see no distinction in principle between the two cases. It is the merest accident that the lands of the plaintiff's estate have become annexed to a tenure under the estate. The lands after emergence have legally vested in the plaintiff and I can see no principle which can entitle the tenant to retain lands which have become annexed to his tenure after re-formation and which justly belong to his landlord. It is said that the landlord will get rent and he ought to be content with that. There is nothing in law or equity which can prevent the landlord from exercising his full proprietary right over land which legally belongs to him. Neither a stranger nor a tenant of his can diminish in any way his right as full proprietor. In this connexion the following observations of the Judicial Committee of the Privy Council in *Lopez's* case (1) are instructive and may be usefully cited :

> It is to be observed, however, that that clause refers simply to cases of gain, of acquisition by means of gradual accession. There are no words which imply the confiscation or destruction of any private person's property whatever. If a regulation is to be construed as taking away anybody's property, that intention to take away ought to be expressed in very plain words, or be made out by very plain and necessary implication. The plaintiff here says : 'I had the property. It was my property before it was covered by the Ganges. It remained my property after it was submerged by the Ganges. There was nothing in that state of things that took it from me and gave it to the Government. When it emerged there was nothing that took it from me and gave it to any other person" And in answer to such a claim it would certainly seem that something more than mere reference to the acquisition of land by increment by alluvion or by what other term may be used would be required in order to enable the owner of one property to take property which had been legally vested in another.

The learned vakil for the respondents has, however, cited the decision of a Full Bench of the Patna High Court in the case of *Khubir Mahton* v. *Mohunt Luchmi Das* (6) as supporting his contention. The question which was referred to the Full Bench of the Patna High Court was :

> Does Cl. (1), S. 4 of Reg. 11 of 1825 apply to a case where the river out of the bed of which the accretions have formed is the private property of an individual and not the property of the Crown.

This question was answered in the affirmative and the learned Chief Justice, Sir Dawson-Miller held that in the case of a claim by a superior landlord it is only where the Crown is the proprietor of the accreted land that the section applies, but in the case of a claim by a subordinate holder the section applies even when the accreted lands belong to the superior landlord. The learned Chief Justice held that the Judicial Committee in *Lopez's* case (1) in restricting the "gain" which an individual proprietor might make under the regulation to a "gain" from that which was part of public territory, the public

domain not usable in the ordinary sense, that is to say, the sea belonging to State, a public river belonging to State, was considering the claim of a proprietor of an estate against the proprietor of a neighbouring estate and not the case of subordinate tenure-holder claiming against his immediate landlord. It is true that in Cl. (1), S. 4, there is nothing to indicate that that clause is not applicable to rivers which are private property, that is to say, in cases where the bed of a navigable river belongs to a private individual and the riparian bank belongs to a different proprietor. But the subject which the legistature intended to deal with while enacting the Regulation, would clearly indicate that Cl. (1), was not meant to be applicable to private rivers of the above kind. This is apparent from what their Lordships of the Judicial Committee said in the following passage :

> In truth, when the whole words are looked at, not merely of that clause, but of the whole Regulation, it is quite obvious that what the then legislative authority was dealing with was the gain which an individual proprietor might make in this way from that which was the public territory, the public domain not usable in the ordinary sense, that is to say, the sea belonging to State, a public river belonging to State : this was a gift to an individual whose estate lay upon the river or lay upon the sea, a gift to him of that which by accretion became valuable and usable out of that which was in a state of nature neither valuable nor usable ; See *Lopez's* case (1).

These words evidently seem to imply that the bank which adjoins the bed of a navigable river, which belongs to a private individual, will not attract the operation of Cl. (1).

To me it seems that the decision of the Patna High Court is contrary to what their Lordships of the Judicial Committee laid down in *Lopez's* case (1). The Full Bench of the Patna High Court seems to have put a wide interpretation on S. 4 of the Regulation than was intended. But it is not necessary in this case to express a final opinion as to whether the view taken by the Patna High Court is right or wrong. For the present case is not a case where the accretion was an accretion from a river bed which was the property of the landlord. In the present case the lands are re-formations of lands which were formerly in the direct possession of the landlord. This is a circumstance which distinguishes the present case from the case which was decided by the Full Bench at Patna and Mr. Justice Mullick who was one of the members of the Full Bench recognizes the distinction for he says at page 30 :

> In the present case it is not known whether the land is re-formation of land which was formerly in the direct possession of the landlord. All that is known is that the bed was the property of the landlord before it emerged and the question is whether the appellant can claim a right of tenancy in the accretions either under Cl. (1) or under some general principle of equity and good conscience.

The Patna Full Bench, therefore, is not a direct authority in support of the contention raised by the respondents and the facts of that case are, as we have shown, distinguishable from the facts of the present case. But it is argued for the respondents that although the Patna case does not directly lend support to the contention of the respondents, the proposition for which the respondents contend logically follows from the decision of the Patna High Court. The answer to this is to be found in the following observations of Lord Chancellor (Earl of Halsbury) in the case of *Quinn* v. *Leathem* (8) :

> A case is only an authority for what it actually decides and it cannot be quoted for a proposition that would seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical Code, whereas every lawyer must acknowledge that the law is not always logical at all.

In 1874 in the case of *Hursahai Singh* v. *Lootf Ali Khan* (9), the Judicial Committee re-affirmed the principle laid down in *Lopez's* case (1), in the following words :

> The question of law involved in these decisions, which is a very important one, was brought before this Committee, in a case of *Lopez* v. *Muddun Mohun Thakore* (1) in which the principles which should govern cases of this description were very fully discussed and elucidated, with the result that it was laid down by the authority of this Committee that where land which has been submerged re-forms, and can be identified as having formed part of a particular estate, the owner of that estate is entitled to it.

In 1876 in the case of *Ranee Sarat Sundari Debya* v. *Soorjya Kant Acharjya* (10), the Judicial Committee laid down that where land re-forms by alluvion on a site capable of identification, the right of the owner of the original site to the chur is indisputable and that such owner

(8) [1901] A. C. 506.
(9) [1874] 2 I. A. 28=14 B. L. R. 268=23 W. R. 8 (P. C.).
(10) [1876] 25 W. R. 242.

would be entitled to recover the land from a party in possession.

In 1877 their Lordships of the Judicial Committee held that the doctrine in *Lopez's* case (1) (cannot be taken to apply to land in which, by long adverse possession or otherwise, another party has acquired an indefeasible title. See *Radha Prosad Singh* v. *Ram Coomar Singh* (11). The finding of the lower appellate Court is that with regard to "ga" Schedule lands defendants have not acquired title by adverse possession and as the suit had been instituted within 12 years from the date when the land re-formed, the decision in *Radha Prosad Singh* v. *Ram Coomar Singh* (11), therefore, does not govern the present case.

In the year 1900 their Lordships of the Judicial Committee held that land submerged by the wanderings of a river from its course and afterwards re-emerging in a form capable of being identified does not cease to belong to its original owner. The following observations of Lord Robertson who delivered the judgment of the Judicial Committee in the case of *Sardar Jagjot Singh* v. *Rani Brijnath Kunwar* (12), are very significant :

> It is perfectly plain that neither the specific provision of the first sub-section nor the general principles of equity and justice lend the slightest support to the pretension of the appellant which is to land that would be gained not from the river but from a neighbour.

Applying the observations to the present case it may be said that neither the specific provision of the first sub-S. (1) of S. 4 of the Regulation nor the general principle of equity and justice lends the slightest support to the pretension of the respondent, which is to land that would be gained not from the river but from one's landlord.

I am, therefore, clearly of opinion that the second ground urged by the appellant is well founded and should be given effect to. To hold otherwise, i. e., to allow the tenant to retain possession of lands which belong to his landlord would be to allow the tenant to be unjustly enriched.

Since we heard this case their Lordships of the Judicial Committee have in the case of *Keshava Prasad Singh* v. *Secretary of State* (4) after reviewing all the authorities re-affirmed the principles laid down in *Lopez's* case (1). This recent decision of the Judicial Committee lends support, as my learned brother has pointed out, to the view which we take in this case.

The third ground urged before us on behalf of the appellant is also well founded and must prevail. It is true that the defendants are also co-proprietors of the estate with the plaintiff. But they have denied plaintiff's title to the "ga" Schedule lands as full proprietor. Consequently the plaintiff is entitled to sue for joint possession with the defendants in respect of his share. Mr. Roy for the respondents has argued that there has been no denial of title inasmuch as the defendants are willing to pay rent in acknowledgment of the plantiff's proprietary title. This really means that plaintiff's title to receive rent is admitted and that his title to receive possession is denied. The case, therefore, does not fall within the principles of the decision of the Judicial Committee in *Watson & Co.* v. *Ram Chund Dutt* (13). The essential elements of the decision in *Watson's* case (13) are absent in the present case. The seizure of possession in the present case amounted to an act of reprisal and was committed in defiance of plaintiff's right. The plaintiff was entitled to cultivate the lands if he liked but he was told that he had no right to take possession as his right was only to receive rent. To that extent there has been a denial of plaintiff's full proprietary right. The defendants have excluded the plaintiff from possession of the disputed lands from the time they re-formed and that they have done in denial of plaintiff's right. There has been exclusive possession coupled with an assertion of hostile title. It would indeed be subversive of the rights of joint owners to held that it is open to any co-sharer who may appear first on the field to seize possession of any land newly formed by accretion to the joint estate and hold it to the permanent exclusion of other co-sharers. This view seems to be in accordance with the decision of this Court in *Surendra Narain Sinha* v. *Hari Mohun Misser* (14).

(11) [1877] 3 Cal. 796=1 C. L. R. 259 (P. C.).
(12) [1900] 27 Cal. 768=27 I. A. 81=4 C. W. N. 555 (P. C.).
(13) [1891] 18 Cal. 10=17 I. A. 110=5 Sar. 535 (P. C.).
(14) [1906] 33 Cal. 1201.

For the reasons given above I agree with my learned brother in allowing the appeal with regard to the "ga" Schedule lands and in holding that plaintiff is entitled to get joint possession with the Defendants Nos. 1 to 4, 6 and 7 to the extent of their share and in dismissing the appeal with regard to the "kha" Schedule lands.

G.B. *Appeal partly allowed.*

---

## A. I. R. 1927 Calcutta 574

SUHRAWARDY AND CAMMIADE, JJ.

*Kishen Dayal Chaukidar*—Accused—Petitioner.

v.

*Darjeeling Municipality*—Opposite Party.

Criminal Revision No. 848 of 1926, Decided on 21st December 1926, from the order of the S. J., Darjeeling, D/- 31st March 1926.

(a) *Practice — Calcutta High Court — One Division Bench issuing rule—Bench hearing it on merits can question the lower Court's order on merits.*

Even where one Division Bench of the High Court has issued Rule, the propriety of the order can be questioned by the Bench hearing the Rule on the ground that the application was made too late: *A. I. R.* 1923 *Cal.* 674, *Dist.* [P. 574, C. 2]

(b) *Criminal P. C., S.* 439—*Limitation is* 60 *days—Practice of Calcutta High Court.*

It is an established practice of the Calcutta High Court that an application against an order of the Court below in criminal cases should be made within 60 days from the date of the order. The practice is uniform, and only in special circumstances it can be departed from: 43 *Cal.* 1029 and 25 *C. L. J.* 564, *Ref.* [P 574 C 2]

That the application could not be made in time owing to the oversight on the part of the petitioner's legal advisers is not a ground for departing from the settled practice. [P 575 C 1]

*N. Barwell* and *Hemchandra Dhur*—for Petitioner.

*G. Sircar*—for the Crown.

**Suhrawardy, J.**—The order complained against in this case was passed by the Deputy Magistrate of Darjeeling on the 21st December 1925. The order was passed under S. 244 (S) of the Darjeeling Municipal Act (1 of 1900, B. C.) directing the demolition of an unauthorised structure in the petitioner's house. The Sessions Judge of Darjeeling was moved against the order of the Deputy Magistrate and he rejected the application on the 31st March 1926. The present Rule was obtained from this Court on the 11th August 1926 calling upon the Deputy Commissioner and the opposite party to show cause why the order complained of should not be set aside. On the face of it this application is too stale. But it is argued by the learned counsel appearing for the petitioner that inasmuch as one Division Bench of this Court has issued the Rule we are not entitled to question the propriety of the order on the ground that the application was made too late. We have considered the matter carefully inasmuch as the point of law raised in the case is one of some importance and we have come to the conclusion that we should not in the present case depart from the practice of this Court. That an application to this Court against an order of the Court below should be made within 60 days from the date of the order is now well established by authorities. It is a question of practice no doubt; but the practice is uniform and only in special circumstances it can be departed from. See the cases of *In the matter of Khetra Mohun Giri* (1) and *Raj Chandra Bhuiya* v. *Emperor* (2).

Our attention has been drawn to the case of *Abdul Matlab* v. *Nandalal* (3) and on the authority of that case it is argued that since the High Court has chosen to issue a Rule it should be heard on the merits. There an application was made to this Court and a Rule granted against an order passed by a Magistrate of the 1st class on appeal from a Subordinate Magistrate. It was pointed out that the proper procedure was to move the Sessions Judge for a reference to this Court. This the petitioner had not done, and it was argued that the Rule should be discharged upon that ground. The learned Judges held that in the circumstances of the case the High Court having issued the Rule it should be heard on the merits. The consideration that prevailed with their Lordships to come to that conclusion are very different from those arising in the present case. There the matter was to be finally decided by the High Court whether it was by way of a reference

(1) [1916] 43 Cal. 1029=35 I. C. 979=20 C. W. N. 1170.
(2) [1916] 25 C. L. J. 564=10 I. C. 694=18 Cr. L. J. 694
(3) A. I. R. 1923 Cal. 674=50 Cal. 423.

by the Sessions Judge or on an application by a party to the High Court. It was a mere matter of procedure, and the learned Judges rightly thought that it should not stand in the way of the petitioner obtaining relief in that case.

In the present case an application was made and a Rule obtained ex parte. The opposite party has been called upon to show cause, and one of the causes shown is that the application is made out of time. We fail to see why we should not take the objection of the opposite party into consideration and decide the point in his presence. We are not, moreover, sure that the attention of the learned Judges, who granted this Rule, was drawn to the various dates on which the orders of the Courts below were passed. In the body of the petition it is stated that the application should have been made within 60 days from the Magistrate's decision, but it was not made within that time due to an oversight on the part of the petitioner's legal advisers. An affidavit was filed sworn by a Barrister practising in Darjeeling in which he said that he was all along under the impression that 60 days from the Sessions Judge's order was the period for moving the High Court. It is possible that this affidavit caught the eye of the learned Judges and they thought that the present application must have been made within 60 days from the order of the Sessions Judge. As a matter of fact the application was made about five months after the order of the Sessions Judge and about eight months after the order of the Magistrate. We also fail to find any special circumstance in this case which will entitle us to extend the time in favour of the petitioner. As we have said, the petitioner simply says that the application could not be made in time owing to the oversight on the part of the petitioner's legal advisers. That is hardly a ground for departing from the settled practice of this Court. This Rule must therefore be discharged.

**Cammiade, J.**—Agreed.

D.D. *Rule discharged.*

---

## A. I. R. 1927 Calcutta 575

DUVAL AND MITTER, JJ.

*Fatiar Bap* and *others* — Accused — Petitioners.

v.

*King-Emperor*—Opposite Party.

Criminal Revision No. 1173 of 1926, Decided on 26th January 1927, from an order of the Dy. Mag., Mymensingh, D/- 11th November 1926.

(a) *Criminal P. C., S. 360—Non-compliance not resulting in failure of justice is not fatal.*

Any non-compliance with provisions of S. 360 which has not resulted in any failure of justice does not vitiate the trial. [P 575 C 2]

(b) *Criminal P. C., S. 35 (as amended 1923) —Charge under S. 147, I. P. C., including acts constituting offences under Ss. 323, 324 and 325, I. P. C. — Separate conviction and sentence on charges for such offences is not bad.*

Separate sentence on charges under Ss. 323, 324 and 325, I. P. C., is not bad in law because the acts in respect of which such charges were made were included within the charge under S. 147: 3 *C. W. N.* 174 and 8 *C. W. N.* 483 *held to be no more good law.*

[P 575 C 2; P 576 C 1]

*Urukram Das Chakrabarty*—for Petitioners.

**Mitter, J.**—This rule was issued on the District Magistrate of Mymensingh to show cause why the conviction and sentence of the petitioners should not be set aside or such other order made as this Court may deem fit and proper on grounds Nos. 1 and 2 of the petition to this Court. Ground No. 1 runs as follows:

> That the conviction and sentence passed upon the petitioners are bad in law for non-compliance with the provisions of S. 360 of the Criminal Procedure Code.

It has not been shown to us that any non-compliance with provisions of S. 360, Criminal P. C., has resulted in any failure of justice and having regard to the decision of the Judicial Committee which disapproved a decision of this Court with reference to the effect of the provisions of S. 360, we think this ground in revision fails.

The second ground on which the rule was issued ran to the effect that the conviction and separate sentence against the Petitioners on charges under Ss. 323, 324 and 325, I. P. C., are bad in law inasmuch as the acts in respect of which such charges were made were included within the charge under S. 147, I. P. C., and two authorities were cited in

support of this ground, one is the case of *Ramdihal* v. *Empress* (1) and the other is *Alim Sheikh* v. *Shahazada Singh* (2). These decisions were given before the amendment of S. 35, Criminal P. C. As has been held in a recent decision in the case of *Kanchan Molla* v. *King-Emperor* (3), the old cases cannot now be held to be good law, after the amendment in 1923 by which words in S. 35 of the Criminal Procedure Code : " A person is convicted at one trial of one or two more distinct offences " the word " distinct " has been deleted. We think there is no substance in this ground also. Besides hurt was caused by the accused individually.

It has been urged that the sentence in the circumstances of the case is too severe. We do not think that on the facts of the case we should interfere with the sentence passed.

The result is that the rule is discharged. The accused will surrender to their bail-bonds.

**Duval, J.**—I agree.

G.B. *Rule discharged.*

(1) [1898] 3 C.W.N. 174.
(2) [1904] 8 C.W.N. 483.
(3) A.I.R. 1925 Cal. 1015.

## A. I. R. 1927 Calcutta 576

SUHRAWARDY AND CAMMIADE, JJ.

*Sutu Howladar* and *others*—Plaintiffs —Appellants.

v.

*Alep* and *others* — Defendants — Respondents.

Appeal No. 1140 of 1924, Decided on 2nd December 1926, from the appellate decree of the Dist. J., Bakargunj, D/- 15th March 1924.

*Evidence Act, S. 13—Dispute concerning land —Landlord's papers prepared in course of business concerning lands are admissible.*

Under S. 13 zemindar's papers prepared in the course of business and in due management of the zemindari are admissible in a dispute concerning the land to which such papers pertain : 9 *Cal.* 741, *Dist.*; 16 *C. W. N.* 116, *Rel. on.*

[P 576, C 2]

*Bepin Chandra Mallick* and *Probodh Krishna Shome*—for Appellants.

*Sarat Chandra Basak* and *Chandra Sekhar Sen*—for Respondents.

**Judgment.**—The plaintiffs have appealed against the decree of the District Judge of Bakargunj dismissing their suit for declaration of their title to the lands in suit and for confirmation of their possession. They succeeded in the first Court. The lower appellate Court has found against them on the question of title.

Three points have been argued before us on behalf of the appellants. The first is as regards the admissibility of certain chittahs. These chittahs were prepared some 50 years ago by the Government of its khas mahal within which admittedly the lands in dispute lay. It is contended that these chittahs were prepared by the Government not under its sovereign authority but as a private landlord and, therefore, are not admissible either under S. 36 or S. 83 of the Evidence Act. The point in dispute between the parties is as to whether the lands in suit appertain to a koli jote under jote Pitambar Mirdha which is subordinate to the taluk owned by the Defendants Nos. 4 to 10. In the Government chittahs the lands in suit are shown not within jote Pitambar Mirdha but as in the khas possession of the Government let out in ijarah. It is contended on the authority of the case of *Ram Chunder Sao* v. *Bunseedhur Naik* (1) that these chittahs are not admissible in evidence. In that case the question was whether a certain land was lakheraj or rent paying. In the Government khas mahal papers they were recorded as rent paying. It was held that statement could not be received in evidence as it was in favour of the party who wanted to use it and made by himself. The learned Chief Justice observed that the Government khas mahal papers could not be used in evidence under S. 36 of the Evidence Act but might be evidence under any other section which might be applicable. It has been decided by a series of authorities that zemindar's papers prepared in the course of business and in due management of the zemindari may be evidence, if not under S. 36 or S. 83, under S. 13 of the Evidence Act : see the case of *Upendra Nath Ghosh* v. *Chairman of the Calcutta Corporation* (2). In the present instance the Government landlord asserted that the lands in suit were not within the jote of Pitambar Mirdha but were in the khas possession of the landlord. That is an assertion or a claim which makes

(1) [1883] 9 Cal. 741.
(2) [1911] 16 C. W. N. 116=13 I. C. 332.

the entry admissible under S. 13 of the Evidence Act. These papers were prepared *anti motam* more than 50 years ago when there was no dispute or likelihood of a dispute with regard to these lands. We accordingly think that these papers ,have been rightly admitted in evidence. As to their probative value, it is for the Courts below to attach such importance to them as under the circumstances and in consideration of other evidence in the case they choose to do.

The next objection taken by the appellants relates to a sale-certificate granted to Basanta Kumar Ghose on the purchase of Pitambar Mirdha jote in 1907. The rent dispute between the parties is with regard to the western boundary of the jote. According to the plaintiffs it was the Baleswar river and according to the defendants Pitambar Mirdha jote extended up to the chur in Baleswar river. The description in the sale-certificate supports the defendants' case. It is argued that the boundaries described in the sale-certificate are statements made by the defendants and, therefore, should not be admitted in evidence. But the fact is that the plaintiffs' lessor obtained his title under that sale-certificate and it is difficult to say how a document, under which the person, from whom the plaintiffs derive their title, obtained his title, cannot be used in evidence where a question of title is raised with reference to the land covered by it or outside it as the case may be. Besides as the learned District Judge has observed the statement was made by the defendants, no doubt, but it was a statement made in the presence of the tenants who were the predecessors-in-title of Basanta Kumar Ghose and accepted by Basanta Kumar Ghose who took possession of the jote in question. We think that the sale-certificate has been rightly admitted.

The third ground is that the decision in the previous suit ought to have been treated as res judicata against the Defendant No. 3. It appears that there was a dispute with regard to the lands in suit during the settlement proceedings and that the Settlement Officer had decided it in favour of the defendants. The plaintiffs, therefore, instituted a title suit for declaration of their title to the disputed lands against Defendants Nos. 1 and 2 who were in possession of the lands by virtue of a settlement from Defendants Nos. 4 to 10. These defendants were not made parties to that suit. The Defendants Nos. 4 to 10 who are called sarkar defendants thereafter obtained a rent decree against Defendants Nos. 1 and 2 and put the holding, comprising the lands in suit, to sale and it was purchased by Defendant No. 3. The first Court found that Defendant No. 3 was a mere benamidar of Defendants Nos. 1 and 2. This finding has not been expressly reversed by the learned Judge and, therefore, it is argued that Defendant No. 2 being a benamidar is bound by the decree which was obtained against Defendants Nos. 1 and 2. In the first place, this argument is not of much value as it is not binding on the sarkar defendants. It does not, therefore, matter much whether it is binding on Defendant No. 3 or not. Besides, according to the learned Judge the lands in suit never belonged to the plaintiffs or their lessor. It belonged to the sarkar defendants and they had settled it with Defendants Nos. 1 and 2. They, as a matter of fact, brought a suit against the Defendants Nos. 1 and 2 for rent and obtained a decree and the holding was sold in execution of the decree and purchased by Defendant No. 3. This shows that the learned Judge was not satisfied that Defendant No. 3 was a benamidar. Besides we have seen the reasons assigned by the Munsif for holding that Defendant No. 3 was benamidar for Defendants Nos. 1 and 2. We are not convinced that the arguments advanced by him are legally sound. This objection must, therefore, be overruled.

There are various other documents to which the learned Judge has referred for the conclusion he has arrived at. The learned Judge has not entered into the question of possession for according to him the lands in suit were not accretions to the jote as claimed by the plaintiffs and as the suit was brought only for declaration of title, possession being according to the plaintiffs with them, and the suit for title having failed. We cannot say that the learned Judge was wrong in not entering into the question of possession in the special circumstances of the case. This appeal is accordingly dismissed with costs.

G.B. *Appeal dismissed.*

## * A. I. R. 1927 Calcutta 578

PANTON AND MULLIK, JJ.

*Somokanta Mohonta* and *others*—Petitioners.

v.

*Sarveswar Das* and *another*—Opposite Party.

Civil Revision No. 69 of 1927, Decided on 24th February 1927, from an order of the Munsif, Jorhat, D/- 30th September 1926.

(a) *Co-operative Societies Act* (1912), *S.* 42 (*b*)—*One member of Executive Committee cannot sue others to recover sums which he is made to pay to the liquidator.*

In the course of liquidation of a co-operative society the liquidator directed payment of Rs. 1,000 by each of two members of the Executive Committee of the Society. These two gentlemen sought to recoup themselves by suing the other members of the society for the recovery of these sums,

*Held* : that the attempt on the part of these two members of the Executive Committee to pass on their liability to the other members of the society was a matter connected with the dfssolution of the society and that consequently it was not a matter in respect of which the civil Court had any jurisdiction.

[P. 578, C. 1 & P. 579, C. 1]

* (*b*) *Civil P. C., S.* 115—*Decree passed without jurisdiction—Decree appealable but not appealed against—Revision was allowed.*

Where a decree was passed without jurisdiction and though an appeal was provided no appeal was filed,

*Held* : that a revision may be allowed in exceptional circumstances. [P. 578, C. 2]

*Panchanan Ghose, Apurba Charan Mukerji* and *A. S. Aiyer*—for Petitioners.

*Khitish Chandra Chakrabarty, Panchanan Ghosal* and *M. Nuruddin Ahmed*—for Opposite Party.

**Judgment.**—This Rule is directed against certain decrees of the Munsif at Jorhat and certain orders made by him in execution of those decrees in two suits which arose out of the liquidation of the Nakari Bamangaon Bank, a Co-operative Society registered under Act II of 1912. In the course of this liquidation the liquidator directed payment of Rs. 1,000 by each of two members of the Executive Committee of the society. These two gentlemen sought to recoup themselves by suing the other members of the society for the recovery of these sums. The suits were decreed in the plaintiff's favour by the learned Munsif on the 4th August 1923. Under these decrees the learned Munsif made all the defendants liable for equal shares of the sum total decreed. Certain of the defendants thereafter applied on various grounds to have the decrees as against them set aside, with the result that the suits were restored and re-heard as against these persons. On the 15th of July 1924 the learned Munsif by his judgment held that the effect of S. 42, sub-S. (b) of the Co-operative Societies Act was to deprive the civil Courts of jurisdiction in the matter. In the result he dismissed the suits as against these particular defendants. He observed that the judgment and decree so far as they related to the other defendants in the suit

> although based upon erroneous findings on questions of law must stand good against all the defendants except those in whose cases revival has been granted.

Against this judgment the plaintiffs appealed to the District Judge who by his judgment of the 15th December 1925 dismissed the appeal. In the following year the decree-holders applied for execution of their decrees and the judgment-debtor raised an objection before the executing Court that the decrees were null and void and could not be put into execution. This objection was disallowed, by the Munsif—by his order of the 30th September 1926.

In the present Rule the judgment-debtors attack the decrees of the 4th August 1923 on the ground that they were made without jurisdiction and seek to protect themselves against their execution.

For the Opposite Parties it is contended that the decrees themselves were appealable and that no appeal was preferred against them and that the present petitions are stale. It is further pointed out that an appeal lay against the order of the Munsif of the 30th September 1926 and that no appeal was preferred. The circumstances, are, however, in our opinion, somewhat exceptional and we do not consider that on proper cause being shown the petitioners should be deprived of the remedy which they have here sought. It has been contended that the learned Munsif in his judgment of the 15th July 1924 and the learned District Judge in his judgment of the 15th December 1925 were wrong in holding that the matter was one which came within the scope of sub-S. (b) of S. 42 of the Act. That sub-section, however, is framed in the widest terms. It runs thus :

Save in so far as hereinbefore expressly provided no civil Court shall have any jurisdiction in respect of any matter connected with the dissolution of a registered society under this Act.

Now this attempt on the part of these two members of the Executive Committee to pass on their liability to the other members of the society was, we think, a matter connected with the dissolution of the society and that consequently it was not a matter in respect of which the civil Court had any jurisdiction.

The result then is that the decrees of the 4th August 1923 were null and void and that no execution of them can proceed. In this view we make this Rule absolute, set aside the decrees in question and stay all further proceedings in execution.

Having regard to the circumstances of the case, we make no order as to costs.

D.D. *Rule made absolute.*

---

## A. I. R. 1927 Calcutta 579

MUKERJI AND GRAHAM, JJ.

*Jamiraddin Ahmed* — Plaintiff — Appellant.

v.

*Mt. Sahera Khatun Bibi* and *others*— Defendants—Respondents.

Appeal No. 34 of 1925, Decided on 1st December 1926, from the appellate decree of the 2nd Sub.-J., Tipperah, D/- 24th September 1924.

*Muhammadan Law—Restitution of conjugal rights—Wife living in adultery — Husband describing her as such is not legal cruelty.*

Under the Muhammadan Law, in order to establish legal cruelty between man and wife there must be actual violence of such a character as to endanger personal health or safety; or there must be a reasonable apprehension of it. To speak of a wife that she has been living in adultery at a time when she has been so living, can hardly be said to be cruelty at all and in any event it cannot be said that this conduct on the part of the husband disentitled him from claiming restitution : 11 *M. I. A.* 551 (*P. C.*), *Rel. on.* [P 580 C 1]

*J. N. Kanjilal* and *Sasadhar Roy*—for Appellant.

*Kali Kinkar Chakravarti* for *Bipin Chandra Bose*—for Respondents.

**Mukerji, J.**—This appeal arises out of a suit instituted by a husband for restitution of conjugal rights against the wife. Several defences were taken on behalf of the wife, one being to the effect that there was a talak by reason of which the plaintiff was not entitled to claim restitution of conjugal rights any further. Various allegations were made against the husband in the written statement alleging inter alia that he had got no means, and that there was cruelty on his part. Both the Courts below have refused to grant the plaintiff the decree asked for in the suit. Both the Courts below have come to the conclusion that the story as to talak was altogether unfounded. The Court of first instance towards the end of its judgment observed that the alliance between the husband and the wife was an unhappy one—unhappy from the side of both of them—that the husband's only fault was that he was poor and foolish and that the wife was too intelligent to be under his protection. It observed further that the letters of the wife to her paramour—it may be stated here that the Defendant No. 4 was the alleged paramour of the wife—showed that the wife had an intelligence far beyond the reach of her husband. That Court held that there was evidence to show that the wife had already given her affection to the said Defendant No. 4, and here I may quote the words used by the learned Munsif : "The law cannot have a duel with nature as the latter must have its own course" and by this process of reasoning the learned Munsif came to the conclusion that the husband was not entitled to a decree.

The husband then preferred an appeal to the Subordinate Judge. That learned Judge affirmed all the findings of fact which had been arrived at in favour of the husband by the Court of first instance. There is no specific finding on the question of adultery in the judgment of the Subordinate Judge, but towards the conclusion of his judgment the learned Judge states that the suit had been instituted by the plaintiff not for his own sake but at the instigation of the father of the Defendant No. 4 who wanted to extricate his son from the struggle, meaning evidently that the wife was living in adultery with the Defendant No. 4. That learned Judge, however, also refused to pass a decree in favour of the plaintiff. His reasons are that the case was one of an unhappy alliance ; that the plaintiff had openly charged the wife

with adultery; and this was clear cruelty on the part of the plaintiff and on this ground he thought that no specific performance of the contract should be allowed. He further found that there was a great risk in the two living together as there would be constant quarrels and fighting and their lives would be in danger and one day one would find himself killed or both may be killed together. He recorded an opinion to the effect that the parties could not be expected to live in amity and that if all those troubles arose out of the negligence on the part of the husband the latter should be considered guilty of 'contributory negligence.' On those grounds the learned Subordinate Judge affirmed the decree of the Court of first instance.

By 'contributory negligence' the learned Judge evidently meant that the husband had not taken sufficient precaution so that the wife might not go on living in adultery. Be that as it may, these are all the grounds which have been referred to by one Court or the other in refusing the plaintiff the relief that he sought for in the present suit. As regards cruelty the Judicial Committee in the case of *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (1) has observed thus :

> The Muhammadan Law, on a question of what is legal cruelty between man and wife, would probably not differ naturally from our own, of which one of the most recent expositions is the following : 'There must be actual violence of such a character as to endanger personal health or safety ; or there must be a reasonable apprehension of it.'

"The Court," as Lord Stowell said, in *Evans* v. *Evans* (2) "has never been driven off this ground." Judging the findings of the Courts below by the test of this observation of their Lordships of the Judicial Committee it is clear to my mind that the cruelty that has been found in the present case falls far short of the mark. To speak of a wife that she has been living in adultery at a time when she has been so living, can hardly be said to be cruelty at all, and in any event it cannot be said that this conduct on the part of the husband fulfils the requirements of the conditions laid down by their Lordships in those observations.

It has been contended on behalf of the respondent, and rightly contended, that cruelty is not necessarily the only ground upon which a claim for specific performance of a contract of this character may be resisted and my attention has been drawn to some other observations of their Lordships in their judgment in the same case, for instance, to the passage where their Lordships say :

> It may be, too, that gross failure by the husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the wife, might, if properly proved, afford good grounds for refusing to him the assistance of the Court.

Their Lordships, however, proceeded to observe as follows :

> And, as their Lordships have already intimated there may be cases in which the Court would qualify its interference by imposing terms on the husband. But all these are questions to be carefully considered, and considered with some reference to Muhammadan Law.

There is in the present case hardly anything which may be said to justify an inference that in point of fact the plaintiff was unable to perform or that there was gross failure on his part to perform those obligations which the marriage imposed on him for the benefit of his wife. None of the findings to which I have referred, nor any of the reasons which have been given by the Courts below, would fulfil the requirements laid down by their Lordships of the Judicial Committee to which I have referred. I am accordingly of opinion that there was no justification whatsoever for the Courts below to have refused the plaintiff the relief that he sought for in the present case.

An unreported case of this Court has been brought to our notice in which it was laid down in a case in which the husband was living in the house of his second wife and wanted to take his first wife, the defendant in the suit, to that house, and there was a finding to the effect that he was unable to maintain his first wife, that the plaintiff in that case was not entitled to restitution of conjugal rights. The facts of that case are entirely different from those of the present. To refuse the plaintiff relief in a case like the present would be to put a high premium on immorality and adultery.

Furthermore, it has been argued that the husband has not got means enough to maintain the wife, that he has got no house of his own, and also several other matters have been brought to our notice which are to be found stated in para. 11

(1) [1866] 11 M. I. A. 551=8 W. R. 3=2 Suther. 59=2 Sar. 259 (P. C.).
(2) [1870] 1 Hagg. Con. 35=161 E. R. 466.

of the wife's written statement. These matters were alleged no doubt, but none of the Courts below have come to any finding which would go to show that these allegations are well-founded.

I am accordingly of opinion that the decrees passed by the Courts below cannot be sustained; that they should be set aside; and a decree should be entered in favour of the plaintiff granting him restitution of conjugal rights which he prayed for. The plaintiff will be entitled to all costs in all the Courts. Having regard to the facts of the case the decree for costs will be as against Defendant No. 4 only.

**Graham, J.**—I entirely agree. In my judgment the ratio decidendi, which has been adopted by the Courts below, is fundamentally erroneous, being contrary alike to the principles of Muhammadan Law, as well as to the dictates of common sense. Having regard to the facts alleged and proved and, indeed, it may also be said found, there was no real answer to the case set up by the plaintiff. No facts have been either proved, or found, which can deprive the plaintiff of his right to the custody of his wife's person. Certainly, poverty can be no ground for refusing to grant to the plaintiff the relief which he was entitled to expect from the Court. Nor can it be said that any case of cruelty was made out. Apparently the only cruelty which has been found consisted in the husband openly charging the wife with adultery with another man notwithstanding the fact that such adultery had, undoubtedly taken place, and the findings are to that effect. Apart from this there is no other finding as to other acts of cruelty.

In my opinion, the decisions of the Courts below amount to a denial of justice, and I agree with my learned brother that the appeal must be allowed.

D.D. *Appeal allowed.*

---

## * A. I. R. 1927 Calcutta 581

MUKERJI AND GRAHAM, JJ.

*J. O. Galstaun* — Judgment-debtor—Appellant.

v.

*F. E. Dinshaw* and *others*—Decree-holders—Respondents.

Appeal No. 467 of 1926, and Civ. Rev. Nos. 1188 and 1223 of 1926, Decided on 17th January 1927.

* (a) *Practice—Discretion—Motive of a party in seeking to enforce a legal right is not altogether irrelevant.*

In judicial proceedings the question of motive is not altogether irrelevant. If there is a discretion in the Courts to allow a party to enforce one remedy in preference to another, where more remedies than one are open, or if an enforcement of a remedy will amount to an abuse of the processes of the Court, motive may in some cases have to be considered; but there again it is not so much to find out what the real motive of the party is, but rather to determine what resultant injury would accrue to his antagonist. [P 583 C 2]

(b) *Civil P. C., S. 115—Revision may be converted into appeal.*

It is alway open to the High Court to allow an application under S. 115, Civil P. C., to be converted into an appeal. [P 584 C 1]

* (c) *Civil P. C., S. 151—Executing Court—Inherent power thereof is not limited to Rr. 11, 21, 26 and 37 of O. 21—It can delay issuing processes but not so as to ignore just rights of the decree-holder.*

An inherent power in a Court to stay or defer the issue or operation of its own processes in cases demanding the exercise of such power in the interest of justice has been always recognised. O. 21, Rr. 21, 26 and 37 do not exhaust all the discretion of the executing Court, nor does R. 11, in the case of a decree for money, limit or restrict any jurisdiction or discretion which an executing Court may have in respect of any decree that is before it for execution. [P 585 C 1]

The right of the decree-holder to execute his decree, unless the decree itself imposes a restriction upon the right of immediate enforcement, arises as soon as the decree is complete. But, consistently with this right, if the Court finds that its processes for its enforcement should be delayed for a while, the Court is not powerless; but the discretion that it has lies within very narrow limits and should not be used to ignore the just rights of the decree-holder and putting him off indefinitely. [P 585 C 2]

* (d) *Civil P. C., O. 21, R. 10—Power of simultaneous execution is not same as power of transferring Court to order execution after the decree is transferred for execution.*

The power to make an order for simultaneous or concurrent execution of a decree in more Courts than one is not the same as the power to make an order for execution after a decree is no longer in the file of the Court, having, already been transferred to another Court for execution. [P 587 C 2]

(e) *Civil P. C., S. 46—Decree transferred for execution—Parent Court can issue precept.*

After the transfer of the decree for execution, the Court which passed it retains jurisdiction for certain purposes out of which S. 46 is one. The object of a precept is to enable a decree-holder to obtain an interim attachment when there is ground to apprehend that he may otherwise be deprived of the fruits of his decree and it can be issued by the parent Court even after the decree is transferred. [P 588 C 1]

*(f) Civil P. C., S. 46—Validity of precept cannot be challenged by the Court to which it is sent.*

The Court to which the precept has been issued cannot vest itself with jurisdiction to question the validity of the precept. The issuing Court makes the order and the Court to which it is sent has only to carry it out. If any variation is to be made it is the issuing Court which is competent to make it and not the Court to which it is sent. [P 588 C 2]

*Binod Mitter, C. C. Biswas, Profulla Chandra Chakravarti* and *Manindra Kumar Bose*—for Appellant.

*J. Langford James, A. C. Batra, Kali Kinkar Chakerbutty, Narain Chandra Kar* and *Dwarkanath Chakravarti*—for Respondents.

**Mukerji, J.**—By two indentures of mortgage, one dated the 31st March 1921 in favour of Mr. Framroz Edulji Dinshaw and two others, and another dated the 28th June 1925 in favour of Mr. Framroz Edulji Dinshaw alone, Mr. J. C. Galstaun borrowed 30 lacs and 2 lacs of rupees respectively on hypothecation of some immovable properties. In Febuary 1926 the mortgagees having attempted to sell the mortgaged properties without the intervention of the Court on the strength of a covenant in the deeds, Mr. Galstaun instituted a suit in the Court of the Subordinate Judge at Alipore for a declaration that the mortgagees are not entitled to exercise that power of a sale and for an injunction restraining them from doing so and obtained a temporary injunction to that effect in his favour. Thereafter the mortgagees instituted two suits in the High Court of Judicature at Bombay in its Original Jurisdiction for moneys due on the said mortgages being Suits Nos. 1418 and 1420 of 1926, on the basis of the personal covenants contained in them. On the 8th October 1926 decrees were passed in these suits, in the former for Rs. 2,12,686-3-0 and in the latter for Rs. 31,24,373-5-0.

Early in November last the two decrees were transferred by the Court which passed them: the decree in Suit No. 1418 of 1926 to the first Court of the Subordinate Judge at Alipore, and that in Suit No. 1420 of 1926 to this Court in its Original Jurisdiction.

On the 10th November 1926 an application was made by the decree-holders in the first Court of the Subordinate Judge at Alipore for attachment of the moveable properties of the judgment-debtor, and the learned Judge made an order for attachment under O. 21, R. 30, Civil P. C. fixing 6th December 1926 for return and further orders, Thereafter on the objection of the judgment-debtor he passed further orders from time to time, allowing the judgment-debtor time to pay up the decretal dues. He eventually passed an order on the 17th November 1926 deferring the issue of the writ to the 27th November 1926 and on the last-mentioned date again deferred it till the 22nd December 1926. Against these two orders the decree-holders moved this Court and obtained a Rule which is Rule No. 1188 of 1926.

Rule No. 1188 of 1926 was partly heard by us on the 22nd December 1926. The time granted by the Subordinate Judge having expired, the judgment-debtor applied on the 22nd December 1926 to the learned Judge for further time, and the learned Judge again granted time to the judgment-debtor till the 31st January 1927. The decree-holders moved this Court on the 4th January 1927 against this and a subsequent order passed by the learned Judge on the 23rd December 1926 in connexion with this matter, and we directed the application to be made with notice to the judgment-debtor and we also sent for the judgment-debtor's application upon which the order of the 22nd December 1926 was made. The notice having been given and the application so sent for having arrived, we heard the decree-holders' application on the 7th January 1927. This application will be dealt with along with Rule No. 1188 of 1926.

It has been already stated that the decree in Suit No. 1420 of 1926 was transferred to this Court in its Original Jurisdiction early in November last. Thereafter at the instance of the decree-holders in that suit, a precept under S. 46, Civil Procedure Code, was issued by the Bombay High Court on the 2nd December 1926 to the Subordinate Judge of 24-Parganas at Alipore for attachment of certain moveable properties of the judgment-debtor. It was received by the Subordinate Judge 1st Court, Alipore, on the 6th December 1926 and on that day an application was made by the decree-holders to execute the same, and the learned Judge made an order directing a

writ of attachment to issue. The judgment-debtor objected to the issue of the writ but his objections were overruled. The issue of the writ, however, was deferred till the afternoon of the 13th December 1926. In the meantime the judgment-debtor moved this Court and obtained a Rule to show cause why the order of attachment should not be set aside on the ground that the precept had been issued without jurisdiction. An interim stay was also obtained. This Rule is Rule No. 1223 of 1926. The judgment-debtor filed an appeal in the alternative in this matter, which is appeal from Original Order No. 467 of 1926. The decree-holders, thereafter, moved this Court and at their instance and for their protection a Rule was issued calling upon the judgment-debtor to show cause why he should not be restrained by an injunction from dealing with or disposing of the properties for the attachment of which the precept had been issued, and an interim injunction to the same effect was issued. This Rule is Rule No. 1229 of 1926.

Rule No. 1188 of 1926 and the application were heard on the 7th January 1927.

Before dealing with the main question which arises in these two matters it will be convenient to dispose of two questions about which there is a good deal of controversy between the parties and on which a mass of materials has been placed before us. One of these is the question whether the moneys which were borrowed by the judgment-debtor belonged to the decree-holders or to the Maharaja of Gwalior. In my judgment the matter has scarcely any bearing upon the real questions which are before us, and the opinion that we have formed on it only affects the general credibility of the respective parties. It cannot be urged that the rights of the decree-holders, assuming that they are benamidars for the Maharaja of Gwalior, are any less than those of the latter if he was the holder of the decree. For the determination of the main question we have to proceed upon facts which are more or less admitted. The other question is whether the allegations of the judgment-debtor that the decree-holders are actuated by malice or vindictiveness in resorting to the steps that they have taken in consequence of the judgment-debtor's failure or refusal to comply with Mr. Dinshaw's demands for commission are true or whether, as alleged on behalf of the decree-holders, they instituted the suits bona fide, as they apprehended that the security was or would be impaired and took the steps in execution in the usual course. It has been urged on behalf of the decree-holders that the question of motive is entirely irrelevant and that Courts should not concern themselves with the motives which actuate a party who is asserting a legal right, and reference had been made to *King* v. *Henderson* (1) and *Fitzroy* v. *Cave* (2). In my judgment the question of motive cannot in a matter like this be said to be altogether foreign to the enquiry. If there is a discretion in the Courts to allow a party to enforce one remedy in preference to another, where more remedies than one are open, or if an enforcement of a remedy will amount to an abuse of the processes of the Court, motive may in some cases have to be considered; but there again it is not so much to find out what the real motive of the party is, but rather to determine what resultant injury would accrue to his antagonist. It is not necessary to go in detail into the mass of materials that has been placed before us on this head. It is sufficient to state that materials that have been placed before us do not justify us in holding that absolute bona fides have been established on the part of the decree-holders, but they rather indicate that dissatisfied with the neglect on the part of the judgment-debtor to pay up his dues under the mortgages and exasperated at the obstruction that was offered by the injunction, which the judgment-debtor had recourse to and finding that the power of sale without the intervention of the Court which had been conferred on them in the deeds was rendered nugatory and possibly also on account of other differences, they proceeded to stand strictly upon the rights that the law conferred on them. The enforcement of these rights is bound to put the judgment-debtor to difficulty and disgrace, but the decree-holders' attitude seems to be that if they are entitled under the law to the remedy

(1) [1898] A. C. 730.
(2) [1905] 2 K. B. 364=74 L. J. K. B. 829=54 W. R. 17=93 L. T. 499=21 T. L. R 612.

they are seeking, for, they do not mind the consequences that will follow. We seldom find a decree-holder who entertains a sympathy for his judgment-debtor; and between want of sympathy and vindictiveness there is only difference in degrees.

It will be convenient to refer here to an objection that has been raised as to the competency of the application for revision in Rule No. 1188 of 1926, and the objection, I take it, will apply equally well to the application we heard on the 7th January 1927. This objection is to the effect that appeals lie from the orders complained of. The objection is based on the view of S. 47, Civil Procedure Code, taken in the cases of *Subramaniya* v. *Kumara Velu* (3), *Chidambaram* v. *Krishna Vathiar* (4) and *Venkatasubba Mudali* v. *Manickammal* (5). The contrary view has been taken in the cases of *Janardan* v. *Martand* (6), *Hussain Bhai* v. *Beltu Shah* (7), *Ram Prasad* v. *Anukul Chandra* (8) and *Rajendra Kishore* v. *Mathura Mohan* (9). Our attention has been drawn in support of this objection to the observations of Mookerjee, J., to be found in the case of *Srinibash* v. *Kesheo Prosad* (10). This last-mentioned case has been explained by Mookerjee, J., himself in the later case of *Ram Prosad* v. *Anukul Chandra* (8), where the nature of orders in execution proceedings which may or may not be treated as coming under S. 47 of the Code has been clearly pointed out. While I should be inclined, following the decisions of this Court, to hold that no appeals lie from the orders complained of, I do not see much point in this objection, for it is always open to us to allow an application under S. 115, Civil P. C. to be converted into an appeal no question of payment of additional Court-fees arising in the case. The matter therefore need not be pursued any further.

Turning now to the substance of the thing, the main question is whether an executing Court has jurisdiction to make orders of the discription that have been made in this case, or, in other words, whether that Court is competent to put off the execution in the exercise of its discretion upon grounds other than those provided for by the Code.

Order 21, R. 17, sub-R. (4) says that when the application is admitted and that is the stage from which we may begin, the Court shall enter in the proper register a note of the application and the date on which it was made and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application. The proviso is not relevant for our present purposes. The expression "subject to the provisions hereinafter contained" must necessarily refer to some provision in the Code itself, O. 21, R. 24, sub-R. (1) says that when the preliminary measures (if any) required by the foregoing rules have been taken the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decrees. Speaking of the words "unless he sees cause to the contrary" which occurred in the corresponding section, viz., S. 250 of the Code of 1882 in the case of *Ishan Chandra Roy* v. *Ashanulla Khan* (11) in which the words had been relied on as indicating the existence of a discretionary power in the Court to refuse to execute a decree against which no appeal had been preferred and the time for appealing against which had expired, this Court observed thus:

> Sections 239 and 250 have been referred to, and the words in the latter section, unless he sees cause to the contrary have been relied upon as indicating the existence of such a discretionary power. It appears to us that these words are sufficiently explained by a reference to express provisions contained in other sections of the Code (see for example S. 246) which provide for setting off cross-decrees against each other, the effect being that no execution of the decree for the smaller amount will take place. We may also refer to S. 243, and we may bear in mind that when a decree-holder dies, while execution proceedings are pending, the Court may properly see cause not to issue its warrant until a proper person has been substituted on the record in the place of the deceased decree-holder. We are therefore unable to say that there are any provisions in the Code which indirectly empower a Court of first instance to refuse to execute a decree against which no appeal has been preferred, and the time for appealing against which has expired and we

(3) [1916] 39 Mad. 541=33 I. C. 66.
(4) [1917] 40 Mad. 233=5 L. W. 132=32 M. L. J. 13=37 I. C. 836=(1917) M. W. N. N. 44 (F. B.).
(5) A. I. R. 1926 Mad. 582=49 Mad. 513.
(6) A. I. R. 1921 Bom. 208=45 Bom. 241.
(7) A. I. R. 1924 All. 808=46 All. 733.
(8) [1914] 20 C. L. J. 512=27 I. C. 444.
(9) [1919] 25 C. W N. 555=55 I. C. 228.
(10) [1911] 14 C. L. J. 489=12 I. C. 745.
(11) [1884] 10 Cal. 817.

think that we would not be justified in importing into the Code a provision which the legislature has not thought fit to insert expressly or by necessary implication.

These observations so long as they are confined to the facts of the particular case with which the learned Judges were then dealing are, if I may say so without being guilty of presumptuousness, perfectly correct but if they were intended to serve as a general interpretation of the expression aforesaid, I would take leave to dissent, especially in view of of the express provisions made in the Code of 1908 for the exercise of such powers *ex debtic justitiae*, subject to the provisions of the Code, as, the exigencies of any particular case may require. There is nothing in the words themselves to indicate that they are to be taken in that limited sense. An inherent power in a Court to stay or defer the issue or operation of its own processes in cases demanding the exercise of such power in the interest of justice has been always recognized : see *Nanda Kishore Singh* v. *Ram Golam Sahu* (12).

On behalf of the decree-holders, it has been urged that there is no discretion at all in the Court not to allow a decree to be executed except such as is provided for in the Code itself, e. g., as in O. 21, Rr. 21, 26 and 37 and elsewhere. These rules, however, in my opinion, do not exhaust all the discretion that there is in an executing Court. The provisions of O. 20, R. 11 have also been referred to on their behalf as suggesting that if the payment of the amount decreed in the case of a decree of payment of money is to be postponed, the power to grant such postponement is in the Court which passes the decree. This is a rule which, as it stood in the Code of 1882, enabled a Court to pass an instalment decree, and by the amendments introduced in 1908, now enables the Court also to postpone the payment of the decreed amount notwithstanding anything contained in the contract under which the money is payable. This rule, in my opinion, does not, in the case of a decree for money, limit or restrict any jurisdiction or discretion which an executing Court may have in respect of any decree that is before it for execution. In England judgments and orders for the recovery of payment of a sum of money, except such as are usually enforced by proceedings for contempt and except in such cases as according to the rules cannot be enforced without the leave of the Court, and except in cases where the judgments or orders impose a restriction upon the right of immediate enforcement, may, generally speaking, be enforced immediately upon signing the judgment or drawing up or otherwise completing the order by the issue of a writ of *fieri faciss* (on goods, chattels, moneys and securities) or of alegit (on land only): *Land Credit Co.* v. *Lord Fermroy* (13). So also with regard to a judgment for recovery of possession of land for which a writ of possession will issue. That it is the duty of the judgment-debtor to find the judgment-creditor and pay him the amount of the judgment-debt provided the latter is within the realm cannot be disputed. *In re a debtor* (14), Cozens Hardy, M. R., referring to this rule that it is found in very old authorities, Coke upon Littleton and Sheppard's Touchstone, and that it has been undoubtedly affirmed and reiterated in more modern authorities. Farwell, L. J., in the same case at page 62 observed :

> The judgment is in the common form that the plaintiffs do recover so many pounds. It states no place of payment, and it is obvious of course that execution might issue at once ;
>
> and further,
>
> supposing the ordinary rule, therefore, which has been established since Coke wrote upon Littleton to apply, the debtor would have to find his creditor, provided the creditor is within the jurisdiction.

It follows, therefore, that the right of the decree-holder to execute his decree unless the decree itself imposes a restriction upon the right of immediate enforcement, arises as soon as the decree is complete. But, consistently with this right, if the Court finds that its processes for its enforcement should be delayed for a while, I am of opinion the Court is not powerless; but the discretion that it has lies within very narrow limits and it is quite easy to conceive of cases in which this discretion may rightly and justly be exercised.

The view of the law I take does not absolve us from the necessity of examining the orders now before us, for we have got to see the exact nature and scope of the discretion that has been exercised.

(12) [1912] 40 Cal. 955=18 I. C. 207=16 C. L. J. 508.

(13) [1870] 5 Ch. 323=39 L. J. Ch. 477=18 W. R. 393=22 L. T. 394.

(14) [1911] 1 K. B. 53.

Once it is held that the Court had jurisdiction to defer its processess in execution and that it decided to adopt that course a very wide margin must be allowed and in a matter of judicial discretion its exercise will not be readily overruled. It is necessary, therefore, to examine the orders from this point of view.

The writ of attachment under O. 21, R. 30 was ordered to issue on the 10th November 1926. Thereafter the judgment-debtor files a petition for stay of execution for three days to enable him to put in an objection. The Subordinate Judge heard the parties on the next day, and on the 12th November 1926 he definitely held that there was no ground for objection as to the execution of the decree. By order which he passed on that day he appears to have been of opinion that he ought to give the judgment-debtor a short time to enable the judgment-debtor to arrange for payment and that the decree holder would not be prejudiced there by. He proceeded to pass an order which ran in these words:

I allow time up to Wednesday next the 17th instant, and expect the judgment-debtor to be ready with the money on that date or at least to to be in position to state definitely when payment will be made. If no payment is made on the 17th instant I shall pass such order as may be necessary for safeguarding the decree-holder's interest. Put up on 17th November 1926 for further orders.

On the 17th November 1926 the money was not ready. New matters were then brought to the notice of the Court—the fact some negotiations were going on with the Imperial Bank of India for raising a loan that the money for which the decree had been obtained was still secured by a mortgage—a question which barely arose in execution—and that the judgment-debtor's credit would be injured. As regards a definite statement by the judgment-debtor as to when the payment was to be made there was none offered by the judgment-debtor, but an assurance was given that the loan was expected to be finally sanctioned by the Imperial Bank within ten days. It does not appear what justification the Court had for accepting this assurance. The Court then proceeded to pass an order in these terms:

I, therefore, allow the judgment-debtor ten days' time for the present. If at the end of that period I am informed that the loan has been definitely sanctioned I shall be ready to grant further time such as may be necessary to have the transaction completed and the money paid, I think I could mention that I am convinced about the judgment-debtor's bona fide intention of payment and that I feel it to be my duty to afford him facilities for that purpose. Put up on the 27th November 1926, for further orders.

It thus appears that neither of the two conditions laid down in the order of the 12th November, one as to payment and the other as regards a definite statement as to the date on which payment would be made was fulfilled, and yet the learned Judge granted a further stay, without any attempt made to safeguard the decree-holders' interest and by the order which he passed, he appeared to be willing to grant a further stay if he was satisfied that the loan was definitely sanctioned by the Imperial Bank. On the 27th November 1926, the judgment-debtor was not in a position to satisfy the Court even on that point and all that the learned Judge was able to find was that the negotiations had made some progress. On this, and being of opinion that the decree-holders had sufficient security for the decretal amount he gave further time to the judgement-debtor till the 22nd December 1926. Still no order was made by him for the protection of the decree-holders. Two valuable race-horses, it is admitted, were sold by the judgment-debtor; and though I am prepared to accept the statement that the sale was in the ordinary course and not with a view to prejudice the decree-holders the fact remains and it is not disputed that the money realised by the sale never reached the decree-holders. On the 22nd December 1926 the Subordinate Judge was asked by the judgment-debtor to grant a month's further time and all that the learned Judge was informed was that the valuer had made a favourable report and that the Bank had offered to consider the question of the loan if the judgment-debtor agreed to certain conditions. He then granted further time till the 31st January 1927. This time he thought of the decree-holders' safety and found that an interim injunction had already been issued by this Court. This order was passed by him ex-parte, but the decree-holder was heard on the next day and he saw no reason to alter his order. These are the facts.

While it is impossible to define what judicial discretion is, it is quite possible to give instances of what in a matter like this would be instances of an exercise of the discretion right or wrong; and these instances would stand apart from cases

where all bounds of such discretion are clearly overstepped and the exercise of it is altogether arbitrary. The orders passed on the 10th and the 12th would come within the former category, but when by gradually enlarging the conditions upon which the discretion was being exercised the Court ultimately passed its order on the 17th and the 27th November 1926 and again took a much wider view of its power as an executing Court on the 22nd December 1926, and stayed the execution upon the mere ground that the decree-holders had ample security and the judgment-debtor was making bona fide efforts to raise a loan, the discretion which the Court exercised in passing those orders surpassed all conceiveble limits and the orders that were passed on these dates were clearly arbitrary as ignoring the just rights of the decree-holders and putting them off indefinitely. These orders therefore in my opinion cannot possibly be supported.

To enable us to hold that the orders should not be interfered with it has been brought to our notice that the agreement in the terms proposed by the Bank has now been signed between the parties and an affidavit sworn to by Mr. Galstaun on 7th January 1927 has been placed before us. To take cognizance of these matters, however, would be to countenance a position which has been brought about under cover of orders which the Court had no right to pass. I am constrained to hold that the orders must be set aside. The Rule accordingly is made absolute with costs 10 gold mohurs and the application of the decree-holder heard on the 7th January 1927 granted, the order complained of therein being set aside.

The learned Subordinate Judge on the records arriving in his Court will pass proper orders for issuing the writ of attachment.

Appeal from Original Order No. 467 of 1926 and Rule No. 1223 of 1926.

The judgment-debtor's objection as regards the precept is that it was issued without jurisdiction. His contention is that once a decree is transferred by the Court which passed it to a Court for the purpose of execution the former Court loses all powers of execution except with regard to matters specifically provided for by the Code and ceases to have such powers until it withdraws the decree from the executing Court or until the latter Court returns the decree to it with a certificate of non-satisfaction and that until then the only Court which has seisin of the execution proceedings is the Court to which the decree has been sent for execution and the Court which passed it has no jurisdiction to entertain an application for execution. In support of this proposition reliance has been placed upon the wording of R. 10 of O. 21, Civil P. C., and the authorities relied upon are the decisions of the Judicial Committee in the cases of *Maharaja of Bobbili* v. *Narasaraja* (15), affirming on appeal the decision of the Madras High Court in *Maharaja of Bobbili* v. *Narasaraju* (16). *Jnanendra* v. *Kumar Jogendra Narain* (17), *Rangaswami* v. *Sheshappa* (18), and some other cases. On behalf of the decree-holders it has been contended that these cases are distinguishable and that notwithstanding the want of specific provision for simultaneous execution of a decree in several Courts in any of the earlier Codes it has always been held that such execution is permissible, and reference has been made in this behalf to the decisions in the cases of *Saroda Prosad Mullick* v. *Luchmeeput Sing Deogar* (19), as under the Code of 1859, *Krishto Kishore Dutt* v. *Rooplal Das* (20) as under the Code of 1877. *Baijnath Goenka* v. *F. H. Holloway* (21) as under the Code of 1882. Now the power to make an order for simultaneous or concurrent execution of a decree in more Courts than one is not the same as the power to make an order for execution after a decree is no longer on the file of the Court having already been transferred to another Court for execution. On the other hand the decision of the Judicial Committee in the case of *Maharaja of Bobili* v. *Narasaraja* (15) in my opinion cannot, having regard to the words in which it is expressed, be regarded as a settler on the question. But the words of O. 21, R. 10, Civil P. C., favour the view contended for on behalf of the judgment-debtor and that is how

(15) [1916] 39 Mad. 640=36 I. C. 682=43 I.A. 238 (P. C.).
(16) [1912] 37 Mad. 231=23 M. L. J. 236=15 I. C. 738=(1912) M.W.N. 721.
(17) A. I. R. 1923 Patna 384=2 Pat. 247.
(18) A. I. R. 1922 Bom. 359=47 Bom. 56.
(19) [1872] 14 M. I. A. 529=10 B. L. R. 214=17 W. R. 289 (P.C.).
(20) [1882] 8 Cal. 687=10 C.L.R. 609.
(21) [1905] 1 C. L. J. 315.

the law is generally understood. Moreover there are weighty considerations that make it the more acceptable view. It is conceded, however, that after the transfer of the decree for execution, the Court passed it retains jurisdiction for certain purposes specially provided for by the Code [see *Baijnath Goenka* v. *F. H. Holloway* (21)]. I do not see why S. 46 should not be regarded as one of those purposes. The object of a precept is to enable a decree-holder to obtain an interim attachment when there is ground to apprehend that he may otherwise be deprived of the fruits of his decree and seeing that all that can be got under it is an attachment of properties for a limited period, so that they may be held under attachment pending an application for execution to be subsequently made. I do not see why this should not be the view to be taken of the section. Effect must, in my opinion, be given to the words "whenever it thinks fit" which appear in the sub-S. (1) of this section. I am accordingly of opinion that there was no want of jurisdiction in the issue of the precept.

In the next place, in challenging the validity of the precept various matters have been placed before us which would go to establish that in the circumstances of the case no precept should have been issued. This contention, if accepted would only amount to this : that in the circumstances of the case the Bombay High Court was wrong in according to the decree-holder's prayer for issuing the precept. The Court to which the precept has been issued can hardly vest itself with jurisdiction to question the validity of the precept on grounds such as these or embark upon an enquiry of this character.

Lastly it has been contended that the provisions of sub-S. (2) of S. 46 indicate that the Court to which a precept is sent has that discretion in the matter of executing it as it has as a Court executing a decree and in a fit case may stay the execution of the precept and defer the making of the attachment. The sub-section, however, deals only with the manner in which the attachment is to be made and the procedure to be adopted in connexion therewith. In my opinion the issuing Court makes the order and the Court to which it is sent has only to carry it out. If any variation is to be made it is the issuing Court which is competent to make it.

The grounds urged on behalf of the judgment-debtor therefore fail, and the appeal and the Rule accordingly must fail. The appeal is dismissed with costs 10 gold mohurs and the rule is discharged.

**Graham, J.**—These Rules have arisen out of certain execution proceedings, which are pending in the Court of the first Subordinate Judge of Alipore following upon two decrees made by the Bombay High Court on the 8th October last.

The first of these Rules No. 1188, which was obtained by the decree-holders, F. E. Dinshaw and others, is directed against two orders of the Subordinate Judge, dated the 17th and 27th November granting time to the judgment-debtor J. C. Galstaun to satisfy the decree.

Thereafter the judgment-debtor obtained Rule No. 1223 to show cause why a writ of precept issued by the Bombay High Court to the Subordinate Judge of Alipore should not be declared to have been issued without jurisdiction and subsequently on a further application by the decree-holders an injunction was granted restraining the judgment-debtor from dealing with or disposing of any of the properties in respect of which the attachment order had been issued. At a later stage an application was made by the decree-holders for a Rule to show cause why two further orders of the Subordinate Judge, dated the 22nd and 23rd December, granting further time to the judgment-debtor, should not be set aside as having been made without jurisdiction.

The facts so far as they appear to be material for present purposes are as follows :

The judgment-debtor Galstaun borrowed large sums of money from the decree-holders on the security of house properties in Calcutta. According to the decree-holders the value of these properties has depreciated, and, becoming apprehensive about their security, they instituted two suits in the Bombay High Court, and obtained two decrees on the 8th October last for money in the first instance, one for Rs. 31,24,373-5 and the other for Rs. 2,12,686-3, reserving their rights under mortgages. The decree for the smaller sum was transferred to the Court of the Subordinate Judge of

Alipore for execution and the larger decree is said to have been transferred to this Court. On the 10th November an application was made by the decree-holders in the Court of the Subordinate Judge for attachment of the moveable properties of the judgment-debtor and a writ was ordered to be issued. On the following day the judgment-debtor applied for a stay of execution for three days, and orders were reserved till the next day. On the 12th November the judgment-debtor asked for time to put in an objection to the execution; and time was allowed until the 17th November.

On the 17th November the judgment-debtor made a further application for time to enable him to raise a loan, and the learned Subordinate Judge being of opinion that the decree-holders had no real ground for apprehension; and that the credit of the judgment-debtor would suffer, if attachment were resorted to, granted ten days' further time to enable him to complete certain negotiations which had been entered into with the Imperial Bank.

On the 27th November there was a further application for time by the judgment-debtor on the ground that the negotiations with the Bank had made further progress, and he annexed with his petition ccpies of the correspondence, and of a resolution of the Bank. The learned Subordinate Judge thereupon allowed a further postponement of execution until the 22nd December.

It is these orders of the 17th and 27th November which form the subject-matter of the first Rule. Shortly stated, the point involved is whether the Subordinate Judge had jurisdiction to grant time, or whether he was bound to issue attachment as soon as the application was presented to the Court by the decree-holders. The learned counsel for the judgment-debtor argued that under O. 21, Rr. 17, 24 and 26 of the Code of Civil Procedure the Subordinate Judge had jurisdiction to extend the time for satisfying the decree. Sub-S. (4) of R.17, O. 21 lays down that when an application for execution of a decree has been admitted the Court "shall subject to the provisions hereinafter contained, order execution of the decree."

Rule 24 provides that

> when the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree.

Rule 26 relates to stay of execution and the portion, which has been relied upon, reads as follows:

> The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court which passed the decree . . . . . for an order to stay the execution.

It is contended on the basis of the above rules that the Subordinate Judge had jurisdiction; and that he had a discretion to postpone attachment, if he considered that there were sufficient grounds for allowing time. It was further argued that the Subordinate Judge exercised his discretion, and that unless it can be shown that he exercised that discretion arbitrarily, and in such a manner as to cause irreparable loss or injury to the aggrieved party, this Court ought not in the exercise of its revisional jurisdiction to interfere.

It was next contended that, apart from these provisions of the Code conferring a discretion upon the Court in express terms, every Court has inherent jurisdiction to pass such orders as may be necessary for the ends of justice. The Court below, it was pointed out, had not refused to execute the decree, but had merely allowed time to the judgment-debtor to arrange for payment. The security, it was argued, is ample, and therefore there can be no question of irreparable injury or loss.

So far as R. 26 of O. 21 is concerned it seems to be plain that it can be of no avail to the judgment-debtor, inasmuch as the ground on which it was sought to stay execution is not the ground mentioned therein. There was apparently no suggestion of making any application to the Bombay High Court for stay of execution.

Adverting to R. 24 (1) the words "unless it sees cause to the contrary" have been relied upon, and they would appear at first sight to confer a discretion upon the executing Court to postpone execution. It was held, however, in the case of *Ishan Chandra Roy* v. *Ashanullah Khan* (11), that these words are to be explained by reference to express provisions in the Code, e. g., Ss. 343 and 246 (corresponding to O. 21, R. 29, and O. 21, R. 18 respectively in the present Code.) It was

held further that it is not open to a Court of execution to refuse to execute a decree against which no appeal has been preferred, and in respect of which the time for appeal has expired. Upon general grounds this view seems to commend itself, since the function of an execution Court is to execute the decree, and as a general rule a person, who has obtained a judgment, is entitled to obtain execution forthwith. Moreover it can hardly have been intended by the legislature that a Court exercising the limited functions of an executing Court should have discretion to postpone execution from time to time, the consequence of which might well be to frustrate the decree and perhaps to render it infructuous. In the absence of any such power plainly conferred by the Code, and of any authority in favour of such power, we must in my judgment hold that the orders postponing execution were made without jurisdiction. At the same time I should like to make it clear that I am not prepared to go so far as to hold that an executing Court has under no circumstances whatever any discretion to allow time. There may be circumstances in which the Court would have discretion to grant reasonable time, e. g., in case of illness of the judgment-debtor, or again in the circumstances referred to in the specific provisions of the Code already mentioned above. But that discretion would not extend to repeatedly postponing execution of the decree in such a way as to prejudice the rights of the decree-holder, and where, as here, such a course has been adopted, I think it must be held that the executing Court has failed to exercise a jurisdiction vested in it by law. In my opinion therefore this rule must be made absolute.

In Rule No. 1223 the question involved is whether the precept issued by the Bombay High Court should not be declared to have been issued without jurisdiction. In this connexion allegations and counter-allegations have been made as to vindictiveness on the part of the decree-holders, it being alleged on behalf of the judgment-debtor that the decree-holders has been actuated by malice because he failed to obtain from the judgment-debtor a large sum of money by way of commission for securing a renewal of the mortgages, while on behalf of the decree-holders on the other hand it has been represented that, so far from betraying any vindictive spirit, he has treated the judgment-debtor with every possible consideration, and has repeatedly given him time to make payment.

The question as to the notice which actuated the decree-holders is entirely irrelevant, and the matter must be decided with reference to the legal rights of the parties, and not upon any such extraneous considerations.

The general question as to the jurisdiction of an executing Court to go behind a decree was recently considered by a Full Bench of this Court in the case of *Gora Chand Haldar* v. *Profulla Kumar Roy* (22). It has been urged on behalf of the judgment-debtor that that decision concludes the matter, and that the Court below not only had jurisdiction, but that it was its bounden duty to refuse to act upon the precept, if it was of opinion that it had been issued without jurisdiction. The present case, however, would hardly appear to be covered by the Full Bench decision. What was held in that case was that, where it was apparent that the Court which made the decree had no jurisdiction, whether pecuniary or territorial, to make it, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction. No such question arises here, and it cannot be said that the precept on the face of it is bad. No question of pecuniary or territorial jurisdiction is involved. The allegation here is that the Bombay High Court had no jurisdiction to issue the precept by reason of the fact that it had already transferred the decree to this Court for execution, and therefore had no longer any seisin of the case. That is a question of law not altogether free from difficulty, the decision of which must depend upon the interpretation of S. 46 and other sections and rules of the Code of Civil Procedure, and it seems to me that the execution Court is not the proper Court to consider such matters. The function of an executing Court is to execute, and not to decide intricate questions of law, such power as it has to decide being limited to questions arising out of the decree itself. When a decree has been transferred, or precept issued, the existence of a decree, or precept susceptible, and capable of execution is assumed, and it seems to me that it is

(22) A.I.R. 1925 Cal. 907=53 Cal. 166 (F.B.).

the duty of the executing Court to proceed upon that assumption. *Hasan Ali* v. *Guari Ali Mir* (23). The proper place to raise the question of jurisdiction is in the Court which passed the decree, or precept, and to allow such a question, as is involved here, to be raised in the executing Court would in my opinion be to adopt a most dangerous principle fraught with possibly mischievous consequences. If the Court had no jurisdiction to issue the precept, the ordinary course would be to assail the order by way of review or appeal. I venture to think that it can never have been intended that such a matter should be raised and decided in the executing Court, the result of which would be that the executing Court would be virtually sitting in appeal over the Court which issued the precept.

Adverting to S. 46 of the Code of Civil Procedure the material portion of that section lays down that the Court which passed the decree may, whenever it thinks fit, issue a precept. It has been urged on behalf of the judgment-debtor that the Bombay High Court, having transferred the decree to this Court, had no longer any seisin of the case or jurisdiction to issue the precept. It is well settled, and this has not been disputed, that the Court which passes a decree can issue executing writs simultaneously to more Courts than one. If that is so, there does not seem to be any reason why a Court having already transferred a decree for execution, should not issue a precept, which is but another and a special form of execution to another Court. It is no doubt true that what the section appears to contemplate is the issue of the precept in the first instance, i.e., before the decree is transferred, the object of the procedure apparently being preventive, and not to bring the properties to sale, but to enable the decree-holder to obtain an interim attachment where there is ground to apprehend that he may otherwise be deprived of the fruits of his decree. But, if the jurisdiction to issue the precept exists, the position cannot be altered in any way by reason of the fact that the precept was not issued until after the decree had been transferred, It is conceivable that circumstances might arise after the decree had been transferred which might render the issue of a precept necessary. It is clear from the language of the section that the Court which passed the decree can alone issue the precept, and that the Court to which the decree has been transferred, would not have jurisdiction to do so. The result therefore would be that in the event of such circumstances arising after transfer of the decree, if the Court which passed the decree ceased to have any jurisdiction, the provision as to procedure by precept would be rendered nugatory and the decree-holder would be without remedy. I do not think that that can possibly have been the intention. The section itself says in plain terms that the Court which passed the decree can "whenever it thinks fit issue a precept," and I do not think that it can be held to lose that jurisdiction by reason of the fact that it has previously transferred the decree to another Court for execution. There is authority for the view that when the Court which has made a decree has transferred it for execution to another Court, it does not completely lose all jurisdiction in respect of execution thereof : see *Baijnath Goenka* v. *F. H. Holloway* (21). In the case in question this was illustrated by reference to Ss. 232 and 295 of the former Code of Civil Procedure (corresponding to O. 21, R. 16 and S. 73 respectively of the present Code). Reference may also be made in this connexion to O.21, R. 26 of the Code, which supports the same conclusion.

In my judgment we must hold that the Subordinate Judge had no jurisdiction to question the validity of the precept upon the ground which has been urged here, and I would hold further that, if he had jurisdiction, the Bombay High Court had in fact jurisdiction to issue the precept. I am also of opinion that upon the application for attachment being presented to the Subordinate Judge he was bound under S. 46 to proceed with the attachment. The language of sub-S. (2) of S. 46 is clear and unambiguous, and says that "the Court, to which a precept is sent, shall proceed to attach the property."

In my judgment therefore this rule must be discharged.

The result is that I agree with the conclusions at which my learned brother has arrived, and with the orders which he has made in disposing of these rules.

D.D. *Order accordingly.*

(23) [1903] 31 Cal. 179.

## A. I. R. 1927 Calcutta 592

MUKERJI AND GRAHAM, JJ.

*Chairman, Municipal Corporation of Faridpore*—Defendant—Appellant.

v.

*Gour Gopal*—Plaintiff—Respondent.

Appeals Nos. 181 and 182 of 1925, Decided on 9th December 1926, from the appellate decrees of the 1st Sub-J., Faridpore, D/- 25th September 1924.

(*a*) *Bengal Municipal Act* (1884), *S.* 6 (3)—*Expression "surrounded by one set of boundaries" illustrated.*

There were two plots of land belonging to plaintiff with a building on each of them. One of these buildings was divided into three compartments and the other into two, and these five compartments were in the occupation of five different tenants. On the north as well as on the south of the buildings there were two plots of land which formed open spaces which were not divided and they were common to all the compartments in the buildings.

*Held*: that it cannot be said that the premises are surrounded by one set of boundaries within S. 6 (3). [P. 592, C. 1, 2; P. 593, C. 1]

(*b*) *Bengal Municipal Act* (1884), *S.* 363—*Claim for damages for wrongful act of Municipal Officers—S.* 363 *applies.*

Section 363 is applicable only to those cases where the plaintiff claims damages or compensation for some wrongful act committed by the Commissioners or their officers in the exercise or honestly supposed exercise of their statutory powers: 6 *Cal.* 3; 3 *C. L. J.* 376; 3 *C. L. J.* 36n and 12 *C. L. J.* 410, *Foll.*

[P. 592, C. 2]

(*c*) *Bengal Municipal Act* (1884), *S.* 6 (3)—*Occupation is the basis.*

A holding means land held by an occupier under one title and one set of boundaries, that is to say, it is on the basis of occupation and not on the basis of ownership the question as to whether certain premises form the holding or not is to be determined: 12 *C. L. J.* 410, *Ref.*

[P. 593, C. 1]

*Bhupendra Kumar Mitter* and *Dharmadas Set*—for Appellant.

*Hiralal Chakraburtty*—for Respondent.

**Mukerji, J.**—The Chairman of the Municipal Corporation of Faridpore who was the defendant in the suits out of which these appeals have arisen and who was unsuccessful in the Courts below has preferred these appeals. The facts relating to the suits may briefly be stated as follows:

There were two plots of land with a building on each of them. One of these buildings was divided into three compartments and the other into two, and these five compartments are, it is alleged, now in the occupation of five different tenants. In September 1922 the Municipality assessed taxes on these lands and buildings on the footing that they consisted of five different and separate holdings. This position was resisted on behalf of the plaintiff and he then instituted the two suits which have given rise to these appeals. In both these suits the prayers of the plaintiff substantially were to the effect that the assessments made after splitting up the two holdings into five were ultra vires, that the extra taxes realized on the basis of such assessment should be refunded and there was also further prayer amongst others, to the effect that damages and compensation might be awarded to the plaintiff for the wrongful act on the part of the defendants in making the assessments as aforesaid. It may be mentioned here that this last prayer does not seem to have been pressed in the suit and at any rate no relief on the basis thereof has been given to the plaintiff.

Two contentions have been urged before us in support of this appeal. The first one relates to the question of limitation. It has been urged that the suit is barred by reason of the provisions of S. 363 of the Bengal Municipal Act. That section has been construed in a series of decisions of this Court as being applicable only to those cases where the plaintiff claims damages or compensation for some wrongful act committed by the Commissioners or their officers, in the exercise, or honestly supposed exercise, of their statutory powers: see *Chunder Sikhur Bhundopadhya* v. *Obhoy Churn Bagchi* (1), *Shudhangshu Bhusan Roy Chowdhury* v. *Bejoy Kali Roy Chowdhury* (2), *in re Bishunpada Chatterjee* (3) and *Shama Bibi* v. *Chairman of Baranagore Municipality* (4). Leaving aside the last of the prayers mentioned above which, if pressed, would have brought the suit within the class of suits contemplated by S. 383 of the Act, the suit, in so far as it consisted of the rest of the prayers in the plaint, is not a suit which falls under the category or those that are contemplated by that

(1) [1881] 6 Cal. 8 (F.B.).
(2) [1906] 3 C. L. J. 376.
(3) [1906] 3 C. L. J. 36n.
(4) [1910] 12 C. L. J. 410=6 I. C. 675.

section. I am accordingly of opinion that the appellant's first contention must fail.

The next contention of the appellants is to the effect that the Courts below have erred in law in holding that the premises to which the suits relate formed two holdings and not five. In support of this contention reference has been made to the definition of "holding" given in S. 6, Sub-S. (3) of the Act and to the decision of this Court in the case of *Shah Hamid Hussain* v. *Chairman of Patna Municipality* (5). S. (6), Sub-S. (3). leaving aside the proviso to which we need not pay any attention for the purposes of the present case, says that

"holding" means "land held under one title or agreement and surrounded by one set of boundaries."

The decision to which reference has been made above lays down that a "holding" means "land held by an occupier under one title and one set of boundaries, that is to say, it is on the basis of occupation and not on the basis of ownership the question as to whether certain premises form the holding or not is to be determined. It may be conceded that inasmuch as there are five tenants in the five different compartments the requirements of the first part of the definition of holding, as given above, is satisfied but then the question arises as to whether it can be said that the premises in question are surrounded by one set of boundaries. So far as this matter is concerned the findings of the Courts below are to the effect that on the north as well as on the south of the buildings there are two plots of land which formed open spaces which have not been divided and that they are common to all the compartments in the buildings. If this finding be treated as a correct one, and there is no reason to suppose that it is not correct, then it is clear that it cannot be said that the premises are surrounded by one set of boundaries. The Courts below, therefore, in my opinion, were right in the view that they took and this contention of the appellants also fails.

These appeals accordingly must be dismissed with costs.

**Graham, J.**—I agree. There is no reason to doubt that the action of the Municipality was perfectly bona fide; but the question is whether it is legally entitled to treat the holdings as five separate holdings and to assess them on that basis. Having regard to the words "surrounded by one set of boundaries" in the definition of holding in S. (6), Sub-S. (3) of the Bengal Municipal Act, I do not think that there can be any doubt that the Municipality is not entitled to adopt that course.

I agree, therefore, with my learned brother that the appeals must be dismissed.

D.D. *Appeals dismissed.*

(5) [1912] 17 C. W. N. 812=15 I. C. 548=17 C. L. J. 31.

1927 C/75 & 76

---

## * A. I. R. 1927 Calcutta 593

SUHRAWARDY AND CAMMIADE, JJ.

*Rahamat Sheikh* and *another*—Appellants.

v.

*King-Emperor*—Opposite Party.

Criminal Appeal No. 722 of 1926, Decided on 16th March 1927, from an order of the Asst. S. J., Pabna, D/- 7th September 1926.

* (a) *Criminal P. C., S. 276—Choosing of jurors.*

Where of the juorors that were summoned to act, only five were present on the day on which the case against the accused was taken up and they were chosen as jurors.

*Held*: that the procedure was not illegal: *A. I. R.* 1927 *Cal.* 242, *Diss. from*; 8 *Cal.* 739, *Dist.*; *A. I. R.* 1925 *Cal.* 798, *Foll.* [P 596, C 2]

(b) *Criminal P. C., Ss. 326 and 276—Provisions are imperative.*

The provisions of Ss. 326 and 276, Criminal P. C., are imperative and their violation will render the constitution of the Court illegal. It is not a question of jurisdiction, but more a question relating to the constitution or even the very existence of a valid forum; much less is it an irregularity curable by S. 537, Criminal P.C., or with the consent of parties. [P 595, C 1]

(c) *Criminal P. C., S. 276—Choosing is to be done when more than necessary number are present.*

The provision of choosing jurors by lot is applicable only when the persons summoned to act as jurors are present in such number as to make it possible to choose them by lot and when such number is not present the Judge is to take the help of persons present in Court to form the jury. [P 596, C 1]

(d) *Criminal P. C., S. 276 — "Deficiency" means "deficiency in the number required."*

The word "deficiency" and "number of jurors required" in the second proviso to

S. 276 mean deficiency in the number of jurors required to make up the jury and not to make up a sufficient number for the purpose of selection by lot. [P 596, C 2]

*Jahnnabi Charan Das Gupta*—for Appellants.

*Heramba Ch. Guha*—for the Crown.

**Suhrawardy, J.**—This is an appeal by seven persons all of whom have been convicted under S. 147, Indian Penal Code, and sentenced to two years' and one year's rigorous imprisonment and four of them (Appellants Nos. 1 to 4) have also been convicted under S. 325, Indian Penal Code and sentenced to four and five years' rigorous imprisonment and a fine of Rs. 200 each, in default one and a half years' rigorous imprisonment the sentences of imprisonment to run concurrently. They were unanimously found guilty by a jury of five and convicted as above. The real ground upon which this appeal is based is with regard to the irregularity complained of by the accused as to the empanelling of the jury. It appears from a reference to the order-sheet of the Assistant Sessions Judge that of the jurors that were summoned to act only five were present on the day on which the case against the accused was taken up. The learned Judge thereupon passed the following order :

Among the jurors summoned five jurors are only present and they are chosen jurors neither party having got any objection.

It has been represented by the Crown that the five jurors who acted in the present case were selected to act with the consent of both parties. It seems so, but it does not materially affect the question that has been raised which is one of illegality in the trial. The ground stressed is that jurors were not selected according to the procedure laid down in the Criminal P. C., and therefore the Court was not rightly constituted and hence the trial must be held to be no trial under the law. It is argued that under S. 276, Criminal P. C., the jurors must be chosen by lot and the Judge had no authority to ask the five persons present to act as jurors without choosing them by lot; and in support of this contention reference has been made to the recently decided case of *Bholanath Hazra* v. *Emperor* (1) of which the facts are similar. In that case what happened was that 12 jurors were summoned to attend but only five appeared and those were empanelled as jurors. The learned Judges (Chotzner and Duval, JJ.) who decided that case held that the procedure followed was in contravention of S. 276 and therefore the trial was illegal. I regret very much to say that I cannot bring myself to accept the decision as correct on the materials on which it is based. I respectfully submit that the learned Judges who decided that case did not give a correct interpretation to the previous decisions of this Court which lay down a contrary rule.

In *Empress* v. *Jhubboo* (2), the Sessions Judge himself selected the jurors instead of choosing them by lot; but as no objection was taken by the appellant in that case at the trial Field, J., thought that the objection was not one which ought to be entertained for the purpose of interfering with the verdict in view of the provisions of S. 283 of the Code of Criminal Procedure (Act 10 of 1872) corresponding to S. 537 of the present Code. This case was considered in *Brojendra Lal Sirkar* v. *King-Emperor* (3). There what happened was that for some reason or other on the date fixed for the trial of the case only three jurors were in attendance. Thereupon nine other persons were summoned from among the residents of the town and eight of them appeared. Two of them were found to have no relationship with the accused persons and were asked by the Judge to act as jurors. On these facts Stevens, J., was of opinion that the trial was contrary to law and so invalid.

In the first place, according to the learned Judge, the procedure laid down by S. 326, Criminal P. C., was not followed in not subsequently summoning the jurors out of the jury list but from the residents of the town, on the day fixed for the trial. It appears that the persons summoned were specially selected and were not summoned after being chosen as the law requires by lot from the list of persons liable to serve on the jury. The next irregularity which appeared to the learned Judge on the face of the proceedings was that instead of proceeding to choose by lot from among the jurors who were present including the jurors formerly summoned, the Sessions Judge seemed to have at once

(1) A. I. R. 1927 Cal. 242.

(2) [1882] 8 Cal. 739=12 W. R. 233.

(3) [1902] 7 C. W. N. 188.

exempted most of those persons merely on their own representation and chosen only two but not by lot. The learned Judge rightly observed that the procedure laid down by the legislature for summoning the jurors by lot and again when they appeared before the Court for selecting them by lot was to secure impartiality in the trial by avoiding a packed jury; and there can be no question that when it is possible to follow this procedure it must be followed and a violation of the rule will render the constitution of the Court illegal. With reference to the decision of Mr. Justice Field in the case of *The Empress* v. *Jhubboo Maton* (2), Stevens, J., said that it was unnecessary to say more with reference to that case than that it could apparently be distinguished from the case then before him, as it did not appear from the report of that case that objections were taken at the time to the selection of the jurors as was done in the case before him. I am prepared to go further and hold that the provisions of Ss. 326 and 276, Criminal P. C., are imperative and their violation will render the constitution of the Court illegal. It is not a question of jurisdiction but more a question relating to the constitution or even the very existence of a valid forum; much less is it an irregularity curable by S. 537, Criminal P. C., or with the consent of parties.

The above case upon which the learned Judges who decided the case of *Bholanath Hazra* v. *Emperor* (1) have relied, has neither on its facts nor on the law laid down there, any bearing on the question before them. The view taken in that case seems to be that when three of the jurors out of the number summoned were present the Sessions Judge should have acted under the provisions of S. 276, Cl. (2), Criminal P. C., or postponed the trial and summoned more jurors out of the persons entitled to serve on the jury, and further he was wrong, when he had 11 persons before him, not to choose jurors by lot but to ask two of the persons recently summoned by him to act as jurors. We cannot say what the learned Judges in that case would have said if the Sessions Judge had asked two persons present in the precincts of the Court to complete the number of jurors required. I am not called upon to defend the irregularity pointed out in that case but I am decidedly of opinion that the ratio of that case has no application to the facts of the present case or the case of *Bholanath Hazra* v. *Emperor* (1). The learned Judges also relied upon the decision in the case of *Emperor* v. *Bradshaw* (4). There the accused being a European ten jurors were summoned to attend on the date of trial but only three of them appeared and those three were empanelled without being selected by lot. There were therefore only three jurors with whose help the case was heard by the Sessions Judge. According to the rules, referred to in the judgment of the High Court, the number of jurors should have been five and the learned Judge, in deciding that case further held that the jury should have been selected by lot. The facts of that case too do not help us in coming to a right decision on the question raised in the present case excepting the observation made therein that the jury should be selected by lot according to the provisions of the Criminal P C.

The case of *The Government of Bengal* v. *Muchu Khan* (5) was dismissed by the learned Judges who decided the case of *Bholanath Hazra* v. *Emperor* (1), with the remark that that case did not lay down any different proposition of law. With all respect I think that the ratio decidendi of that case was not correctly appreciated and the view taken in the case of *Bholanath Hazra* v. *Emperor* (1) is in direct conflict with the view of law taken in *Muchu Khan's* case (5). In the latter case the facts were that on the date fixed for the trial out of 14 special jurors summoned 3 only appeared. The Sessions Judge thereupon called four gentlemen who happened to be in the precincts of the Court to serve as jurors and make up the required number of seven. They were not chosen by lot and were not all on the jury list. The learned Judges (Newbould and Mukerji, JJ.) held that the procedure adopted was not illegal in view of the provisions of Cl. (2) of S. 276, Criminal P. C. I agree with the interpretation put by the learned Judges upon S. 276 with all its provisos read together. S. 276 requires that the jurors shall be chosen by lot from the persons sum

(4) [1911] 33 All. 385=9 I. C. 278=8 A. L. J 182.
(5) A. I. R. 1925 Cal. 798.

moned to act as such. The second proviso to that section clearly indicates that in case of a deficiency of persons summoned the procedure laid down in the first part of the clause need not be followed and the number of jurors required may be chosen from such persons as may be present. In other words, the provision of choosing jurors by lot is applicable only when the persons summoned to act as jurors are present in such number as to make it possible to choose them by lot, and when such number is not present the Judge is to take the help of persons present in Court to form the jury.

The learned Judges who decided the case of *Bholanath Hazra* v. *Emperor* (1) were of opinion that if enough jurors were not present to permit their being chosen by lot, the proper course for the Sessions Judge to follow was to make good the deficiency by calliug some persons who were present (presumably according to second proviso to S. 276), then adding them to the five summoned jurors to choose from the whole body the necessary five by lot to act as the jury in the case. This of course presupposes that the number to be requisitioned out of the persons present in Court must be more than the number required to form the jury and enough to make up the deficiency in the number required for the purpose of drawing lot. If this procedure were followed I venture to think that it would have been as much against the provisions of S. 276 Criminal P. C., as the procedure adopted by the Sessions Judge in that case and condemned by Chotzner, J. That section provides that jurors shall be chosen by lot only from the persons summoned to act as jurors and not out of a body consisting of some persons summoned and some called by the Judge under the second proviso to that section. There is also no provision in law that the Sessions Judge may choose more persons present than the number required to complete the jury.

Then again a reference to S. 279, Criminal P.C. upon which the learned Judge in *Muchu Khan's* case (5) relied, ought, in my opinion, to set the matter at rest. That section says that when objection is taken to a juror by a party the place of such juror shall be supplied by any other juror attending in obedience to a summons, or if there is no such other juror present, then by any other person present in Court whose name is on the list of jurors or whom the Court considers to be a proper person to serve on the jury. It is idle to say that in the circumstances mentioned in that section, any claim to choose the juror by lot can be made.

Suppose instead of five there were four jurors present on the date of the trial. The Judge undoubtedly had the power under the second proviso to S. 276 to choose only one person who may be present to complete the required number. In that case according to the interpretation I have ventured to put upon S. 276 there will be no choosing of jurors by lot; for it is not specifically provided that in such a case the number to be chosen by the Judge must be more than the number required and the jurors chosen by lot out of the total number. There is no reason why the drawing of lots should be insisted upon when the required number is present.

The question therefore that falls for consideration is as to the meaning to be attached to the words "deficiency" and "number of jurors required" in the second proviso to S. 276. I take them to mean deficiency in the number of jurors required to make up the jury and not to make up a sufficient number for the purpose of selection by lot.

The result of all these considerations is that in my opinion the procedure that has been followed by the Sessions Judge in this case is not illegal or contrary to law and therefore the trial was not vitiated. I am further of opinion that, the case of *Bholanath Hazra* v. *Emperor* (1) has not been correctly decided. It would have been my duty to refer this matter to a Full Bench, but in the special circumstances of this case I do not think I am called upon to do so. The learned Judges in *Bholanath Hazra's* case (1) have, according to my opinion, not given full effect to the decision in the case of *Government of Bengal* v. *Muchu Khan* (5). If they had done so and appreciated the reasonings there it would have been proper for them, differing from the view taken in that case, to have referred the point of law to a Full Bench. Of the two conflicting decisions, therefore, namely, in *Bholanath Hazra's* case (1) and *Muchu Khan's* case (5), I choose to follow the latter. In this view I hold that the trial was not vitiated.

The learned vakil who has appeared for the appellants has not argued any other ground which would require any serious consideration. He has urged that the conviction under S. 147, Indian Penal Code, in the circumstances of the case is bad. The accused were charged under Ss. 147, 325/149 and 366/149 and some of them were charged with the substantive offences under Ss. 366 and 325, Indian Penal Code. They have been acquitted by the jury of the charge under Ss. 325/149 and 366/149. They have also been acquitted of the charges under S. 366. On these findings the learned vakil argues that the conviction under S. 147 ought not to stand. We do not think that there is any substance in the contention. The common object mentioned in the charge under S. 147 is to abduct the woman Omejan. That common object has been found by the jury to be the common object of the unlawful assembly. They have further found that some of the accused individually caused grievous hurt to several persons. On that finding they have convicted some of the accused under S. 325, Indian Penal Code and acquitted all under Ss. 325/149. As I read the verdict of the jury I do not find any illegality in it. This argument is applicable to the cases of three of the appellants. As regards the other four it is a matter of no importance because the sentence under S. 147 is to run concurrently with the sentence under S. 325. The appeal is accordingly dismissed. As regards the sentence we do not think it is severe.

**Cammiade, J.**—I agree with what my learned brother has said with regard to the interpretation of the provisions of S. 276, Criminal P. C. It is true that according to the terms of that section the jurors have to be chosen by lot from amongst the persons summoned to act as such. It is, however, in my opinion, with all respect to the learned Judges who decided the case of *Bholanath Hazra* v. *Emperor* (1), only in cases where the number of jurors summoned exceeds the number required to sit, that selection by lot becomes necessary. The object of the provisions of that section is to prevent the packing of jurors, and that object is safeguarded by the summoning of jurors whose names have been drawn by lot in the first instance. Even after the attendance of the jurors and even after their being chosen to sit, it is open to the accused or to the prosecution to object to their sitting, so that when no objection is made to the sitting of any particular juror, it must be taken that the object of S. 276 is fully carried out.

The difficulty which arises in the case, as my learned brother has pointed out, is in connexion with the meaning of the words "deficiency" and "the number of jurors required"—words which appear in the second proviso to S. 276, Criminal P. C. In my opinion, there can be no difficulty as to the interpretation to be put on those terms. The second proviso reads as follows :

> In case of a deficiency of persons summoned, the number of jurors required may, with the leave of the Court, be chosen from such persons as may be present.

The word "chosen" does not mean chosen for the purpose of a lottery. The word "chosen" will be found in the section itself and it then has the meaning of chosen to sit : so if the word "chosen" occurs in this proviso, it can only denote that if there is deficiency in the number of persons required to sit, one or more persons required to fill the deficiency may be selected. That this interpretation was put upon the second proviso seems to appear from the decision in the case of *The Government of Bengal* v. *Muchu Khan* (5). It does not clearly appear from the report that the two vacant seats in the jury were filled from among the four persons who were subsequently called by the Court. But the acceptance of that meaning seems to be implied, because the words we find used in the judgment are as follows :

> Section 276, Criminal P. C. provides that in case of a deficiency of persons summoned the number of jurors required may, with the leave of the Court, be chosen from such other persons as may be present.

So that the section, as I understand it, means that if the number of the persons who had been summoned and who were in attendance fell short of the required number, the vacant places may be filled from among the persons who may be present in Court or subsequently called by the Court. In these circumstances I entirely agree with my learned brother that the appeal should be dismissed.

D.D. *Appeal dismissed.*

## A. I. R. 1927 Calcutta 598

RANKIN, C. J., AND MAJUMDAR, J.

*Mawazzam Ali Khan* and *others*—Appellants.

v.

*Shebash Chandra Pakrashi* and *another*—Respondents.

Civil Appeal No. 23 of 1926, Decided on 12th April 1927, against the Original Order of the Dist. J., Pabna and Bogra, D/- 22nd December 1925.

(a) *Bengal, North-Western Provinces and Assam Civil Courts Act, S.* 10—*District Judge absent from place of his office—He has no jurisdiction to hear appeals—Another Judge acting for him should hear them.*

Where the District Judge leaves the place where his Court is held, the only person who has any right to deal with an appeal lying to the District Judge would be the Subordinate Judge who is then discharging the office of the District Judge. Assumption of jurisdiction by the District Judge in respect of such an appeal would be wholly irregular. There is no intention on the part of the legislature to have a duplication of characters or to give people a choice to go before one officer or another. [P 599 C 2, P 600 C 1]

(b) *Civil P. C., O.* 3?, *R.* 2 (3)—*Abettors of contempt of Court cannot be punished.*

Clause (3), R. (2) is not intended to give the Court power to visit for contempt of Court people against whom no order is made or terms imposed and therefore abettors of contempt of Court cannot be punished. [P 600 C 2]

(c) *Civil P. C., O.* 39, *R.* 2 (3)—*Attachment.*

Attachment of property is not a suitable form of remedy except where a person is ordered to do something and he does not do it. [P 600 C 2]

*Pugh* and *Nazim Ali*—for Appellants.

*Girija P. Sanyal* and *Bansori Lal Sirkar* and *Jitendra Mohan Banerji*—for Respondents.

**Rankin, C. J.**—This is a somewhat unusual case and in certain aspects it is regrettable.

It appears that there was an election, the date of which is not given in the paper-book, for the Serajgunj Local Board. One of the thanas that sent representatives to that Local Board is called the Chauhali Thana, and it appears that a certain Babu Shebash Chandra Pakrashi was declared elected to the Local Board for that thana. There was then a suit for setting aside that election and on the 9th May 1925, by the judgment of the Munsif that election was declared invalid and Shebash Chandra Pakrashi was restrained from acting as a member. There was a meeting of the Local Board on the 3rd July 1925, apparently for the purpose of electing a Chairman and Vice-Chairman, and for electing nine persons to represent the Local Board on the District Board.

It was at one time alleged that, apart from the circumstance that there was no representative from the Chauhali Thana, other illegalities affected what was done in that meeting. The meeting having been held on the 3rd July 1925, we find that on the 13th November 1925 Shebash Chandra Pakrashi and another gentleman who had been elected to the Local Board of Serajgunj instituted a suit and presented a petition asking that a temporary injunction should be granted against the defendants being the persons elected to represent the Local Board on the District Board, restraining them from attending at a meeting of the District Board which had been announced for the 26th November, that is to say, 13 days after the suit and four months after the illegalities complained of. When this meeting had been first announced I do not know. The Munsif dealt with the application for injunction and we are informed that he dealt with it not as an ex-parte application, but in the presence of both parties and he refused the application. This had happened on the 16th November 1925. Thereupon on the 24th November proceedings took place which to my mind are astonishing in more ways than one.

It appears that the District Judge was at the time sitting at Bogra—a place where he has to take sessions and not a place at which civil business is done by the District Judge at all. An application was made to him on the 24th November being the presentation of an appeal against the order of the Munsif and being a petition asking for a temporary injunction to restrain the persons whom I have mentioned from attending this meeting on the 26th November, that is, in two days' time. The learned District Judge who in the ordinary way would have had nothing to do with such an application—it being part of the legitimate business of the senior Subordinate Judge in charge of the office of the District Judge at Pabna—made an order to issue notices upon the respondents to show cause on the 30th November. "In the meantime, the respondents are directed not to join in the said

meeting"—in other words (as the only question before the Munsif was whether those persons should be restrained from taking part in the meeting of the 26th November) the District Judge reversed the decision of the Munsif for all purposes and granted the very relief which the Munsif had refused—and all this in the absence of the respondents.

The paper-book in this appeal does not contain the petition on which this District Judge acted in this manner, but the document is on the record. It is a somewhat lengthy Bengali document and we have done our best to discover what representation was therein made as to the irreparable injury that would be sustained by the appellants if those nine persons were permitted to attend this meeting. It appears that this document contains all sorts of grievances but it is entirely lacking in any statement which purports in any sensible way to show that there would be any real injury at all. It is stated that if the meeting of the Local Board held on the 3rd of July 1925 had been properly conducted, one of the plaintiffs would have been elected to the District Board and that the Chauhali Thana was not represented at the meeting of the 3rd July of the Local Board. One would have thought that no Judge would think of interfering with the proceedings of a local authority on such materials. The petition is demurrable and discloses no reason for a summary interference with the proceedings of the local authority.

Now, there are two separate questions. The first question is whether the learned District Judge had any jurisdiction to entertain this matter at all. The second question is whether the learned District Judge was acting oppressively and wrongly in making the order with which we are now concerned. There is a great difference between these two questions for the present purpose. Whether an order is right or wrong, if it is made with jurisdiction it is the duty of the parties to obey the order and the obedience that has to be given to orders of the Court cannot be dependent on people's opinion as to their propriety. I proceed therefore to deal with the first question of jurisdiction.

In the Bengal, North-Western Provinces and Assam Civil Courts Act (Act 12 of 1887), S. 14 provides that it is for the Local Government, by notification in the official gazette, to fix and alter the place or places at which any Civil Court under this Act is to be held. In this case the fixed place was Pabna. By S. 10 it is provided that

> in the event of the death, resignation or removal of the District Judge, or of his being incapacitated by illness or otherwise for the performance of his duties, or of his absence from the place at which his Court is held, the Additional Judge, or if an Additional Judge is not present at that place, the senior Subordinate Judge present thereat shall, without relinquishing his ordinary duties, assume charge of the office of the District Judge and shall continue in charge thereof until the office is resumed by the District Judge or assumed by an officer appointed thereto.

Now, under that section absence from the place at which the Court is held is dealt with in the same way as resignation or removal or incapacity by illness and the duty of doing the work is cast imperatively upon the Subordinate Judge. We also know that the office is to be resumed by the District Judge according to the plain terms of the section. It was not disputed that in this case the assumption of jurisdiction by the District Judge was irregular—certainly it was highly irregular and particularly unwise.

But it is contended that he was not without jurisdiction, because, the District Judge, although he was not at the place where his Court is held, must be taken to be still the District Judge and so the procedure adopted by him cannot be said to be more than an irregularity on his part. It is also argued that there may be at the same time two officers each of whom is discharging the office of the District Judge. In my opinion, however, the statute cannot be so construed. There is no intention on the part of the legislature to have a duplication of characters or to give people a choice to go before one officer or another. If, for example, one puts to oneself the question whether this District Judge at Bogra could have summoned parties in a contested case before him at Bogra and proceeded to exercise civil jurisdiction over them, then the answer must be that such proceedings would be wholly without jurisdiction. The parties would have been under no duty or obligation whatever to attend the Court. In my judgment the learned District Judge having left Pabna and being absent from the place where his Court was held, the only

person who had any right to deal with the appeal was the Subordinate Judge who was then discharging the office of the District Judge. In my opinion therefore this order of the District Judge is without jurisdiction. I have already pointed out that it was, in any possible view, irregular. Nobody supposes that it was in any way usual that civil business of Pabna should be done at Bogra. The order made was also wrong on the merits.

There is another point, however, which requires to be animadverted upon. It appears that there was a certain pleader who was a candidate for the Chairmanship of the District Board, and, the defendants in this case were apparently—most of them—his supporters. On evidence which does not appear to me to be very definite or very strong—the District Judge found that these people had been heard discussing the matter and that this pleader had been heard saying that the order was made without jurisdiction and that it would be no offence if it was disobeyed. In that view the learned District Judge has not only punished for contempt of Court the persons who were guilty of a breach of his order of the 24th November 1925, but he has directed the properties of this pleader to be attached as a person who was abetting the other people in committing the contempt of Court.

There can be no doubt that according to the English cases there does exist in the High Court in England a power to commit for contempt persons who abet disobedience of an injunction. But for the purposes of the mofussil Courts this jurisdiction has to be taken as it appears in O. 39 of the Code of Civil Procedure, In my judgment there is no reason to suppose that any such power was intended to be conferred by the terms of R. 2 of that order. It is quite true that the phrase used is "the person guilty of such disobedience or breach." It is used with reference to Cl. (1) and Cl. (2). Cl. 2 gives the Court the power of granting an injunction

> on such terms as to the duration of the injunction, keeping an account, giving security or otherwise as the Court thinks fit.

"The person guilty of such disobedience or breach" includes a person guilty of a breach of any such terms. It seems to me wrong to argue that Cl. (3) is intended to give the Court power to visit for contempt of Court people against whom no order is made or terms imposed. I have the greatest difficulty in seeing that anybody can be guilty of disobedience of an order except the person to whom the order is directed.

There is a still further point about the order under appeal. That order directs the attachment of the properties of all the parties, and, as regards Respondents Nos. 1 and 3 to 9 it directs that they be detained in civil prison for a fortnight as well. It is quite true that the terms in which R. 2 of O. 39 is expressed are misleading and ill-advised in that they read as if the Court were obliged to order an attachment of property and unless this is done, cannot order imprisonment. That may be the reason why the learned District Judge has made the orders in the way he has done.

Attachment is a singularly unsuitable form of punishment in such a case as the case of the Khan Bahadur. If a person is ordered to do something and he does not do it, attachment of his property may be a very useful form of pressure to compel him to do his duty. But it seems to me that to order attachment of the properties of the Khan Bahadur was a somewhat ill-advised order in this case. This case presents several regrettable incidents.

I hold that the learned District Judge on the 22nd December 1925 had no jurisdiction to make the order which was made and that the parties therefore cannot be visited with punishment for disobedience to it.

In my judgment the order of the District Judge should be set aside and this appeal must be allowed with costs. The hearing-fee is assessed at ten gold mohurs.

**Majumdar, J.**—I agree.

G.B. *Appeal allowed.*

## A. I. R. 1927 Calcutta 601

RANKIN, C. J., AND C. C. GHOSE, J.

*Surajmull Askaran*—Appellant.

v.

*Chandmull Moolchand* and *others*—Respondents.

Appeal No. 5 of 1926, Decided on 2nd February 1927, from the Original Judgment of Page, J., D/- 29th July 1925.

*Arbitration—Award appealed to Committee of Calcutta Baled Jute Association—Parties not satisfied on question of fact—Committee not precluded by rules to take fresh evidence—Failure to take fresh evidence amounts to misconduct—Instead of referring back the matter to same Committee Court can set aside award and deal with the matter itself.*

A dispute between the buyer and the seller of jute was referred to arbitration of two arbitrators relating to its quality or condition. The arbitrators disagreed and the matter was dealt with by an umpire. The umpire made his award and the aggrieved party appealed against his award to the appeal Committee of the Calcutta Baled Jute Association. Before the Committee both parties contended that the issue of fact upon which the award was based, was not correctly decided, but the umpire refused to go into fresh evidence. Under the practice of the Commiteee its position was not like that of a Court of Appeal, i, e., they did not bind themselves by the materials before the umpire was examined on question of fact,

*Held* : that Committee's refusal to take new evidence and afford the parties an opportunity to be present at the hearing and adduce rebutting evidence constituted clear misconduct on their part and their award must be set aside. [P 602 C 2]

*Held further*: that the contractual forum which the parties intended to erect for the purpose of settling their disputes having failed to operate, the Court of law was entitled to deal with the matter on the award being set aside, as sending back the matter to the same Committee would be unfair to the parties. [P 603 C 1]

*N. N. Sircar* and *B. C. Ghosh*—for Appellant.

*B. C. Mitter* and *A. K. Ray*—for Respondents.

**Rankin, C. J.**—This is an appeal from a judgment of my learned brother Mr. Justice Page who has set aside an award made by the Committee of the Baled Jute Association upon an appeal, as the proceeding is called, under the rules of that body. Putting the matter quite shortly, it was a dispute between the buyers and sellers of jute. The buyers said that although the original time ended at the end of September and an extension had been granted till the 15th of October 1920 there was a further extension till the 30th of October. The sellers denied that the extension had been given and accordingly they refused the claim of the buyers that they were in default for not delivering at the end of October.

What happened was in effect this: There was first of all an abortive arbitration before a Mr. Holzman and that was followed by proceedings which set it aside and there was another arbitration before two arbitrators, a Mr. Holzman and a Mr. Singleton. These arbitrators disagreed and the matter was dealt with by Mr. Connew as umpire. Mr. Connew, on the 20th of May 1921, awarded damages to the buyers, the firm of Chandmull Moolchand, against the sellers, the firm of Surajmull Askaran. He ordered Messrs. Surajmull Askaran to pay Rupees 6,000 by way of damages for their failure to deliver at the end of October. There can be no doubt that that was the view taken by him because, as a matter of fact, he stated in his award that the damages were the difference between the contract-rate and the market-rate on the 30th of October 1920. Thereupon the sellers Messrs. Surajmull Askaran, who are now the appellants before us, appealed to the Committee of the Baled Jute Association and both sides took the view that the question to be decided was whether or not there had been an extension from the 15th of October to the 30th and what was the market-rate at the end of October.

The appellants before the Committee, if one may so call them, were Messrs. Surajmull Askaran. In their grounds of appeal they alleged that " the letter of Messrs. Massey & Co. was written on the information of some Babu " who, as a matter of fact, did not put through the alleged extension. They went on to say :

> Under the circumstances the arbitrators cannot possibly decide the case without taking oral evidence of the 'Babu' and of our representative Ful Chand Serowgee who is supposed to have consented to an extension and which he emphatically denies that he consented to the alleged extension.
>
> We pray that the arbitrators should fix a time to enable us to give evidence on our behalf and no justice can be done to the merits of the case without allowing us to submit our evidence. Apart from the question of extension we have a very strong case on the question of the rate of the alleged damages as the figure claimed is absolutely fictitious and wholly 'exaggerated, We beg to reserve our submissions on this point viz., as to the amount of the grossly exaggerated claim which has no relation to prevailing market-rate.

We shall submit our evidence on being asked by the learned arbitrators to do so.

That was the view of the sellers before the Committee.

The view of the buyers who had succeeded before Mr. Connew was this. They said:

With reference to the alleged grounds of appeal submitted by Messrs. Surajmull Askaran we respectfully submit to call for the umpire's fair doings of the matters referred to as he took evidence of Babu Ful Chand and others concerned of the market-rate.

It will not be out of place to mention here that Babu Ful Chand of Messrs. Surajmull Askaran admitted the extension before Mr. Connew, the umpire, and he further admitted that the arrangement of the extension was previous to the unpleasantness between Babu Ful Chand and the Moolchand. Babu Moolchand and Messrs. Massey & Co. must be called on the question of the arrangement.

That was the case of the two parties.

The rules which this Association has made to control appeals to the Committee do not anywhere state that the committee shall be entitled to restrict themselves to the materials which were before the umpire or the arbitrators. They nowhere make a provision restricting the right of a party to insist that his evidence upon a question of fact relevant to the case shall be taken. It is not clear what the Committee's duties are from the rules themselves, but in cases where the quality or the condition of the jute is the subject-matter in dispute, it appears that the Chairman can appoint at his discretion an expert to examine the jute and report to the Committee, so that in those cases, at all events, the Committee does not appear to act like a Court of Appeal or to bind itself prima facie to the materials to be taken before the tribunal whose order is under question.

There is another piece of evidence which seems to show the same thing and I will refer to the letter, dated the 13th of June 1921, which the Secretary wrote to Mr. Connew. At the same time he was writing to the parties fixing the date of the hearing of this appeal. The Secretary wrote to Mr. Connew:

The Committee will hear the appeal to-morrow . . . They will be glad if you will kindly attend to give evidence.

It appears, therefore, that this Committee, in hearing appeals, takes evidence, but it is not at all clear because there was no proper record of the proceedings, so far as this Court knows, either before Mr. Connew or before the Committee. It looks as if there was some oral evidence taken before Mr. Connew, although it does not appear to have been reduced to writing, and it looks as if the Committee, too, might have taken evidence from Mr. Connew himself. It has to be remembered that, according to the case of the plaintiffs, Mr. Connew was a person who could give evidence of an actual admission made on the part of the present appellants that they had consented to an extension. I am not, therefore, prepared to dispose of this case on the basis that this Committee treated themselves as a Court of Appeal in the ordinary sense. I am not prepared to hold that the Committee's functions were such as to entitle them to restrict themselves to the materials recorded before the umpire. I think they purported to deal with the case de novo and they were entirely unable to deal with the case de novo without taking evidence. Further, if they took evidence from Mr. Connew as to whether an admission was made in his hearing or not and did not afford an opportunity to the parties to be present at the hearing or to give rebutting evidence if they desired, they were guilty of very clear misconduct. It seems to me, therefore, that on the question whether the Committee's award reversing the decision of the umpire can stand, the learned Judge is right.

It does not seem to me to be reasonable to say that the aggrieved person who has, without his evidence being taken, had an award in his favour reversed, is bound to go on and show the exact reasons which motived the tribunal to reverse the previous award. If the proceedings taken by the Committee are not such as they should have taken, then the duty of finding out exactly where the ultimate harm has been produced is not upon the plaintiffs at all. We are not to support an award of that character by guessing as to whether or not the misconduct may have been in the end entirely innocuous. I have, therefore, no hesitation in refusing to accede to the argument that it is conceivable that this Committee may have held that there were no damages although there was an extension in point of fact. Indeed, on the facts of this case, as far as one can tell them, and in view of the agreement as to the amount of damages made bet-

ween the parties in the end, there seems to be no reason at all for such an extravagant supposition as that no award was made because there was no damage. I think, therefore, that the learned Judge's judgment should be supported.

One more point was pressed upon us by Mr. Sircar and that was this. He said: Assuming that the award of the Committee is bad, why should the effect of that be to leave the matter to be decided in a Court of law? Is not the result really this: that Mr. Connew's award is left standing subject to any right that Messrs. Surajmull Askran may have to appeal to the Committee and get it set aside? With regard to that matter it has to be observed that any such appeal has to go back to the same Committee. There is only one Committee here that discharges the duty of dealing with such appeals. The learned Judge has held quite properly that he does not want this matter sent back to that Committee because he does not think it would be fair to the parties. That being so, it is quite clear that the contractual forum which the parties intended to erect for the purpose of settling their disputes has failed to operate and it would be entirely unreasonable to hold either party bound by the award of Mr. Connew, which was never intended to be absolutely final, because of the circumstance that the further right of appeal has failed owing to the conduct of the Committee. I think the position is that the matter is at large and this Court of law is entitled to deal with it on the award being set aside. In my judgment, therefore, the question resolves itself into the question of how much damages the plaintiff shall have if he proved the extension to the satisfaction of the Court. The learned Judge's judgment has not been challenged before us as regards that part of the case, nor has Mr. Sircar for the appellants taken any point as to the case being incompetently brought by way of suit rather than by way of petition under the Indian Arbitration Act.

In these circumstances, I think the appeal fails and must be dismissed with costs.

**C. C. Ghose, J.**—I agree.

G.B. *Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 603

DUVAL AND MITTER, JJ.

*Kshetra Lal Singha Roy*—Plaintiff—Appellant.

v.

*Prohlad Chandra Majumdar* and *another*—Defendants—Respondents.

Appeals Nos. 1871 and 1872 of 1924, Decided on 9th December 1926, from the appellate decrees of the Sub-J., Burdwan, D/- 17th April 1924.

*Bengal Tenancy Act, S. 105—Proceedings based on assumption that lands are rent paying—Question of liability to pay rent not decided—Question is not barred.*

Where proceedings under S. 105 are based on the assumption that the land concerned is rent paying and owing to there being no appearance on behalf of the tenants the question whether the land is rent paying or lakheraj land could not be agitated, the plea that lands are not rent paying lands is not barred by the provisions of S. 105. [P 604, C 2]

*Sitaram Banerjee* and *Bejoy Prosad Singha*—for Appellant.

*Hiralal Chakravarti* and *Shamdas Bhattacharjee*—for Respondents.

**Mitter, J.**—These two appeals have been preferred by the plaintiff and arise out of two suits which were tried together by consent of parties. The plaintiff, the landlord, brought a rent suit against the Mazumdars. The landlord sued for rent at the rate of Rs. 55-14-0 with cess and damages for the years 1325 to 1328. He based his claim on a decree under S. 105 passed by the Assistant Settlement Officer under Chap. X of the Bengal Tenancy Act. The other suit was filed by the tenant Mazumdars against the landlord alleging that the disputed property in respect of which the rent suit was brought was lakheraj tank and that no rent was ever paid in respect of it to the landlord. It was further alleged in the plaint in that suit that the Assistant Settlement Officer had no jurisdiction to assess rent of tanks as they were not agricultural holdings and that consequently the decree under S. 105 is not binding on them. The Court of first instance decreed the title suit of the tenants and dismissed the rent suit of the landlord holding that it was established by evidence that the Muzumdars had been possessing these lands for a long time without payment of rent and from other evidence it came to the conclusion that it was lakheraj and that no rent was assessable on it.

An appeal was carried by the plaintiff to the Subordinate Judge who affirmed the decision of the first Court and dismissed both the appeals. The landlord has appealed in both the cases.

It has been contended before us by the learned vakil for the appellant that the title suit was not maintainable as the question which was raised in that suit formed the subject-matter of the proceeding under S. 105 of the Bengal Tenancy Act and reliance was placed on the decision of a Full Bench of this Court reported in *Becharam Choudhuri* v. *Puran Chandra Chatterji* (1). I may mention here that the lower appellate Court rested its decision on the ground that the period for limitation for a declaratory suit was six years and that the plaintiff was entitled to bring a suit within six years and three months under the provisions of Cl. (4) of S. 111-B of the Bengal Tenancy Act. That ground has also been attacked by the learned vakil for the appellant in this Court and it is contended that the suit is barred by six years' period of limitation as the plaintiff was not entitled to the deduction of three months within which it was necessary to bring a suit under S. 105.

With regard to the last of these contentions we think that the contention is wholly untenable having regard to the express provisions of S. 111-B, Cl. 4. The sub-clause of the section runs as follows :

> Where the making of an application or institution of a suit has been delayed owing to the operation of sub-S. (1) the period of three months therein mentioned shall be excluded in computing the period of limitation prescribed for such suit or application.

It was not open to the tenant to bring a suit within the three months. Consequently the period must be excluded in computing limitation. This ground of appeal, therefore, fails.

With regard to the other ground as to the bar raised by the proceedings under S. 105 it is found by the lower appellate Court that in the proceedings for settlement of fair and equitable rent in the disputed tank the plaintiff did not appear. The proceeding was an ex-parte one. No issue as to whether the land was or was not liable to pay rent was raised by the Revenue Officer. On this ground the lower appellate Court held that the proceedings under S. 105 did not operate as a bar to the maintainability of the tenants' suit. As we have already stated the first Court, in holding that proceedings under S. 105 did not operate as bar to the tenants' suit for declaration rested its decision on the ground that the Assistant Settlement Officer had no jurisdiction. It is not necessary to go into that question, for it seems to us that it cannot be said in this case that the question whether the land was mal or lakheraj was raised at any stage of the proceedings under S. 105. It is true that the landlord came to Court on the basis of the finally published Record of Rights. As there was no appearance on behalf of the tenants the question whether the land was rent-paying or lakheraj land could not be agitated and could not form the subject-matter of the proceedings under S. 105. The S. 105 proceedings were based on the assumption that the land was rent paying. This ground of appeal also fails.

The result is that both the appeals are dismissed with costs.

**Duval, J.**—I agree.

G.B. *Appeals dismissed.*

(1) A. I. R. 1925 Cal. 845=52 Cal. 894 (F. B.).

---

## * A. I. R. 1927 Calcutta 604

C. C. GHOSE AND GRAHAM, JJ.

*Surjya Kumar Singh*—Petitioner.

v.

*Secretary of State* and *another*—Opposite Party.

Civil Rule No. 791 of 1926, Decided on 22nd November 1926, from an order of the Small Cause Court J., Karimgung (Sylhet), D/- 11th March 1926, in Suit No. 1846 of 1925.

* *Right of suit—Witness refused travelling expenses—Suit to recover does not lie.*

A civil suit for recovery of the expenses alleged to have been incurred by plaintiff in obedience to a subpoena in a criminal case requiring him to give evidence, is not maintainable. His proper remedy is to move a superior Court.

[P 605, C 1]

*Birendra Kumar De*—for Petitioner.

*Surendra Nath Guha*—for Opposite Party.

**Judgment.**—In this case we are of opinion that on the pleadings the Small Cause Court Judge was entirely right in holding that a suit of this nature is not maintainable. If the plaintiff was ag-

grieved by any order of the Magistrate who tried the case in which the plaintiff gave evidence, his proper remedy was to move a superior Court. In no case was he, as the plaintiff, entitled to maintain a civil suit for recovery of the expenses alleged to have been incurred by him in obedience to a subpoena in a criminal case requiring him to give evidence.

The Rule is accordingly discharged with costs. We assess the hearing fee at three gold mohurs.

D.D. *Rule discharged.*

---

## * A. I. R. 1927 Calcutta 605

COSTELLO, J.

*Ladha Singh*—Plaintiff.

v.

*Munshiram Agarwalla*—Defendant.

Original Suit No. 100 of 1927, Decided on 5th May 1927.

* *Specific Relief Act, S.* 31—*Misstatement in pro-note as to rate of interest owing to mutual mistake can be rectified—Evidence Act, S.* 92, *proviso* 1.

The Court can correct the terms of a document if it is proved to the satisfaction of the Court that any of such terms are inaccurate owing to a mutual mistake. It can also correct a misstatement in a promissory note if in fact a term had been placed in the note without really representing the true bargain between the parties: *Druieff* v. *Lord Parker* (1868) 5 *Eq.* 131, *Foll.*; (1885) *A. W. N.* 42, *Ref.* [P 606 C 2]

*B. C. Sen* and *N. C. Chatterjee*—for Plaintiff.

**Costello, J.**—In this undefended action the plaintiff is suing the defendant firm for the recovery of the sum of Rs. 24,598, being the amount of principal and interest due on the promissory note, dated 1st April 1924, and it is stated in para. 1 of the plaint that this promissory note was executed on 1st April 1924 in favour of the plaintiff for the sum of Rs. 18,700 to be paid on demand with interest thereon at the rate of 1 per cent. per mensem, by inadvertence wrongly stated in the promissory note as "1 per cent. per annum." It appears that the promissory note was in fact to all intents and purposes given in renewal of a previous promissory note which was for the sum I think of something like Rs. 15,000 and the promissory note now sued on represents the amount of the plaintiff under the original promissory note together with the accrued interest thereon as provided in that note.

It is stated on the face of the document now sued on that the rate of interest payable on the sum of Rs. 18,700 is to be at the rate of Re. 1 per cent. per annum from the date of the note to the date of the demand in full. The question I have to determine is whether that in fact represented the real bargain between the parties and, if it did not, whether I ought in the circumstances of the case to make such a rectification of the document as will enable the plaintiff to recover the full amount which he is claiming in the suit. (The judgment here quoted Ss. 91 and 92 of the Evidence Act 1872, and proceeded.) The principle on which the Courts act in correcting instruments is that the parties are to be placed in the same position as that in which they would have stood if no error had been committed, and there is no doubt to my mind that the law on the point is quite well settled viz., that the Court can correct the terms of the document if it is proved to the satisfaction of the Court that any of such terms are inaccurate owing to a mutual mistake. The present case is in my opinion covered by the decision in *Druieff* v. *Lord Parker* (1) where it was held that it was competent for the Court to correct a misstatement even in a negotiable instrument such as a bill of exchange or a promissory note if in fact one of the terms had been placed in that document without really representing the true bargain between the parties. There is a similar decision in an old case decided in 1885: *Bisseser Singh* v. *Bhagaban Das* (2). I am not at all sure that in the circumstances of that particular case the decision was correct, but it is sufficient for my purpose to say that if it appears that there is a prima facie mistake in the document it is open to the Court to rectify it. The real question therefore which I have to decide is whether there was a mutual mistake or not. With regard to that there is the evidence of the plaintiff that what was really agreed between the parties was that the rate of interest should be the same as under the previous promissory note viz., at the rate of 12 per cent. per annum, and the plaintiff further says that he was unware when the defendant

(1) [1868] 5 Eq. 131=37 L. J. Ch. 241=16 W. R. 557=18 L. T. 46.
(2) [1885] A. W. N. 42.

wrote out the promissory note sued upon, that he had in fact inserted therein that the rate of interest would be only one per cent. per annum instead of one per cent. per mensem. I have some doubt as to whether this document was drawn up in the form in which it appears owing to any mistake at all on the part of the defendant. It seems to me having regard to the ordinary course of business amongst commercial people of the description of the plaintiff and the defendant it would be much more likely that inadvertently the defendant should have written "per mensem" rather than "per annum."

It therefore appears to me that the words in the promissory note must have been inserted of design rather than of accident. At the same time, however, the defendant has not chosen to defend this suit and to come before the Court and give an explanation from his side of the matter. Therefore having regard to the fact that this is an undefended suit, I think on the whole that I am justified in accepting the evidence of the plaintiff and coming to the conclusion that what is expressed on the face of this document does not represent the real bargain arrived at between the parties. I am not at all sure that the plaintiff ought not to have brought appropriate proceedings under S. 31 of the Specific Relief Act to have this document rectified: but looking at the matter broadly and having regard to the form in which the plaint is framed, as I have already said, equally having regard to the fact that there is no other explanation from the side of the defendant, I will act in the matter upon the basis that it was a mutual mistake and therefore it is open to the Court to ascertain what the real contract between the parties was.

In the circumstances therefore without attempting to give a definite judgment with regard to the principles of law applicable to cases of the kind because ordinarily it is not competent for a plaintiff to recover interest at a higher rate than what appears on the face of the instrument itself, I find that the plaintiff is entitled to recover the full amount asked in the prayer of the plaint. The plaintiff will also be entitled to interest on decree at 6 per cent. and costs on Scale No. 1.

D.D. *Suit decreed.*

## A. I. R. 1927 Calcutta 606

DUVAL AND MITTER, JJ.

*Behari Lall Sen* and *others*—Plaintiffs—Appellants.

v.

*Gour Chandra Biruni* and *others*—Defendants—Respondents.

Appeal No. 1863 of 1924, Decided on 6th December 1926, from the appellate decree of the Dist., J., Bankura, D/- 10th May 1924.

*Civil P. C., S.* 11—*Prior proceedings against shebait apparently in person—Idol effectively represented by shebait — Decision is against idol.*

Where in the previous commutation proceedings the plaintiff in the subsequent suit was not described as a shebait of the idol, but it was found that he appeared but did not set up any interest adverse to that of the idol but defended the commutation proceedings as a shebait

*Held*: that there was effective representation of the idol in the commutation proceedings although the suit was nominally brought against the present plaintiff, as such proceedings were really directed against the debutter estate: 6 *M. I. A.* 393, (*P. C.*), *Rel. on.* [P 607 ,C 1,2]

*Bankim Chandra Mukerji* and *Charu Chandra Ganguli*—for Appellants.

*Panchanan Ghose* and *Surendra Krishna Ghose*—for Respondents.

**Mitter, J.**—This is an appeal by the plaintiffs and arises out of a suit for a declaration that the defendants are only bhag tenants and that the decree in the Commutation Case No. 130 of 1921 is not binding against the idol, the plaintiff. It may be mentioned here that the present suit was instituted by one Behari Lal Sen puporting to act as a shebait of the idol Sri Sri Durga as also on behalf of the Plaintiffs Nos. 2 to 12 who allege that they had also the powers of supervision over this endowment. The suit was for recovery of paddy and bhag rent for the year 1328 which they assessed at Rs. 50. The defence was that on the question as to whether money rent or bhag rent was recoverable the decision of the Settlement Officer under S. 40 of the Bengal Tenancy Act is conclusive against the plaintiff. The defence also alleged that with regard to their status as to whether they were bhag tenants or occupancy raiyats there was a previous decision in Suit No. 392 of 1919 which was conclusive between the parties. The Munsif granted a decree

in part for the money rent with proportionate costs against Defendants Nos. 1, 2 and 4 and ex-parte against the others. He also held that Plaintiffs Nos. 2 to 12 got no locus standi in the suit, and that, therefore, they were not necessary parties. An appeal was carried to the Court of the District Judge of Bankura who upheld the decision of the First Court and dismissed the appeal.

In second appeal before us it has been contended that the decision in the commutation proceedings under S. 40 is not binding on the plaintiff landlords because the deity Sri Sri Durga was not a party to the previous commutation proceedings and that the shebait Behari was there in his personal capacity and not as a shebait. It has also been contended before us that the proceedings under S. 40 are without jurisdiction regard being had to the fact that the tenants were not occupancy raiyats within the meaning of S. 40 of the Bengal Tenancy Act.

With regard to the first point it is true that in the commutation proceedings Behari was not described as a shebait of the idol. But it appears that Behari appeared but did not set up any interest adverse to that of the idol but defended the commutation proceedings as a shebait for we find in the judgment in the commutation proceedings that one of the grounds taken was that it would be a hardship if the bhag rent were turned into a money-rent it being a debutter property. Both the Courts have found that the idol was effectively represented by Behari in those proceedings and this finding is supported by the remark which we have just quoted from the judgment in those proceedings.

The cases which have been cited before us to show that the decree against the shebait in his personal capacity is not binding on the debutter estate have no application to the facts of the present case. Here it has not been suggested that Behari had any interest adverse to that of the debutter estate. In this connexion we may state that the observation of the Judicial Committee in the case of *Hunoomanpersaud Panday* v. *Babooee Munraj Koonweree* (1) can properly be applied. In that case a mortgage-bond was executed by the guardian of an infant heir describing herself as the proprietress of the estate and a suit was instituted by the infant after attaining majority for the recovery of possession of the property from the mortgagee. To that suit the guardian (Ranee) was made a party defendant. Their Lordships at page 412 observed :

> They consider that the acts of the Ranee cannot be reasonably viewed otherwise than as acts done on behalf of another, whatever description she gave to herself, or others gave to her ; that she must be viewed as a manager inaccurately and erroneously described as proprietor or heir.

In this view we think that the lower Courts were right in coming to the conclusion that there was effective representation in the commutation proceedings although the suit was nominally brought against Behari as such proceedings were really directed against the debutter estate. This ground of appeal, therefore, fails.

With regard to the second ground, namely, that the Commutation Officer had no jurisdiction because the tenants were not occupancy tenants we think that the decision in Suit No. 790 of 1919 is conclusive and bars the re-agitation of the same questions in the present suit. From that decision it appears that the Court came to the finding that the defendants were occupancy raiyats. It has been contended before us that that was not a ground of the decision as the Court also came to the finding in the alternative case on the assumption that they were not occupancy tenants. But we think that the decision was based on both the grounds. Consequently, so far as the finding as to the question of occupancy right is concerned we think that the decision is right. This ground also fails.

The result is that the appeal is dismissed with costs.

**Duval, J.**—I agree.

D.D. *Appeal dismissed.*

(1) [1855] 6 M. I. A. 393 = 18 W. R. 81 = 2 Suther. 29=1 Sar. 552 (P. C.).

## * A. I. R. 1927 Calcutta 608

MUKERJI AND GRAHAM, JJ.

*Ismail Munshi* and *another*—Defendants 1 and 2—Appellants.

v.

*Niamat Khan* and *others*—Respondents.

Appeal No. 2337 of 1924, Decided on 7th December 1926, from appellate decree of the 3rd Sub-J., Dacca, D/ 27th September 1924.

* (a) *Civil P. C., O. 1, R. 8—Permission validly granted for suit—Fresh permission for appeal therefrom is not necessary.*

If a permission has been validly granted for re-presentation of the suit in the Court of first instance, no fresh permission is necessary for the purposes of an appeal if an appeal is preferred from the trial Court's decree. So far as this question is concerned, the proceedings in appeal may very well be regarded as proceedings in continuation of the suit and the result of the appeal would be taken as the result of the suit itself. [P 610 C 1]

(b) *Civil P. C., O. 1. R. 8—Defendant permitted to represent public — Written statement not specifically mentioning that he was appearing inre presentative capacity—Public cannot be said as not represented.*

Where the defendant was permitted to appear in the suit as representing the public and he was aware of the fact that he was required to appear in the suit and defend the same in his personal capacity, as well as representing the public, and being aware of these conditions he did appear in the suit and contest it. the mere fact that he did not choose to state specifically in the written statement that he was appearing not merely in his individual capacity, but also as representing the public, does not indicate that the public were not represented. [P 610 C 2]

(c) *Civil P. C., O. 1, R. 8—Order can be made against the will of person asked to represent.*

An order for representation under R. 8 may be made by a Court notwithstanding that it is objected to by the person who is asked by the Court to represent the public: *Wood* v. *McCarthy* (1893) 1 *Q. B.* 775, *Rel. on.* [P 610 C 2]

(d) *Civil P. C., O. 1, R. 8—Notice must show names of persons permitted to represent other persons interested.*

Order 1, Rule 8. requires that the Court should exercise a judicial discretion in permitting some definite person or persons to sue or be sued on behalf of all the persons interested, and it further requires the Court to give to the persons interested notice of the institution of the suit which must include a notice of the names of the persons who have been permitted to represent others, so that the persons interested may have an opportunity of knowing who have been selected to represent them: 17 *Cal.* 906, *Foll.* [P 611 C 1]

Where, however, a decree is passed after issue of a notice defective in the above respect the decree is binding as against the persons who have appeared and contested the suit, irrespective as to whether the decree would bind the public or the other persons interested. [P 611 C 1]

(e) *Civil P. C., O. 1, R. 8—Leave need not be express.*

The leave of the Court, necessary under O. 1, R. 8, need not be express, and it is enough if it can be gathered from the proceedings: 21 *Cal.* 180; 29 *Cal.* 100 and *A. I. R.* 1924 *Cal.* 993, *Rel. on.* [P 611 C 2]

*S. C. Basak* and *Sasadhar Roy (Sr.)*—for Appellants.

*Sarat Chandra Roy Choudhuri* and *Amullya Chandra Sen*—for Respondents.

**Mukerji, J.**—The Defendants Nos. 1 and 2 are the appellants in this appeal. The facts relating to the suit out of which this appeal has arisen, are as follows: At the instance of the Defendants Nos. 1 and 2 certain proceedings under S. 133 of the Criminal Procedure Code were taken by a criminal Court in respect of an alleged public channel or water-course. The said public channel or water-course is said to have been in existence over the plaintiffs' land, and through it, it is alleged, the surplus water of the lands lying to the south of the plaintiffs' land used to be drained off towards the north. As a result of these criminal proceedings the alleged public channel or water-course was found to have been obstructed and an order was passed under the provisions of that Code for the removal of that obstruction, the practical result of which was that the channel or water-course, such as it was, was re-excavated. Thereafter the plaintiffs who were interested in the lands over which the alleged public channel or water-course is said to have existed instituted the present suit. In this suit they asked for several reliefs and it is necessary to mention here only two out of them, namely, first, a declaration that the plaintiffs were entitled to the lands on which the channel is alleged to have existed, and, secondly, a declaration that the Defendants Nos. 1 and 2, or the public in general, had no right of overflow of surplus water over any channel or watercourse through the plaintiffs' lands. There was a prayer for a declaration that the proceedings held in the criminal Court were ultra vires and there were other prayers as well; but with these we are not concerned at the present stage. In this suit the plaintiffs impleaded as defendants the Defendants Nos. 1 and 2, who are the appellants before us as the principal defendants, and

twelve other persons as the pro forma defendants; and they purported to institute this suit against the Defendant No. 1, not merely in his personal capacity, but also as representative of the public.

The Munsif dismissed the suit holding in effect that the passage or water-course was in existence over the plaintiffs' land and that, therefore, the plaintiffs were not entitled to any relief in the present suit. On appeal preferred by the plaintiffs the Subordinate Judge took a contrary view and held that there was no public channel or water-course over the plaintiffs' land and, therefore, gave the plaintiffs a decree to the terms of which it is necessary to refer here. By this decree the decree passed by the learned Munsif was reversed and the plaintiffs' suit was decreed their title to the disputed land was declared, and it was further declared that there was no public channel or water-course over the plaintiffs' land. The decree further directed that the principal defendants, namely, the appellants before us, do fill up the channel or water-course and restore the disputed land to its original condition. Against this decree the present appeal has been preferred.

The contentions urged before us ultimately resolve themselves into two.—The first contention relates to the propriety of the decree that has been passed by the Subordinate Judge in view of the findings that he has recorded in his judgment, In this connexion a very ingenious attempt has been made on behalf of the appellant before us to induce us to hold that the findings at which the learned Subordinate Judge has arrived are inconsistent with the position which would justify the decree that he has passed. It has been urged in substance that whereas in the judgment of the learned Subordinate Judge there are passages which go to indicate that the water of lands lying to the south of the plaintiffs' land drained out to the north through some depression on the plaintiffs' land, he has eventually held that there is no channel or water-course, and on that footing has given the plaintiffs the relief mentioned above. Reference, for instance, has been made to a passage in the judgment of the learned Subordinate Judge which runs in these words:

> The general slope is from east to west and from south to north though the slope is not uniform. It then appears that the rain-water falling in the char drains off and towards the north and that it collects also in the depression of the char in the middle between the slopes to the east and west. Tide-water also comes over the char from the north and during the rains the char is submerged except the high bank of a river in the east. Tide water and flood water do not appear to require any channel over the plaintiffs to pass out except perhaps the residgue.

Other passages to the same effect and as tending to show that this was what was the state of things on the plaintiffs' lands were drawn to our notice. Reading the judgment as a whole, however, I am of opinion that the finding at which the learned Subordinate Judge arrived in this case was clearly this: that although the allegation of the defendants was that the drain or channel existed over the plaintiffs' land, and that surplus rain-water of the lands lying to the south of the plaintiffs' land used to be drained off over that channel that allegation of the defendants had not been proved or established in the case. The learned Subordinate Judge clearly said in his judgment that tide-water and flood-water did not require any channel to pass out and that he was not satisfied that there was any water-course or channel over the plaintiffs' land and that the water which collected in the plaintiffs' land or the lands to its south passed out of it by the natural flow of water without any channel. In other words he found that there never was any defined passage in the shape of a channel or water-course such as was alleged on behalf of the defendants through which the said water used to pass off towards the north. This, in my opinion, is the view which may be gathered, and gathered very clearly, from what has been said by the learned Subordinate Judge in his judgment. The depression that is referred to in the passage which I have quoted above is not the water-course or channel which is claimed on behalf of the defendants. I am, therefore, of opinion that the findings of the learned Subordinate Judge are not inconsistent and the first ground urged on behalf of the appellants must fail.

The second ground relates to the validity of the proceedings which were taken in connexion with the representation of the public by the Defendant No. 1 in the suit. It may be observed at the outset that in the written statement that was filed on behalf of the Defendants Nos. 1 and 2 no objection in

particular was taken to the validity of these proceedings, and although two issues were framed regarding the maintainability of the suit, and the form thereof, those issues appear not to have been pressed during the trial of the suit in the Court of first instance. In the judgment of the learned Subordinate Judge there is also no mention of any objection having been taken so far as this matter is concerned. These, however, are objections which relate to the legality of the procedure that was adopted and the validity of the decree tnat has been passed and having regard to the insistence and ability with which they have been put forward before us, we think we must deal with them here.

In the memorandum of appeal that has been presented to this Court there is one paragraph in the grounds which relates to some of these objections and that ground, taken along with arguments that have been advanced before us, means to object to the validity of the proceedings on the ground that although there may have been a permission duly granted by the Court for representation of the public by the Defendant No. 1 in the Court of first instance there was no such permission either taken or granted for the purposes of the appeal that was heard by the lower appellate Court, it being remembered that the plaintiffs were the appellants in that appeal. No authority has been brought to our notice for the proposition that if a permission has been validly granted for such representation of the suit in the Court of first instance a fresh permission is necessary for the purposes of an appeal if an appeal is preferred subsequent to the disposal of the suit by the Court of first instance and, in my opinion, it would be unreasonable to hold that in point of fact a fresh permission for the purposes of the appeal would be necessary under the law. The law does not require such permission to be given, and so far as this question is concerned the proceedings in appeal may very well be regarded as proceedings in continuation of the suit and the result of the appeal would be taken as the result of the suit itself. I am of opinion that if there has been a permission properly granted for the representation of the public by some of the defendants in a suit it is not necessary that a fresh permission should have to be taken or granted for the purposes of such an appeal in that suit at any subsequent stage.

It has next been said that although the Defendant No. 1 may be taken to have been permitted to appear in the suit as representing the public, he entered appearance not in his character as representative of the public but in his own personal capacity and in support of that our attention has been drawn to the written statement that was filed in the suit on behalf of the defendants. It is true that in this written statement the Defendant No. 1 nowhere says that he was in point of fact appearing as representative of the public. But at the same time there is nothing to show that he objected to appear in that capacity. The position seems to be that the Defendant No. 1 was aware of the fact that he was required to appear in the suit and defend the same in his personal capacity as well as representing the public; and being aware of these conditions he did appear in the suit and contest it. In the circumstances, in my opinion, it cannot be said that the mere fact, that he did not choose to state specifically in the written statement that he was appearing not merely in his individual capacity, but also as representing the public, indicates that the public were not represented. It was argued that there was no obligation on the said defendant to represent the public; but then it must be remembered that an order for such representation may be made by a Court notwithstanding that it is objected to by the person who is asked by the Court to represent the public. In this connexion reference may be made to the decision o *Wood* v. *McCarthy* (1) in which it has been held that an order may be made under O. 16, R. 9, which corresponds to O. 1, R. 8 of the Civil P. C. authorizing one or more persons to defend on behalf of persons interested against the will of the persor or persons so authorized.

A third objection has been taken in connexion with these proceedings and that relates to the notice that was issued for the purposes of this representation. This notice to which our attention has been drawn gives first of all the names of the plaintiffs as Niamat Khan and others. It purports to state that a suit has been instituted by the plaintiffs against the

(1) [1893] 1 Q. B. 775=62 L. J. Q. B. 373=11 W. R. 523=69 L. T. 431=5 R. 403.

defendants for the declarations to which I have already referred, and it calls upon the public or such members of the public as may so desire to appear and contest the plaintiffs' claim. There is then a schedule attached showing the plots of land with regard to which a declaration was sought for by the plaintiffs in the suit. It has been contended before us that the notice does not satisfy the requirements of law, and I may say at once that I feel very much pressed by this contention. The object of a notice required by O. 1, R. 8 of the Civil P. C., has been clearly explained in the case of *Kali Kanta Sarma* v. *Gouri Prosad Sarma* (2), where Mr. Justice Banerji, delivering the judgment of this Court, observes thus:

> Section 30, as we understand it, requires that the Court should exercise a judicial discretion in permitting some definite person or persons to sue or be sued on behalf of all the persons interested, and it further requires the Court to give to the persons interested notice of the institution of the suit which must include a notice of the names of the persons who have been permitted to represent others, so that the persons interested may have an opportunity of knowing who have been selected to represent them. Now, in the present case, no such thing was done. In the first place the Court did not give permission to any definitely named persons among those interested to represent the rest; and in the second place the notice issued by the Court did not show who the persons were that had been selected to represent the remaining persons interested.

Judged by the test laid down in that case the notice in the present case falls far short of the requisite. It did not in point of fact mention the fact that the Defendant No. 1 would be authorized to represent the public in the suit and the public in general could not possibly have any idea as to the persons who were going to represent them for the said purpose. Whether a decree obtained in a suit in which a notice of this character was issued would be binding on the public or not is a question with regard to which we are not called upon on the present occasion to express any definite opinion. In the present case, however, the Defendant No. 1, knowing that he had been asked to represent the public, had appeared in the suit and presumably taken all the defences that were possibly open. The decree that has been passed in the suit can under no circumstances be treated as not binding as against the defendants, at any rate, who have appeared and contested the suit under the circumstances to which I have referred. If in future the public succeed in showing that they were not properly represented, or that the decree is not binding on them or in a future suit in which the public are properly represented it is found that the channel or water-course does exist in fact and that there is a right of the public to drain off their surplus water through the same, the Defendants No. 1 and 2 would not be prevented from coming in as members of the public and getting the benefit of that decree; for, on the present occasion, we think they are bound by the present decree on the footing that they did not represent the public properly, but appeared in the suit on their own behalf.

Another ground has been taken, namely, that there is no specific order granting the permission required by O. 1, R. 8; but having regard to the order in the order-sheet to which our attention has been drawn, and taking the same in conjunction with the proceedings that have taken place, it is open to us to infer that such permission was granted. It has been laid down by this Court in a series of decisions that the leave of the Court necessary under O. 1, R. 8, Civil P. C., need not be express, and it is enough if it can be gathered from the proceedings: see *Dhunpat Singh* v. *Paresh Nath Singh* (3), *Kalu Khabir* v *Jan Meah* (4), and *Krishna Kumar Deb* v. *Atul Chandra Ghose* (5).

Lastly, it has been argued that the public were a necessary party to the suit and the provisions of O. 1, R. 9, Civil P. C., will not enable the plaintiffs to maintain the suit in the absence of the public. Reference in this connexion has been made to the case of *Performing Right Society* v. *London Theatre of Varieties* (6) and the observations of Viscount Cave, L. C. at page 14 in that case, which are in these words:

> Further, under O. 16, R. 11, (which corresponds to O. 1, R. 9, of our Code) no action can now be defeated by reason of the misjoinder or non-joinder of any party; but this does not mean that judgment can be obtained in the absence of a necessary party to the action, and the rule is satisfied by allowing parties to be added at any stage of a case.

(2) [1890] 17 Cal. 906.

(3) [1894] 21 Cal. 180.
(4) [1902] 29 Cal. 100.
(5) A. I. R. 1924 Cal. 998.
(6) [1924] A. C. 1=93 L. J. K. B. 93=40 T. L. R. 52=130 L. T. 450=68 S. J. 99.

These observations were made in connexion with a suit in which the interest of the plaintiffs, the Performing Right Society, Ltd., in the performing rights was equitable only, and they brought an action to obtain a perpetual injunction against an infringement of their rights without joining the legal owners of the copyright as parties to the action, and it was held that the plaintiffs were prevented by the law and practice of the Courts from obtaining the perpetual injunction which they claimed. It is not possible to say in the present case that the reliefs which the plaintiffs have obtained were not such as they were not entitled to obtain in a suit against the Defendants Nos. 1 and 2 only, though a decree in such a suit will not be of any avail as against the public in general.

These are all the contentions that have been urged before us in this appeal and as they fail the appeal must be dismissed with costs.

**Graham, J.**—I agree.

D.D. *Appeal dismissed.*

---

## * A. I. R. 1927 Calcutta 612

C. C. GHOSE, J.

*In the matter of the Jajodia Cotton Mills, Ltd.*

Civil Petition for winding up of the Jajodia Cotton Mills, Ltd., Decided on 16th July 1926.

* *Promissory note—Execution by Directors of a Company—Liability of the Company discussed.*

A promissory note ran as follows: "We promise to pay to . . . or order the sum of . . . value received" and it was signed by two Directors of the Company and below the signatures was given their description as Directors. Below these signatures was the signature of the Managing Agents. The pro-note also bore the seal of the Company.

*Held*: that the pro-note did not bind the Company. [P 612 C 2; P 613 C 2]

*A. K. Roy, Langford James* and *R. C. Ghose*—for Applicants.

*S. N. Bannerjee* and *B. L. Mitter*—for Jajodia Cotton Mills, Ltd.

**C. C. Ghose, J.**—On the 2nd June 1926 an application was presented before me on behalf of the Japan Trading Co., Ltd., for an order that the Jajodia Cotton Mills, Ltd. be wound up under the provisions of the Indian Companies Act. The usual directions for advertisement of the substance of the petition were given and the petition was made returnable on 2nd July 1926 for hearing. On the 11th June 1926 the Jajodia Cotton Mills, Ltd. made an application for an order that the Japan Trading Co., Ltd. may be restrained from proceeding with the petition for winding up presented by them, from taking any further steps in respect thereof, and from issuing any further advertisements, and the said petition be struck out and taken off the file and proceedings thereunder stayed.

The petition for compulsory winding up and the petition of the Jajodia Cotton Mills, Ltd., have come on for hearing before me together. I have had the advantage of hearing elaborate arguments on both sides. Everything that learned counsel who have appeared in this case have by their industry been able to lay their hands on has been brought to my notice and I now proceed to consider the points raised.

The Jajodia Cotton Mills, Ltd. have taken four points before me. They are conveniently summarized in paras. 12 and 20 of the petition of the Jajodia Cotton Mills, Ltd. The case of the Japan Trading Co. is that they are the holders in due course of a promissory note executed on the 24th July 1925 for a sum of Rs. 6,00,000 and that the said promissory note was presented to the Jajodia Cotton Mills, Ltd. for payment, but it was dishonoured and returned unpaid. Thereafter it is alleged that the Japan Trading Co. caused a letter to be written to and delivered to the Jajodia Cotton Mills, Ltd. on the 31st March 1926, drawing attention to the fact of the dishonour of the promissory note and giving statutory notice under S. 163 of the Indian Companies Act to enable them to make an application to this Court for winding up.

The promissory note runs as follows:

"Calcutta 24th July 1926."

("1926" is struck out and "1925" written in place of it, and the name "Sukhdeodas Ramprosad", who are the Managing Agents of the Jajodia Cotton Mills, Ltd., appears below). Then the body of the note runs as follows:

"On the 31st March 1926 we promise to pay to Messrs. Sukhdeodas Ramprosad or order the sum of rupees six lakhs (Rs. 6,00,000) value received.

D. H. Wilmer."

(Then there is a Nagri signature purporting to be that of Radhakissen

Santalia, and against the signature of D. H. Wilmer and Radhakissen their description is added, i. e., Directors, Jajodia Cotton Mills, Ltd. Below the signatures of the two Directors is the signature of the Managing Agents, Sukhdeodas Ramprosad, who are described as such in the promissory note. On the left hand side there is the seal of the Company. "Jajodia Cotton Mills, Ltd., Incorporated 1919.")

On the back of the promissory note the following endorsement occurs :

"Pay to the Japan Trading Co., Ltd., or order.

Sukhdeodas Ramprosad
By Ranglal Jajodia, a partner."

The first point taken on behalf of the Jajodia Cotton Mills, Ltd. is that the promissory note in question is not a note made by the Company and that as such is not binding on the Company. In support of this contention attention has been drawn by learned counsel for the Jajodia Cotton Mills to two cases, viz., *Dutton* v. *Marsh* (1) and *Srilal Mangtulal* v. *Lister Antiseptic & Dressing Co., Ltd.* (2). On the other hand, Mr. A. K. Roy, appearing for the Japan Trading Co., Ltd. has contended that the promissory note in question was in fact and in truth a note made by the Company, and that as such it was and is binding on the Company. In support of his contention Mr. Roy has drawn attention to several cases, some of which I shall notice presently.

It is settled law that in making bills of exchange Directors of a limited Company must be careful not to use forms which pledge their personal credit. Thus for instance where the promissory note ran as follows :

"We, the Directors of the A B Company, do promise to pay, etc." and where the promissory note was signed by the Directors it was held that such a promissory note made the Directors personally liable although the seal of the Company was on the promissory note. [see *Dutton* v. *Marsh* (1)]. Where the promissory note ran as follows :

"I promise to pay, etc.,
(Sd.)—J. H. Smethurst Laundry, Ltd.,
J. H. Smethurst,
Managing Director,"

it was held not to make the Director personally liable : see *Chapman* v. *Smethurst* (3).

Again where the promissory note ran as follows :

I promise to pay etc.,
but it was signed
"For the M. Railway Company
J. S.
Secretary,

it was held that the Company was bound : see *Alexander* v. *Sizor* (4).

Again where the promissory note ran as follows :

We jointly promise to pay £ 600 for value received in stock on account of the Company,

and it was signed by three Directors, it was held that the promissory note was one by which the Company was bound : see *Lindus* v. *Melrose* (5).

The above cases may be taken as typical of the line of cases relating to this matter and scrutinizing the promissory note in question as closely as possible and giving to the arguments which have been advanced by Mr. Roy my very best consideration and not overlooking the points sought to be made in the joint affidavit of D. H. Wilmer and Radhakissen Santalia, a copy of which has been annexed to an affidavit made by one of Mr. Roy's clients, I have come to the conclusion that the promissory note in question is one which did not and does not bind the Company. Therefore so far as the first point is concerned, that must be decided in favour of the Jajodia Cotton Mills, Ltd.

The second point taken by Mr. Bannerjee relates to the question of the proper stamp having been put on the promissory note in question. Whatever defect the promissory not had, has been cured by the certificate of the stamp officer, and I am of opinion that the objection has now no substance.

The third objection taken by Mr. Bannerjee is that there has been material alteration in the document after execution thereof and that as such the instrument has been avoided. I have considered what is in the promissory note and I am satisfied that it was a

(1) [1871] 6 Q. B. 361=40 L. J. Q. B. 175=19 W. R. 754=24 L. T. 470.
(2) A. I. R. 1925 Cal. 1062=52 Cal. 802.
(3) [1909] 1 K. B. 927=78 L. J. K. B. 654=16 Manson 171=100 L. T. 465=14 Com. Cas. 94=25 T. L. R. 383=53 S. J. 340.
(4) [1869] 4 Ex. 102=33 L. J. Ex. 59=20 L. T. 38.
(5) [1858] 3 H. & N. 177=27 L. J. Ex. 326=6 W. R. 441=4 Jur. (N. S.) 433.

clerical error which had been corrected and that there has been no material alteration of the kind suggested by Mr. Bannerjee in the course of his argument. Therefore the third objection has no substance and must be decided against Mr. Bannerjee.

The fourth objection is this: The Jajodia Cotton Mills, Ltd. urge that on the 28th May 1926 an arrangement was arrived at with the Japan Trading Company and the partners of Sukhdeodas Ramprosad, whereby the latter made over two cheques to the Japan Trading Co. for Rs. 20,000 each, one bearing date 29th May 1926 and the other 31st May 1926, and it was agreed that the Japan Trading Co. would not take any proceedings against the Jajodia Cotton Mills, Ltd. and free and release the said Company in respect of all claims, if any, on the said promissory note. It is further stated on behalf of Mr. Bannerjee's clients that as against the cheque which bore date the 29th May 1926 a sum of Rs. 20,000 was paid in cash to the Japan Trading Co., and that on a receipt being asked for, no receipt was granted and that in consequence of the refusal on the part of the Japan Trading Co. to grant a receipt for the said sum of Rs. 20,000, payment of the second cheque was stopped. This contenton is referred to at great length in the affidavit of Yukie Obsaka, and it appears to me that the matter cannot be disposed of merely on affidavits but must necessitate investigation on oral evidence. There is also another point taken on behalf of the Jajodia Cotton Mills, Ltd., being the point elaborated in para. 18 of the petition of that Company. That also is dependent on an enquiry into the facts and such enquiry, in my opinion, cannot be satisfactorily held merely on affidavits.

I have therefore to consider what should be done in this case, and I have come to the conclusion that the Japan Trading Co. have not made out a sufficient case for an order under S. 162 of the Indian Companies Act. The result therefore is that the petition for winding up must be dismissed with costs, the Japan Trading Co. being left to take such steps as they may be advised to enforce such rights as they may have by reason of their being endorsees and holders of the promissory note in question.

What I have stated just now disposes of the application for a compulsory winding up. It follows therefore that it is unnecessary to make any order on the petition of the Jajodia Cotton Mills except that they will be entitled to the costs of that application.

G.B. *Petition dismissed.*

---

## * A. I. R. 1927 Calcutta 614

DUVAL AND MITTER, JJ.

*Umapati Mukerjee* and *others*—Defendants—Appellants.

v.

*Sheikh Soleman* and *others*—Plaintiffs—Respondents.

Appeal No. 1738 of 1924, Decided on 22nd December 1926, from the appellate decree of the Dist. J., Birbhum, D/- 31st March 1924.

(a) *Civil P. C., S. 47—Question whether certain land is included in a decree is one under S. 47.*

The question whether certain lands were or were not included in a mortgage decree or sale should be determined under S. 47 and not by separate suit: *A. I. R. 1922 P. C. 252, Foll.* [P 615, C 1 & 2]

* (b) *Civil P. C., S. 47—Applications under —Art. 181 applies.*

The article applicable for applications under S. 47 of the Code is Art. 181 which gives three years from the date when the right to apply accrues. [P 615, C 2]

(c) *Limitation Act, Art. 181— Property wrongly sold—Right to apply to recover arises on date of sale.*

The right to apply to recover property wrongly sold in execution accrues at the date of sale. [P 615, C 2]

*Apurba Charan Mukherjee*—for Appellants.

*Jadunath Kanjilal* and *Nripendra Chandra Das*—for Respondents.

**Mitter, J.**—This is an appeal from a decree of the District Judge of Birbhum affirming a decree of the Munsif of Suri. The appeal has been preferred by the defendants and arises out of a suit (Title Suit No. 29 of 1920) commenced by the plaintiffs, who are the widow and sons and daughters of Milan Sheikh before the Munsif. Plaintiff's case is that Plot No. 2 of the plaint belongs to the widow of Milan and that the other plots of the plaint are not covered by the mortgage executed by the sons of

Milan in favour of the father of Defendant No. 1 and were in possession of the plaintiffs even after delivery of possession to Defendant No. 1, but that Defendants Nos. 2 to 4 forcibly took possession of them alleging that they took settlement of them from Defendant No. 1. The defence of the defendants is that the disputed lands were mortgaged by the sons : of Milan Sheikh and were sold in execution of the mortgage decree and purchased by Defendant No. 1. Defendants Nos. 2 to 4 claim to have taken settlement from the decree-holder auction-purchaser. Defendants deny the title of the widow and daughter of Milan Sheikh in Plots 1 and 3 and they allege that the sons of Milan got the disputed lands (Plots 1, 2 and 3) on partition and the widow and daughters of Milan got other lands. Numerous issues were raised, amongst which it is necessary to notice Issues Nos. 4 and 5. Issue No. 4 runs as follows :

Have the plaintiffs any title to the lands in suit ?

Issue No. 5 was to the following effect :

Do the lands in suit appertain to Plots 6 to 8 of the sale-certificate as alleged by the defendants ?

The Munsif held that Plots 1 and 3 did not belong to the widow and daughters of Milan and further held that the disputed lands were not included in the mortgage executed by the sons of Milan, i. e., Sheikh Soleman and his brothers, who are Plaintiffs Nos. 1 to 3 in this suit and respondents before us. The Munsif accordingly declared the title of the plaintiffs to Plots Nos. 1 and 2 and a part of Plot No. 3 of the plaint and directed that they will recover possession from the defendants. I ought to state that the widow and daughters of Milan are Plaintiffs Nos. 4, 5 and 6, respectively, in the suit. The defendants preferred an appeal to the District Judge, who affirmed the decision of the Munsif, holding that the lands decreed were outside the mortgage, Against the decision of the District Judge a second appeal has been preferred to this Court and it has been contended before us by the learned vakil for the defendants that the suit is barred by the provisions of S. 47 of the Civil P. C. and that the question whether the disputed lands were or were not included in the mortgage decree or sale should have been determined in a proceeding under S. 47 of the Code, as it is a matter which arises in execution of the mortgage decree between the parties to the suit. Reliance has been placed on the decision of the Judicial Committee in the case of *Ramabhadra Naidu* v. *Kadiriyasami Naicker* (1) in support of this contention. This contention of the appellants is well founded and the respondents admit that S. 47 would bar the suit, but the learned advocate for the respondents asked us to treat the suit as a proceeding under S. 47 of the Code and to apply the provision of S. 47 (2) to the present case. The suit could be treated as a proceeding under S. 47 subject to any objection as to jurisdiction and limitation. There was no objection on the score of jurisdiction, as the Court trying the suit was competent to entertain an application under S. 47. The objection as to limitation could not be decided when we first heard the appeal on the 25th November as the records af the mortgage execution case had not been sent up. We, therefore, sent for the records of the execution case and we have again heard the parties who were given an opportunity of inspecting the record. It appears that the sale in execution of the mortgage decree took place on the 5th December 1917, and it was not confirmed till 31st January 1918. The suit was instituted in May 1920. The article applicable for applications under S. 47 of the Code is Art. 181 of Sch. 1 of the Indian Limitation Act, which gives three years from the date when the right to apply accrues. The right to apply accrued at the date of sale and the suit was well within three years from that date. Consequently, if we treat this suit as an application under S. 47 it would be instituted in time. The concurrent findings of both Courts that the lands decreed were outside the mortgaged lands are binding on us in second appeal.

Another point has been taken on behalf of the appellants, viz., that the decree in favour of Plaintiffs Nos. 4, 5 and 6, i. e., the widow and daughters of Milan cannot be sustained as it has been found by both Courts that they have got no title to the decreed lands

(1) A. I. R. 1922 P. C. 252=44 Mad. 483=48 I. A. 155 (P. C.).

which belong to the Plaintiffs Nos. 1, 2 and 3. This has not been controverted by the learned advocate for the respondents. The result, therefore, is that the decree of the Munsif will be varied to this extent, viz., that instead of there being a decree for declaration of title and recovery of possession in favour of all the plaintiffs, there will be a decree in favour of Plaintiffs 1, 2 and 3 alone. With this slight modification the decrees of the Courts below are affirmed. The respondents will be entitled to get the costs of this appeal.

**Duval, J.**—I agree.

D.D. *Decree varied.*

---

## A. I. R. 1927 Calcutta 616

B. B. GHOSE AND PANTON, JJ.

*Jogendra Nath Maiti* and *others*—Appellants.

v.

*Ram Gopal Das* and *others*—Respondents.

Appeals Nos. 114 and 192 of 1925, Decided on 5th January 1927, from the original decrees of the 4th Sub-J., 24 Parganas, D/- 30th July 1924.

(a) *Appeal—Forum—Mesne profits—Valuation of suit.*

*Obiter*: When the value of the mesne profits decreed, taken along with the value of the land, exceeds Rs. 5,000, the value of the suit must be taken to exceed Rs. 5,000, though the suit was valued at less than Rs. 5,000 by the plaintiff, and an appeal from a decree therein lies to the High Court. [P 617 C 2]

(b) *Civil P. C., S. 11—Order made at an earlier stage is binding at a subsequent stage.*

An order made at an earlier stage in the same proceedings is binding upon the Court at a subsequent stage: 6 *All.* 269 (*P. C.*).. *Foll.* [P 617 C 2]

(c) *Mesne profits—Mesne profits must be moulded according to facts of each case—Purchaser of holding in execution is entitled to mesne profits on the basis of what he might have grown on land—Defendant's indolence is no ground for depriving the plaintiff of his dues.*

Mesne profits is in the nature of damages and it must be moulded according to the circumstances of each case by the Court in its discretion. [P 618 C 1]

A purchaser of the holding of a cultivating tenant, in execution of a mortgage decree, is entitled to mesne profits on the basis of the produce which he might have made if he cultivates the land himself and the indolence of the defendant or his reluctance to cultivate the land himself ought not to be a ground for depriving the plaintiff purchaser of his just dues: 35 *Cal.* 1060, *Foll.* [P 618 C 1]

*S. C. Basu, S. C. Maity* and *Apurba Charan Mukerjee*—for Appellants.

*Gunada Charan Sen* and *Satindra Nath Roy Chowdhury* for *Someswar Prasad Mukerji*—for Respondents.

**B. B. Ghose, J.**—These two appeals arise out of a decree by which mesne profits were assessed. The facts are these:

One Sib Chandra Das was the tenant with regard to several jamas under Defendants Nos. 3 to 5. The total area of the jamas is 129 bighas. Sib Chandra mortgaged these jamas to the plaintiffs some time in 1901. The Defendants Nos. 3 to 5 brought one suit for rent for all those jamas in 1905 against Sib Chandra. A decree was passed in that suit on 2nd August 1905. The decree was executed in 1906 and Defendants 3 to 5 purchased the interest of the mortgagor Sib Chandra in execution of their decree and took possession. Under the law the landlords could not claim to have purchased the jamas free from incumbrance having brought one suit for rent for a number of jamas. The plaintiffs then brought a suit on their mortgage against Sib Chandra in 1909 in which the Defendants 3 to 5 were joined as defendants. The Defendants 3 to 5 claimed a paramount title and asked to be discharged from the suit, and that was done. The mortgage suit was decreed and the plaintiffs purchased the property in execution of their own decree and took symbolical possession in July 1912. The Defendants Nos. 3 to 5, who were in actual possession, resisted the plaintiffs in taking actual possession.

Thereupon the plaintiffs brought the suit out of which this appeal arises, which was No. 54 of 1916, against Defendants 3 to 5 for khas possession and wasilat. In that suit other persons were joined as defendants who were said to have been in possession of the property under Defendants 3 to 5. This suit was decreed. Khas possession was allowed and a decree made for mesne profits. The plaintiffs took possession in May 1917. Proceedings were then taken for ascertainment of mesne profits and a commissioner was appointed. The commissioner made his report on the 30th April 1918. In his opinion the plaintiffs were entitled to get mesne profits calculated on the basis of the produce which might have been

grown on the land. The defendants did not produce any paper showing what was actually received from the land in question. Objections were taken by both parties to the report of the commissioner. The plaintiffs wanted more, and the defendant, amongst other things, urged that mesne profits should be calculated on the basis of rent. The matter came up before the Subordinate Judge for hearing and in his judgment dated the 8th September 1920 the Subordinate Judge held that the plaintiffs were entitled to mesne profits on rental basis, that is, on the assumption that the lands in suit were let out to tenants by the defendants on cash rent and bhag rent. He held therefore that the commissioner's calculation was wrong and he said that he would determine the amount of cash rent in taking further evidence, and he also said that he would determine the bhag rent on the evidence taken by the commissioner.

Subsequently the defendants produced certain collection papers, and the question came up before another Subordinate Judge who succeeded the previous Subordinate Judge, and he decided the matter by his judgment dated the 30th July 1924. The Subordinate Judge held that the plaintiffs were only entitled to mesne profits calculated on the basis of the rent realized by the defendants. He held that the rent and cesses payable by the tenants on the land amounted to about Rs. 260 per year. From this amount he deducted the rent payable for the land to the defendants as landlords, and he calculated the annual profits on the difference. In addition to this sum he gave the plaintiffs a decree for Rs. 1,050 which the Defendants 3 to 5 took as Salami from the tenants they had settled on the land. The total amount came up to Rs. 2305-9-0. The plaintiffs have appealed against that decree and claimed Rs. 5,500 in addition to what has been allowed by the Subordinate Judge. Their appeal is No. 114 of 1925. The defendants appeal against that part of the decree by which the Subordinate Judge allowed the plaintiffs the amount of Salami which the defendants had obtained from their tenants as also certain costs allowed against them. Their appeal is valued at Rs. 2,958-8-0; this appeal is No. 192 of 1925.

A preliminary objection has been taken on behalf of the respondents that the appeal of the plaintiffs does not lie to this Court. Their ground is that the plaintiffs valued their land in their plaint at Rs. 2,800 and tentatively valued the mesne profits at Rs. 1,200. This amount falls below Rs. 5,000 and that would not entitle the plaintiffs to prefer an appeal to this Court from the decree of the Subordinate Judge. The plaintiffs on the other hand, say that mesne profits were valued by the Subordinate Judge at Rs. 2,305 and this added to the value of the land would give the value of the suit as over Rs. 5,000 which would entitle them to prefer an appeal to this Court. Even if the question were open to us for consideration we should have held that the appeal to this Court is competent. When the value of the means profits, taken along with the value of the lands exceeded Rs. 5,000, the value of the suit must be taken to exceed Rs. 5,000. But I do not think that this question is open to us for decision. This matter was raised before a District Court at a preliminary stage of the hearing of the appeal and it was decided by that Court, by its judgment dated 26th August 1925, that the appeal to this Court was competent. It is urged on behalf of the respondents that we are not bound by that decision. But this contention would be against the well-known principle laid down in the leading case of *Ram Kirpal Shukul* v. *Mt. Rup Kuari* (1), where it was observed that an order made at an earlier stage in the same proceedings is binding upon the Court at a subsequent stage. Their Lordships of the Privy Council pointed out that if that were not so there would be no end of litigation. This principle has been re-affirmed by the Privy Council in later cases which it is unnecessary to refer to. I therefore hold that the appeal is competent.

The question then arises upon what basis mesne profits should be calculated. The evidence shows that Sib Chandra was a cultivating raiyat. An attempt was made to establish from the evidence that he used to let out lands in Bhag. But from the evidence of defendants' own witnesses it is quite clear that Sib Chandra had his own ploughs and cultivated the land himself. There is no

(1) [1886] 6 All. 269=11 I. A. 37=(1886) A. W. N. 286 (P. C.).

reason to hold that Sib Chandra was a rent receiver or a person who used to derive profits from land by letting it out in Bhag. It is possible that some portion of the land which he could not himself cultivate for some reason was let out in Bhag. But that does not make him any the less a cultivating tenant who used to cultivate the land himself. The plaintiffs, by their purchase in execution of the mortgage made by Sib Chandra, were entitled to Khas possession of the land and to cultivate it themselves. Under these circumstances, when the defendants kept them out of possession, there is no good reason for depriving the plaintiffs mesne profits on this basis of the produce which the plaintiffs might have grown on the land, and what the defendants would have got if they had cultivated the land themselves.

The learned advocate for the respondents relies upon the case of *Lachmi Narain* v. *Mazhar Abbas* (2) for the proposition that the basis on which mense profits should be calculated depends upon the mode of the defendants' occupation of the land, and it is contended that as in this case the defendants were in possession by letting out the land to tenants the rental basis should be taken for the calculation of the mesne profits. But that case really does not support the contention of the learned advocate. The matter has been discussed at page 1005 of the report where many of the previous cases have been cited. Mesne profits, as has been well settled, is in the nature of damages and it must be moulded according to the circumstances of each case by the Court in its discretion. In the present case as I have already stated the plaintiffs were entitled to actual khas possession and there is no reason why they should be deprived of the profits which the defendants might have made by actually cultivating the land. As was observed in the case cited above the indolence of the defendant or his reluctance to cultivate the land himself ought not to be a ground for depriving the plaintiff of his just dues. I am therefore of opinion that the Subordinate Judge's decision, that the plaintiffs are entitled only to mesne profits on the basis of rent realized, is not correct. The commissioner's view should therefore be accepted.

(2) [1908] 35 Cal. 1000=12 C. W. N. 650.

The next question is as to what should be the amount of mesne profits. On behalf of the appellants it is stated that they would be satisfied with what the commissioner found to be the produce for each year. The defendants, it is said, never took any objection to the amount or the value of the produce found by him in his report. There is, however, one objection taken, objection No. 16 in the defendants' petition before the Subordinate Judge which may be read as an objection taken to the quantity of paddy and the price. But it is a very vague statement. It runs thus :

> The finding of the learned Commissioner with regard to the produce of paddy per bigha and the price of paddy per maund is absolutely groundless.

We, however, allowed the learned advocate for the respondents to point out the evidence on their behalf which would show that the Commissioner's estimate is erroneous. Going through the evidence on behalf of the plaintiffs as well as the defendants which was placed before us it seems that the Commissioner has taken a very proper view of the evidence. The plaintiffs in their evidence stated the quantity of paddy as well as the value at a higher rate than was accepted by the Commissioner. The defendants on the other hand gave a lower rate and in some instances the same rate. The Commissioner after considering the evidence in an elaborate report came to the conclusion that different quantities of paddy could be produced on different classes of land and he divided the lands in two classes. I do not think that this can be assailed as erroneous. The Commissioner has been very careful in his report and he shows that for one year which was a bad year, that is, 1321, he calculated the profits at a much lower rate than in the other years. The Commissioner also deducted the costs of cultivation in assessing the mesne profits. I think therefore it is quite reasonable to calculate mesne profits at the rate found by the Commissioner. The defendants might have produced better evidence in support of their allegation as to the quantity of paddy produced by showing in their accounts as to what the quantity of bhag paddy was, they had realized for the lands which were let out in bhag. But that was not done. (After considering evi-

dence the judgment proceeded.) The plaintiffs would be entitled to mesne profits at the rate of Rs. 1,568-10-0 for the years 1320, 1322 and 1323 B. S. with interest at 12 per cent per annum, and for the year 1321 B. S., Rs. 1023 with interest at 12 per cent per annum. The learned advocate for the plaintiff has calculated the amount which they would be entitled to get on this basis at Rs. 8,995-13 as. Out of this the lower Court has allowed Rs. 2,305-9-0 and the plaintiffs therefore would be entitled to get Rs. 6,690-4-0 in addition to what has been allowed by the lower Court. They have however valued their appeal at Rs. 5,500. They cannot ask for more because the appeal cauld not have been valued tentatively as all the evidence was taken in the lower Court on which the plaintiffs might have valued their appeal properly. The plaintiffs should be held to have abandoned a part of their claim in the appeal.

The result therefore is that the plaintiffs will get a decree for Rs. 7,805-9-0 including what was allowed by the Court below with interest at 6 per cent per annum from the date of the decree of the lower Court that is, the 30th July 1924, until realization. The plaintiffs are entitled to their costs of this appeal and of the lower Court.

With regard to the appeal of the defendants, F. A. 192 of 1925, having regard to the basis of the calculation we have adopted in this Court, the plaintiffs are not entitled to get any portion of the salami, and it is not necessary to express any opinion as to whether the plaintiffs would otherwise have been entitled to the salami as was decreed by the Court below. This appeal therefore with regard to the salami only valued at Rs. 1,050 is allowed and dismissed as to the rest, but without costs.

**Panton, J.**—I agree.

R.D. *Appeal No.* 114 *allowed.*
*Appeal No.* 192 *partly allowed.*

---

## A. I. R. 1927 Calcutta 619

RANKIN, C. J., AND C. C. GHOSE, J.

(*Srimati*) *Saroj Bala Bose*—Appellant.

v.

*Jatindra Nath Bose* and *others*—Respondents.

Privy Council Appeal No. 40 of 1926, Decided on 5th January 1927.

(a) *Civil P. C., Sch. 2, para. 1—Reference by all parties except one whose rights are not in dispute is valid.*

Where a reference is made to arbitration by all parties to the suit except one whose rights are not in dispute, the reference is not invalid. [P 620 C 2]

(b) *Civil P. C., Sch. 2, para. 10—Notice of filing not given to a party but filing made known to his pleader and admitted by such pleader—Para. 10 is complied with—Civil P. C., O. 3, R. 5.*

Where a notice of filing of an award is not given to the party but the order filing the award is communicated to his pleader and the pleader admits such communication, it is a sufficient compliance with the mandatory provisions of para. 10 having regard to O. 3, R. 5. [P 621 C 1]

*B. L. Mitter* and *Santimoy Majumdar*—for Appellant.

*Provash Chunder Mitter*, *Manindra Nath Banerji* and *Narayan Chandra Kar*—for Respondents.

**C. C. Ghose, J.**—This is an application for leave to appeal to His Majesty in Council against a final order made by this Court on the 28th of July 1926 in Appeal from Original Order No. 53 of 1924 arising out of Title Suit No. 191 of 1920 in the Court of the 2nd Subordinate Judge of the 24 Perganas. The order complained of is one which affirmed the decision of the Court immediately below. As regards the amount or value of the subject-matter of the suit in the Court of 1st instance and in dispute on appeal to His Majesty in Council, it is more than Rs. 10,000. In these circumstances the only question that has got to be enquired into is whether the appellant for leave to appeal to His Majesty in Council has satisfied this Court that the appeal involves some substantial question of law. The facts shortly stated are as follows.

On the 18th of August 1920, the said suit was filed in the Court of the 2nd Subordinate Judge of the 24-Perganas by the plaintiff Profulla Kumar Bose against four defendants for partition of the estate of one Priya Nath Bose who was the grandfather of the plaintiff and the father of Defendants Nos. 1 and 2 and the father-in-law of Defendants Nos. 3 and 4. It is unnecessary to mention the names of the defendants other than the Defendants Nos. 3 and 4. Defendant No. 3 is Sm. Niroj Sundari Bose, the widow of the eldest son of the testator and the applicant for leave to appeal to His Majesty in Council is Defendant No. 4 Sm. Sarojbala Bose.

It appears that on the 21st of June 1921, a petition of compromise to which the Defendant No. 3 was no party, was filed before the Subordinate Judge. The testator Priya Nath Bose had left a Will under which the Defendant No. 3 was entitled to a maintenance of Rs. 25 a month and a right of residence in the family dwelling house No. 73, Amherest Row. As stated above she was no party to the petition of compromise and she had at no time entered appearance in the suit itself. There was no dispute, however, as regards the rights of the Defendant No. 3 in the estate left by the testator Priya Nath Bose. When the petition of compromise was brought to the notice of the learned Subordinate Judge, he came to the conclusion that as the plaintiff had not adduced any evidence whatsoever as against the Defendant No. 3, the suit should stand dismissed as against her and he passed an order accordingly. As regards the parties to the petition of compromise, the learned Subordinate Judge finding that there was no dispute as regards the shares of the other parties in and to the estate of the testator and further that the parties had waived accounts as against each other, passed a preliminary decree in accordance with the petition of compromise. One of the terms, being Cl. 9 of the petition of compromise, provided for a reference to certain arbitrators named therein to partition the estate of the testator by metes and bounds.

The arbitrators, under the reference to them, made an award which was filed in Court on the 27th of October 1922. Upon the said award being filed, the learned Subordinate Judge passed the following order: "Inform the pleaders of both sides. Put up for final orders on the 10th November next." It appears from the original record which we have examined for ourselves that two of the pleaders engaged in the case signed their names against the said order in the order sheet. It is suggested that the pleader for the Defendant No. 4 who is the present applicant before us did not sign the order sheet. Be that as it may, it appears from the evidence of the pleader of the Defendant No. 4 Jiva Priya Roy (see in this connexion page 104 of the paper-book) that the Bench Clerk of the Subordinate Judge informed him of the fact of the filing of the award in Court by the arbitrators and that thereupon he took time from the Court to inform his client of the fact of the award having been so filed. After certain adjournments had been granted by the learned Subordinate Judge a final decree in accordance with the award was passed by him on the 22nd of November 1922.

Thereafter on the 20th of December 1922 two petitions were presented to the learned Subordinate Judge by the present applicant one under O. 9, R. 13 Civil P. C., asking for the setting aside of the said final decree and another under para. 15 Sch. II of the Code of Civil Procedure praying for the setting aside of the award made by the arbitrators. Those two petitions were heard together and the learned Subordinate Judge came to the conclusion that no case had been made out for the setting aside of the final decree or for the setting aside of the award. Against this judgment an appeal was brought to this Court and, as stated above, their Lordships Mr, Justice Suhrawardy and Mr. Justice Mallik by their judgment dated the 28th of July 1926 dismissed the said appeal.

At the hearing of the present application the learned Advocate General who appeared on behalf of the applicant urged two points, namely, (1) that the reference to the arbitrators was illegal inasmuch as Defendant No. 3 who was a party to the suit had not joined in the reference to arbitration and (2) that no notice of the filing of the award had been given to the parties undes para. 10 Sch. II of the Code of Civil Procedure.

As regards the first point, as will appear from what has already been stated above, there was at no time any dispute as regards the rights to which the Defendant No. 3 was entitled under the will of the testator. She had not appeared in the suit and the plaintiff had not adduced any evidence as against her. In these circumstances the Subordinate Judge dismissed the suit as against the Defendant No. 3 and the reference to the arbitrators proceeded on the footing that there was and could be no question as regards the rights to which the Defendant No. 3 was entitled under the will of the testator.

As regards the 2nd point there can be no doubt on the record before us that there was a notice in writing of the fact of the filing of the award by the arbi-

trators. The only question that therefore remains for our consideration is whether such notice was communicated to the parties in this suit or rather to the present applicant.

The present applicants' pleader in the Court below has stated definitely in in unambiguous language that the fact of the filing of the award of the arbitrators, was duly communicated to him by the Bench Clerk. It follows that the order made by the learned Judge must have been shown to the applicant's pleader. It may be that his signature was not obtained to the order sheet against order No. 38 dated the 27th of October 1922; but the evidence of the pleader taken with the order itself is, in my opinion a sufficient compliance with what has been described as the mandatory provisions of para. 10, Sch. II of the Code of Civil Procedure. In this connexion reference may also be made to O. 3 R. 5, of the Code of Civil Procedure.

In my view, therefore, the learned Advocate General has failed to satisfy the condition of the last clause of S. 110 of the Code of Civil Procedure, in other words, the points urged before us do not in my opinion, involve any substantial question of law. In these circumstances the present application must stand dismissed and dismissed with cost—hearing fee, five gold mohurs.

**Rankin, C. J.**—I agree.

R.D. *Application dismissed.*

---

## * A. I. R. 1927 Calcutta 621

CUMING AND GRAHAM. JJ.

*J. C. Galstaun*—Complainant —Petitioner.

v.

*Banku Behary Dhar*—Accused—Opposite Party.

Criminal Revision No. 120 of 1927, Decided on 8th April 1927, from an order of the 4th Presy. Mag., Calcutta, D/- 27th January 1927.

* *Criminal P. C., S. 195—S. 195 contemplates only civil, criminal and revenue Courts—Land Acquisition Officer is not a Court.*

Although the word used in S. 195, sub-S. (2), is "includes", the Courts which can make a complaint under that section are restricted to the Courts detailed in S. 476, Criminal P. C., namely, civil, criminal and revenue. Land Acquisition Collector is not a Court within S. 195 so far as S. 207, Indian Penal Code, is concerned. His function really is to ascertain on behalf of the Government what is the value of the property which the Government proposes to acquire and to make an offer to the party. In doing so he is allowed to import his own knowledge into the matter ; 32 *Cal.* 605, (*P. C.*) *Rel. on.* [P 623 C 1]

*B. C. Chatterjee, Charu Chandra Biswas* and *Manindra Kumar Bose*—for Petitioner.

*Narendra Kumar Bose* and *Hira Lal Ganguly*—for Opposite Party.

**Cuming, J.**—This is a Rule granted by my learned brothers Mr. Justice Suhrawardy and Mr. Justice Mitter calling upon the Chief Presidency Magistrate to show cause why the order of the Fourth Presidency Magistrate discharging the accused, the opposite party in this Rule, should not be set aside on the ground that the Magistrate has erred in holding that the Land Acquisition Collector is a Court and as such his sanction was necessary for a prosecution under S. 207, Indian Penal Code.

The facts of the case are briefly these : The petitioner sought to prosecute the opposite party for having fraudulently claimed the compensation awarded in respect of Premises No. 10, Howe's Lane, before the Second Land Acquisition Collector knowing that he had no right or rightful claim to such award intending thereby to prevent that money from being taken in execution of a decree or order which had been made or which he knew was likely to be made further by a Court of justice in a civil Court suit ; and the petitioner contended that thereby the opposite party had committed an offence under S. 207, Indian Penal Code. The case proceeded for some time and a certain number of witnesses were examined. Then the learned Magistrate Mr. H. K. De passed the following order :

This is a case under S. 207 Indian Penal Code. From the ruling cited before me I am of opinion that the Land Acquisition Collector's Court is a competent Court and as such under S. 195 (1) (b), Criminal P. C., without the sanction in writing of the Collector the complainant has no legs to stand upon. No sanction in writing of the Collector has been adduced in evidence. The prosecution has not called the Collector. I, therefore, discharge the accused under S. 253, Criminal P. C.

I may here point out that S. 195, Criminal P. C., as it now stands contemplates not a sanction but a complaint by a public servant so far as Cl. (a) is

concerned or by a Court under Cls. (b) and (c). Apparently the amendment of the Code made in 1923 has escaped the notice of the learned Magistrate.

The matter has been somewhat further complicated by the explanation which has been submitted by the learned Magistrate in reply to the Rule. In this explanation the learned Magistrate apparently states that he held that the proceedings continued before the tribunal and that the tribunal was a Court and hence sanction was required. He does not state definitely whose sanction is required. But presumably it would be that of the tribunal. I need hardly say that if his contention is correct the Court who could alone complain would be the tribunal. I can only say that this explanation is at entire variance with his own order of the 27th January 1927. There he states that the Land Acquisition Collector's Court is a competent Court and so

> without the sanction in writing of the Collector, the complainant has no legs to stand upon. No sanction in writing of the Collector has been adduced in evidence.

How possibly in his order the learned Magistrate could mean to refer to the tribunal I do not understand, unless the learned Magistrate did not realize the difference between the Land Acquisition Collector and the Improvement Tribunal.

I think, we must decide the Rule on the plain words as given in the Magistrate's order, namely, that no sanction has been given by the Land Acquisition Collector.

Mr. Chatterjee who has appeared in support of the Rule has argued that the Land Acquisition Collector is not a Court. Mr. Bose who has appeared in opposition to the Rule has argued that even if he is not a Court for the purpose of the Land Acquisition Act, he is a Court for the purpose of S. 195, Criminal P. C. The expression Court is nowhere defined in any of the Codes. Mr. Chatterjee relies on the case of *Ezra* v. *Secretary of State* (1), with special reference to pages 619 and 621. This case went upon appeal from this Court to the Privy Council and the judgment of this Court (Mr. Justice Ameer Ali and Mr. Justice Stephen) is reported in pages 605 to 624 of the volume. At page 619 the learned Judges in considering the question as to whether the Land Acquisition Collecter is or is not a judicial officer or Court states as follows:

> He is, in no sense of the term, a judicial officer; nor is the proceeding before him a judicial proceeding. In this view we are supported by the decision of this Court in *Durga Das Rukhit* v. *Queen-Empress* (2). The award which he makes does not possess any finality so far as the persons interested are concerned, for under S. 18 any person interested who has not accepted the award may within a certain time by written application to the Collector require a reference of the matter for the determination of the Court. This shows that so far as the Collector is concerned, he is not a Court.

And further at page 621 the learned Judges point out:

> His determination was not a judicial act; he was acting merely as an agent of the Government to ascertain the value and to make a tender.

Mr. Bose concedes for the sake of argument that so far as regards the Land Acquisition Act he may not be a Court; but so far as regards proceedings in that Court, he contends, he is a Court under S. 195, Criminal P. C. Mr. Bose points out that S. 195, sub-S. (2) now runs as follows:

> In Cls. (b) and (c) of sub-S. (1) the term 'Court' includes a civil, revenue or criminal Court,

Mr. Bose points out that before the amendment of 1923 the word used was "means." Hence he contends that the section contemplates other Courts besides civil, revenue or criminal Courts. His contention is that a "Court" means an authority who is empowered to take evidence and to decide a matter. In support of his contention he relies upon the case of *Empress* v. *Narayan Ganpayya* (3). In that case the question was whether a mamlatdar was or was not a Court. The learned Judges in disposing of the matter remarked: "I should describe him as a revenue Court," but it matters very little whether you describe him in that way or as a civil Court. The judicial result is precisely the same in a matter of this kind. I say that he was a "Court" for these reasons: he had power to summon witnesses, to take evidence, although it may be not to administer an oath to consider the evidence and to make a final order which might be an order of great importance and would be final unless changed by his superior on revision or appeal until there

(1) [1905] 32 Cal, 605=32 I. A. 93=1 C. L. J 227=9 C. W. N. 454 (P. C.).

(2) [1900] 27 Cal. 820.

(3) [1914] 39 Bom. 310=27 I. C. 147=16 Bom. L. R. 678.

had been a declaration of a civil Court which conflicted with it. I do not know whether that decision helps us much in the present case. Reading S. 475, Criminal P. C., together with S. 195, Criminal P. C., it is difficult to see what would be the Court other than civil, revenue or criminal Court contemplated by S. 195, sub-S. (2). Section 476 provides that any civil, revenue or criminal Court can in certain circumstances make a complaint to the Magistrate with regard to certain offences which are dealt with in Cls. (b) and (c) of sub-S. (1) of S. 195, Criminal P. C.

As far as can be seen S. 476 is the only section which gives any Court powers to make a complaint. This section seems to deal only with civil, revenue or criminal Court. Therefore, it seems to me that although the word used in S. 195, sub-S. (2) is "includes," the Courts which can make a complaint under that section are restricted to the Courts which we find detailed in S. 476, Criminal P. C. Whether S. 195. sub-S. (2) helps us much in determining the question whether the Land Acquisition Collector is or is not a Court, I am not very certain. But, after a careful consideration I have come to the conclusion that he is not a Court. His function really is to ascertain on behalf of the Government what is the value of the property which the Government proposes to acquire and to make an offer to the party. In doing so he is allowed, as has been pointed out in the case of *Ezra* v. *Secretary of State* (1), to import his own knowledge into the matter. In the case of *Durga Das Rukhit* v. *Queen-Empress* (2) (with special reference to page 826) a question arose as to whether a Deputy Collector under the Land Acquisition Act was or was not a judicial officer or a Court. In that case the question was whether his sanction was or was not required under S. 195, Criminal P. C., and it was held that he could not be regarded as a Court.

The conclusion to which I have finally come is that the Land Acquisition Deputy Collector is not a Court and that he, therefore, could neither give sanction nor more correctly make a complaint under S. 195, Criminal P. C., so far as S. 207, Indian Penal Code., is concerned. His sanction or rather his complaint was not necessary for a prosecution under S. 207, Indian Penal Code.

That being so, the Rule must be made absolute. The order of discharge is set aside and the Magistrate is ordered to proceed with the case from the point at which he has discharged the accused.

**Graham, J.**—I agree.

D.D. *Rule made absolute.*

---

## * A. I. R. 1927 Calcutta 623

RANKIN, C. J., AND C. C. GHOSE, J.

*Sarat Chandra Khan*—Appellant.

v.

*Upendra Nath Bose*—Respondent.

Appeal No. 129 of 1926, Decided on 31st January 1927, from the order of C. C. Ghose, J., in Original Civil Suit No. 692 of 1920, D/- 25th June 1926.

* *Limitation Act, S. 12—Appellant required to do certain things before delivery of copies to him—Default in doing these things will disentitle appellant from claiming exclusion of whole time.*

Any failure in reasonable diligence which produces unnecessary delay owing to default of appellant to do things required by law to be done by him at some stage of obtaining copies, will disentitle an appellant to claim the whole of the time actually occupied in obtaining the copy as the time unnecessarily occupied is not time "requisite" within S. 12: *A. I. R.* 1922 *P. C.* 352; *A. I. R.* 1925 *Cal.* 735, *Cons.* [P 624 C 1]

*S. C. Bose*—for Appellant.

*B. K. Ghosh*—for Respondent.

**Rankin, C. J.**—The first question is whether this appeal was brought out of time. The order appealed from was pronounced on the 26th June 1926 and the memorandum of appeal was filed on the 6th November 1926, the last day of the long vacation. The law gives to an appellant twenty days excluding the time requisite for obtaining a copy of the order appealed from. Cases which show how this rule is to be applied to the rules and practice of this Court on the Original Side are *Nibaran* v. *Martin & Co.* (1), *Pramatha* v. *Lee* (2), *Gobind* v. *Official Assignee* (3) *Kamrudin* v. *Mitter* (4).

These decisions show (i) that a copy of the order must be applied for within

(1) [1920] 32 C. L. J. 127=58 I. C. 408.
(2) [1919] 23 C. W. N. 563=52 I. C. 582 on appeal A. I. R. 1922 P. C. 352=49 Cal 999.
(3) A. I. R. 1925 Cal. 291.
(4) A. I. R. 1925 Cal. 735=52 Cal. 342.

twenty days of its being pronounced and (ii) that it will be of no avail to apply for such copy unless within the twenty days a requisition to draw up the order has been given either by the appellant or by some other party to the cause. Even if these conditions are complied with the time to be excluded will not necessarily be the whole of the time which in fact elapsed between the date of the application for a copy and the date on which the copy was furnished. Under the Original Side rules, there are certain points at which the time to be occupied by the process of obtaining a copy of the order is in the control of the appellant to some extent : (a) the draft of the order has to be approved or amended. (b) The fees for the copy order have to be paid in stamps ; (c) the order when ready has to be taken up. Any failure in reasonable diligence which produces unnecessary delay at one or more of these stages will disentitle an appellant to claim the whole of the time actually occupied in obtaining the copy of the order. The time unnecessarily occupied is not time " requisite " within the meaning of S. 12 of the Limitation Act, 1908.

There is, however, another matter as to which time is within the control of the appellant. This appears by S. 27 of Ch. 16 which gives to any party a right to apply to have the order drawn up if the party in whose favour it was made, does not do so within four days. The present case requires us to consider this. Application for a copy was made on the 29th June, but a requisition to draw up the order was not given till 15th July. Meanwhile, of course the application for a copy was entirely ineffective.

In my opinion the decisions show that the proper way for ascertainig whether the appellant is in time is to look first at the date on which he applied for a copy. By that date so many days out of the twenty given to him by Art. 151 of Schedule I of the Limitation Act had been exhausted, and he had so many left. The time requisite for obtaining the copy begins to run in his favour from that date. But if he could and should have applied to have the order drawn up before any such application was in fact made whether by himself or any other party or, if unnecessary delay was occasioned by his conduct at any of the other points at which time was within his control, he can get no credit for the time wasted. Such time as well as the time elapsing between the obtaining of the copy and the filing of the memorandum of appeal must be debited against the balance remaining to his credit out of the twenty days at the time when he applied for the copy of the order.

Now the order in this case was made on 25th June and the appellant applied for a copy on 29th June, so he had sixteen (if not seventeen) days left to him out of the twenty days allowed. He might and should have applied for the order to be drawn up by (say) 1st July. He wasted fourteen days before doing so on 15th July. He took from 12th to 16th August to approve the order but that period included a week-end. I see nothing else against him, though there was some delay between 3rd September when he paid the fees and 14th September when he got the copy. But in any case if we go back a fortnight from 3rd September that only takes us to 20th August. As at that date the appellant had sixteen days still to run out of the twenty allowed to him he was not therefore out of time when on 27th August the long vacation commenced and as the memorandum was filed by the opening day in November he is not barred by the statute.

In these circumstances, an order may be made approving of the index as set forth in paragraph 6 of the petition and giving fourteen days from to-day as time in which to file the paper-book. Costs of this application to be respondent's costs in the appeal. The judgment, if any, to be included in the paper-book.

**Ghose, J.**—I agree.

## * A. I. R. 1927 Calcutta 625

RANKIN, C. J., AND MUKERJI, J.,

*Japan Cotton Trading Company Ld.*, —Appellant,

v.

*Jajodia Cotton Mills, Ld.* — Respondent.

Appeal No. 107 of 1926, Decided on 24th November 1926, from an order of C. C. Ghose, J.

* (a) *Companies Act* (1913), *S.* 163—*Notice by creditor's solicitors is not enough.*

A demand by the solicitors of a creditor is not sufficient for purposes of S. 163. [P. 626, C. 1]

(b) *Companies Act* (1913), *S.* 163 (1)—*Company must be in default at the time of service.*

Sub-Section (1) to S. 163 means that the company to be served must ,at the time of the service, be in default and that, being in default, it is to be served with a demand under rather special precautions so that if it makes further default for a period of three weeks the question of its inability to pay the debts is set at rest. [P. 626, C. 2]

*Langford James* and *A. K. Roy*—for Appellant.

*S. N. Banerjee, Binod Mitter* and *K. P. Khaitan*—for Respondent.

**Rankin, C. J.**—This is an appeal by the Japan Cotton Trading Company, Limited, which presented a petition before Mr. Justice C. C. Ghose for the compulsory winding up of a company called the Jajodia Cotton Mills, Limited. Several points were dealt with by the judgment, but there is a point not dealt with by the judgment, as to which we are not satisfied, that it ever was abandoned and which we think is fatal to the petition.

It appears that a firm called Sukdeodas Ramprosad were the managing agents of the company. They were also Banians and apparently debtors of the petitioning creditors. They obtained a promissory note for Rs. 6,00,000 from the company payable on the 31st of March 1926 and they endorsed that promissory note to the petitioning creditors. It is as endorsees of that promissory note that the Japan Cotton Trading Company, Limited, claim to be entitled to wind up the Cotton Mills, Limited.

The first question in such a case, logically no doubt, is the question whether there is a good petitioning creditor's debt, and two points as to that are contested at the present stage of this case. The first point of contest is that it is said that upon a true construction of the promissory note it is not a note binding the Jajodia Cotton Mills, Limited, at all, but is really a note on which the directors, D. H. Wilmer, Radha Kissen Sonthalia and the firm of Sukdeodas Ramprosad were personally liable.

The second question is this: that towards the end of May 1926 it is alleged that an arrangement was made between the Japan Trading Company, Limited, and Messrs. Sukdeodas Ramprosad either on their own behalf or both on their own behalf and on behalf of the Jajodia Cotton Mills, Limited, whereby Messrs. Sukdeodas Ramprosad were to give two cheques amounting in all to Rs. 40,000 upon the term that the petitioning creditors would abandon their rights on this promissory note against the Jajodia Cotton Mills, Limited.

Apart from these two points there is another. It is said by the company that in this case the petitioning creditors have not served a statutory notice in compliance with S. 163 of the Indian Companies Act and that in their petition for winding up they make no other case as regards the inability of the company to pay its debts.

Now, there can be no doubt that the petition before us is based as regards proof of inability to pay the debts upon two notices which are relied upon under S. 163. Both are from Messrs. Fox and Mandal, the petitioning creditor's solicitors, saying that they were

> instructed to demand payment to the Japan Cotton Trading Company, Limited, or to us as their solicitors the sum of Rs. 6,00,000 (six lacs)

and giving notice that the promissory note had been dishonoured by non-payment and that in default the Japan Cotton Trading Company Limited would adopt legal proceedings.

Those notices are letters signed by the solicitors in their own name Fox and Mandal, and the objection taken before us is that that does not comply with the of sub-S. (1) to S. 163:

> If a creditor, to whom the company is indebted in a sum exceeding Rs. 500 then due, has served on the company a demand under his hand requiring the company to pay the sum so due.

We have, therefore, to consider in this case whether it is correct to apply for the purposes of S. 163 the general common law principle *qui facit per alium facit per se* in accordance with the decision in

*In re Whitlay Partners, Limited* (1). It seems to me very difficult to say that the words "under his hand" in a section of this character are complied with by any notice in writing or by a notice which is signed by somebody acting in the ordinary way as a solicitor of the petitioning creditors. The effect of the statutory notice is that unless the debt is paid within three weeks, or some arrangement is made with the creditors, the company is in the position of being conclusively estopped from denying that it is unable to pay its debts. It is a highly formal and important document, although it is perfectly true that the demand may be made in any terms. It has to be served on the company by leaving the same at its registered office and it has to be a demand "under the hand" of the creditors. I think that those words must be taken to have a special intention. The intention must be that there can be no doubt at all about such a notice as this being recognised as a notice directly authorised by the creditors and as one to which will attach or may attach the very serious consequences which the Companies Act imposes. That any solicitor's letter making a demand in any form, if left at the registered office of the company, should be regarded as a notice that the company must be wound up on the creditor's petition if the debt were not paid within three weeks is, I think, not the intention of the statute. I am far from saying that any good would be done by attempting to draw any analogy between this statutory notice and such a notice as the Bankruptcy notice under the English Bankruptcy Act. But it is clear that "under his hand" has some special purpose in this connexion; and in view of the fact that a consequence so serious is attached to non-compliance with the notice I am not of opinion that there is here nothing to prevent the general common law principle from being applied. That being so the two notices founded upon in this petition as being statutory notices are not sufficient.

The only other question which arises is whether the letter written on the 31st of March 1926 signed in the name of the petitioning creditors by their manager Mr. Y. Ohsaka would not be a sufficient compliance. In this case it appears that the promissory note was payable on the 31st of March—the very day on which this letter was sent. The letter runs as follows:

> Referring to our letter of the 26th March current, we beg to present to you herewith for payment the promissory note for Rs. 6,00,000 dated 24th July 1925 executed by you in favour of Messrs. Sukdeodas Ramprosad and by the latter endorsed over to us for valuable consideration. In default of payment. we shall place the matter in the hands of our solicitors.

There might be no great difficulty in allowing these petitioning creditors to rely upon this letter instead of the two letters founded upon in the petition as statutory notice, but, in my opinion, this letter is not such a notice as satisfies the conditions of S. 163. One may take either of two views with regard to the letter. First, it does not appear that the promissory note was one payable on demand; and, therefore, as at present advised, I think that presentment for payment was necessary before it could be said that on the 31st of March the money was due. At the time this letter was written and at the time it was served upon the company presentment had not been completed in order to make the money due. Whether or not the peon who served this letter was charged with the duty of receiving the money and could, on being told that the money would not be paid, have produced out of his pocket another letter and then served it and so satisfied the section I need not consider; but at the time this letter was served that money could not be said to be due because presentment was being made for the first time by the very letter itself. If, on the other hand, one takes the view that presentment was not necessary at all to charge the makers of this promissory note, then the company was not in default until the end of that day. At the time the letter was served upon them they had still some time in which they could or could not pay the money; and, in my judgment, in no way can that letter be regarded as a compliance with S. 163. In my view sub-S. (1) to S. 163 means that the company to be served must, at the time of the service, be in default and that, being in default, it is to be served with a demand under rather special precautions so that if it makes further default for a period of three weeks the question of its inability to pay its debts is set at rest. For this

(1) [1886] 32 Ch. D. 337=55 L. J. Ch. 540=34 W. R. 505=54 L. T. 912.

reason I think this petition was presented without the petitioning creditors having got their tackle properly in order.

It is said that even if the petitioning creditors should fail in making out that the company is unable to pay its debts by means of the statutory notice, they should be allowed to prove the company's insolvent position *aliunde*. In my judgment, that could only be done by amending the petition. But in the present case it is said that the balance sheet produced by the company itself in the course of the proceedings warrants our holding that the company is unable to pay its debts. Apart from the fact that if the petitioning creditors wanted to show that this company was unable to pay its debts, they ought to have made a definite case so that the company could answer it. I cannot tell for certain, looking at this balance sheet, anything much more than this that this company had some 21 lacs ordinary shares paid up, further 5 lacs preference shares paid up, that it borrowed large sums in addition to that from time to time and has apparently lost something like Rs. 2,72,000. That is an account of the position of the company. Whether it is impossible for this company by creating a mortgage over its freehold property or over its plant and machinery to raise money is another matter. These are questions at which I can only guess. I do not want to pretend for a moment that this balance sheet would inspire me with any confidence in the concern, but it is not right that this balance sheet produced by the respondents should be taken as against them as proof on the face of it that they are unable to pay their debts.

We find that there are two matters on which Mr. Justice Ghose made a decision. He held that the promissory note in this case is not a note of the company. I do not propose to give any opinion on that point, nor would it be fair to do so in view of the fact that the company's case has not been argued before us. The same observation applies to the question whether there was any arrangement releasing the company from the claim of the petitioning creditors. But the effect of our judgment is that these two matters are no longer matters covered by decision and the parties will not any further be deemed to be bound by Mr. Justice Ghose's finding.

There is a further matter, viz., the state of the account between Messrs. Sukdeodas Ramprosad and the petitioning creditors. I doubt if that has any bearing on the matter and in any case I say nothing about it.

But there is yet one matter upon which I do desire to say something. When this petition was presented, the company without waiting for it to come on for hearing, applied to Mr. Justice Ghose for an order to have the petition taken off the file and the advertisements stayed, and so forth. The company took no advantage by that procedure because the hearing was adjourned to the same day as the hearing of the petition, but I find that the learned Judge has given against the petitioning creditors the costs of the company in making that application. We have gone through the points in this case and it is only necessary for me to say that there was no case at all for taking the petition off the file or anything of that sort. It was a case which was bound to be dealt with in the presence of the creditors and shareholders and after advertisements. I think the order of the learned Judge directing the petitioning creditors to pay those costs to the company was unfounded and I am prepared to interfere with that order as to costs and to discharge it. The result is that this petition is disposed of by this Court on the basis that the petitioning creditors have not satisfied the Court by proper proof that the case comes within S. 162, Cl. (5), that the company is unable to pay its debts. The questions as to the liability of the company and as to the arrangement are left open.

The order of the learned Judge is varied by discharging that part of it which directed the petitioning creditors to pay to the company costs of the intermediate application, but the petition is otherwise dismissed with costs and the appeal is dismissed with costs. As to the intermediate application Mr. Banerjee's clients will get the costs of one affidavit only on the ground that it was used as part of their opposition to the petitioning creditors' petition but will get no costs of launching the application or of the hearing of the same.

**Mukerji, J.**—I agree.

D.D.

*Order varied.*

*Appeal dismissed.*

## A. I. R. 1927 Calcutta 628

C. C. GHOSE AND CAMMIADE, JJ.

*Bhuban Chandra Prodhan*— Accused —Appellant.

v.

*King-Emperor*—Opposite Party.

Criminal Appeal No. 34 of 1927, Decided on 26th May 1927, from the order of the Addl. S. J., Midnapur, D/- 20th November 1926.

(a) *Criminal P. C., S. 476—Conduct of jury called in question—Court enquiring into it—Enquiry is judicial.*

Whenever the conduct of the jury is taken exception to, during the progress of the trial in the Sessions Court, the presiding Judge has undoubted jurisdiction to enquire into the same and such an enquiry is a judicial enquiry. In the course of such an enquiry the Sessions Judge is entitled to call upon any persons to appear before him, to administer oath to such persons and to require them to give evidence: *A. I. R.* 1923 *Cal.* 724, *Ref.* [P 629, C 1]

(b) *Criminal Trial—Jury cannot talk to persons connected with accused.*

The jury are not entitled to discuss the case which is being tried before them, or to talk to persons connected with the accused before them. [P 629, C 2]

(c) *Criminal P. C., S. 476—Enquiry need not be exhaustive.*

Having regard to the terms of S. 476, Criminal P. C., any preliminary enquiry that may be deemed necessary before making a complaint need not be of an exhaustive nature. [P 629, C 2]

*Bir Bhushan Dutt*—for Appellant.

*Khundkar*—for the Crown.

**Judgment.**—This appeal must be dismissed. What has happened in this case is this: A trial was going on before the learned Sessions Judge in which the accused had been charged with having committed an offence punishable under S. 395, I. P. C. It appears that certain other people had been committed to take their trial in the Sessions Court in respect of an offence punishable under S. 412, I. P. C. There was an order made in the last-mentioned case that the trial of the accused under S. 412, I. P. C., should be taken up after the trial of the case under S. 395 had been concluded. It appears further that one of the accused in the case under S. 412, I. P. C., was the *tadbidkar* of the accused in the case under S. 395. The appellant before us is the President, Panchayat of the Union, and it is said that he noticed on one particular day that the foreman of the jury, who were trying the accused under S. 395, I. P. C., was talking to the accused in the case under S. 412, who was the *tadbidkar* of the accused in the case under S. 395. He thereupon brought the matter to the notice of the learned Sessions Judge.

The learned Sessions Judge thereupon determined to hold an enquiry into the matter, and as preliminary thereto, the appellant before us was required to file an affidavit stating what he had observed in respect of the matter to which he had drawn the attention of the learned Sessions Judge. The appellant filed an affidavit which was sworn to before the sheristadar of the Court. The affidavit was brought to the notice of the Sessions Judge on the 26th July 1926, when he, after perusing the affidavit, called upon the appellant before us to step into the witness-box and to state orally on oath the circumstances referred to in his affidavit. The appellant thereupon gave evidence before the learned Sessions Judge. It subsequently transpired that the sheristadar had no power to have affidavits sworn before him. It followed thereupon that no action could be taken on the affidavit referred to above, but the learned Sessions Judge having come to the conclusion in the course of the enquiry which he held, wherein the appellant before us gave evidence, that the information which had been supplied by the appellant was false, directed that complaint should be lodged againt the appellant for having committed an offence punishable under S. 193, I. P. C. He accordingly drew up proceedings under S. 476, Criminal P. C., in respect of the statement made by the appellant during his examination on the 26th July 1926 at the enquiry referred to above.

It is argued before us that the proceedings initiated by the learned Sessions Judge under S. 476, Criminal P. C., are incompetent, because there is no provision whatsoever in the Code of Criminal Procedure, which authorized the learned Judge to hold an enquiry, such as he did in the midst of the trial of the accused under S. 395, I. P. C., into the circumstances to which attention had been drawn by the appellant and that, therefore, the enquiry which he held was not and should not be treated as a judicial enquiry, and no oath could be administered to the appellant on the

26th July 1926. It is further argued that there is nothing in the Code of Criminal Procedure which prevented or could prevent the foreman of the jury from talking to the *tadbidkar* of the accused in the case under S. 395.

Lastly, it is argued that the learned Judge has nowhere recorded that it is expedient in the ends of justice to make a complaint such as he directed to be made under the provisions of S. 476, Criminal P. C., nor did he find as a fact that the evidence before him was of such a nature as could warrant his taking action in the manner in which he did.

It is perfectly true that there is no express provision in the Code of Criminal Procedure for an enquiry of the nature such as was held by the learned Sessions Judge during the progress of the trial of the accused under S. 395, I. P. C., but there can be no doubt whatsoever that the learned Judge had power to make such an enquiry, and in this connexion reference may be made to the case of *Rahim Shaik* v. *Emperor* (1). As observed in that case, it would be farcical to hold that when a matter of this description is brought to the notice of the learned Sessions Judge in the midst of a Sessions trial he has no jurisdiction to make an enquiry, such as in his discretion he may consider necessary in the ends of justice.

In our opinion, whenever the conduct of the jury is taken exception to during the progress of the trial in the Sessions Court the presiding Judge has undoubted jurisdiction to enquire into the same. It follows from what has been stated above that an enquiry such as is referred to must in the nature of things be a judicial enquiry. In the course of such an enquiry the Sessions Judge is entitled to call upon persons to appear before him, to administer oath to such persons and to require them to give evidence. We must therefore negative the first point argued before us.

As regards the second point, the statement of the proposition carries, in our opinion, its own refutation. We entirely dissent from the proposition sought to be canvassed before us that the jury were entitled (we leave aside the cases referred to in Ss. 293 and 300, Criminal P. C.) during the progress of a trial of a case to talk to persons connected with the accused. The jury are obviously not entitled to discuss the case which is being tried before them, or to talk to persons connected with the accused before them. The second point must, therefore, be negatived.

As regards the third point, the learned Judge's order shows that in his opinion the appellant had given false evidence before him. That order by itself and in view of the proceedings stated under S. 476, Criminal P. C, carries the implication that the learned Judge must have felt that the ends of justice required that an enquiry before a Magistrate should take place. It is not necessary, having regard to the terms of S. 476, Criminal P. C., that any preliminary enquiry that may be deemed necessary should be of an exhaustive nature. The third point also fails and the result is, as stated above, that this appeal must stand dismissed.

D.D. *Appeal dismissed.*

(1) A. I. R. 1923 Cal. 724=50 Cal. 872.

---

## * A. I. R. 1927 Calcutta 629

CUMING AND MALLIK, JJ.

*M. A. Sassoon and Sons, Ltd.*—Appellants.

v.

*Gosto Behari De* and *others*—Respondents.

Appeal No. 83 of 1927, Decided on 12th May 1927, from original order of the Dist. J., Hooghly, D/- 13th January 1927.

(a) *Presidency Towns Insolvency Act*, (1909), *S.* 18—*S.* 18 *applies where adjudication order has been made.*

Section 18 only applies to a case where the Judge exercising insolvency jurisdiction has already made an order of adjudication. [P 630, C 2]

* (b) *Government of India Act*, (1915), *S.* 107—*Single Judge of High Court exercising insolvency jurisdiction cannot exercise powers under S.* 107.

The power of superintendence as contemplated by S. 107 is exercised by the High Court as a whole in what is the execution capacity and not by a single Judge exercising insolvency jurisdiction.

Therefore, where the Insolvency Judge of the High Court made the order staying insolvency proceedings in the Court of the District Judge at Hooghly.

*Held*: that the District Court at Hooghly which is a Court of concurrent jurisdiction with the Insolvency Court of the High Court was not bound by the order of stay. [P 631, C 1]

(c) *Presidency Towns Insolvency Act*, (1909) *S.* 90—*Insolvency Judge of High Court cannot*

*exercise extraordinary power of calling up a case from mofussil Court.*

The Judge of the High Court presiding over the insolvency Court cannot exercise the extraordinary power of calling up any case pending before a mofussil Court under S. 90. [P 629 C 2]

*H. D. Bose, A. N. Ghose* and *Manindra Kumar Bose*—for Appellants.

*Provas Chandra Mittra, Tarakeswar Pal Choudhury, Anil Chandra Dutt, Bimal Chandra Das Gupta, Nanda Gopal Banerji* and *Gopal Chandra Mukherji*—for Respondents.

**Cuming, J.**—This is an appeal by Messrs. M. A. Sassoon & Sons, Creditors No. 1 of an insolvent Gosto Behari De, against the order of the District Judge of Hooghly, declaring the said Gosto Behari De to be an insolvent. The facts of this case are briefly these. The insolvent Gosto Behari De was a banian of the firm of Messrs. M. A. Sassoon & Sons. He apparently carried on business for some time in Calcutta and got into financial difficulties.

On the 13th November 1926 he made an application before the District Judge of Hooghly to be declared an insolvent. Notices appear to have been served on various parties. Meanwhile, on the 17th December 1926, the present appellants, Messrs. M. A. Sassoon & Sons applied to the insolvency Judge in the High Court to have Gosto Behari De declared an insolvent. On this application an order was passed fixing the hearing of this application in the High Court for Tuesday, the 18th January 1927, and there was a further order that all further proceedings in the Court of the District Judge of Hooghly on the application of the said debtor, Gosto Behari De, in the Insolvency Case No. 75 of 1926, be stayed pending the hearing of the application in the High Court. It does not appear that this order was communicated to the Court concerned by the insolvency Court in the High Court as is the usual practice where proceedings of a Court are stayed by the order of another Court. When the case was called on for hearing before the District Judge the present appellants produced a copy of this order and disputed the jurisdiction of the District Judge of Hooghly to continue his proceedings. The District Judge, however, continued his proceedings and on the 13th January 1927 he adjudicated Gosto Behari De insolvent. This order has been challenged in appeal by Messrs. M. A. Sassoon & Sons on the ground that the proceedings in the Court of the District Judge of Hooghly having been stayed by the order of the insolvency Judge of the High Court the further proceedings were ultra vires and out of jurisdiction and therefore his order was bad in law. The respondents have contended on the other hand that the Judge in the insolvency Court of the High Court had no power to stay the further proceedings in the insolvency Court at Hooghly. Therefore the District Judge acted within his jurisdiction and legally in continuing the proceeding and declaring Gosto Behari De insolvent.

The sole point to be decided in this appeal is whether the Judge in the insolvency Court of High Court had any power to stay the proceedings in the Court of the District Judge at Hooghly. Mr. Bose who has appeared for the appellants has suggested to us that the learned Judge, Mr. Justice Buckland, acted either under S.18 of the Presidency Towns Insolvency Act or under the general power of superintendence which the High Court has over the Subordinate Court under S. 107 of the Government of India Act. With regard to Mr. Bose's first contention S. 18 certainly would not justify the order of stay made by Mr. Justice Buckland. S. 18 provides that

> the Court may, at any time, after the making of an order of adjudication stay any suit or other proceeding pending against the insolvent before any Judge or Judges of the Court or in any other Court subject to the superintendence of the Court.

Section 18, clearly, only applies to a case where the Judge exercising insolvency jurisdiction has already made an order of adjudication. That, however, is not the case at present, for admittedly no order of adjudication had been made in the case. No other provision of the Presidency Towns Insolvency Act has been shown to us under which any stay order could be made. No doubt in the exercise of his extraordinary original jurisdiction a Judge on the Original Side can call up any case pending before a mofussil Court. That, however, is done in the exercise of his extraordinary jurisdiction. It is quite clear from S. 90 of the Presidency Towns Insolvency Act that the Judge presiding over the Insolvency Court does not exercise this extraordinary power. S. 90 states that

in proceedings under this Act the Court shall have the like power and follows the like procedure as it has and follows in the exercise of its original civil jurisdiction,

and clearly therefore not of extraordinary jurisdiction.

Mr. Bose has next contended that the Court would have powers under S. 107 of the Government of India Act which gives the High Court power of superintendence over subordinate Mofussil Court's to stay proceedings in the Court of the District Judge. The power of superintendence as contemplated by S. 107 of the Government of India Act, is exercised by the High Court as a whole in what, in my opinion, is the execution capacity and not by a single Judge exercising insolvency jurisdiction.

The conclusion, therefore, to which I am bound to come is that the District Court at Hooghly which is a Court of concurrent jurisdiction with the insolvency Court of the High Court was not bound by the order of stay granted by Mr. Justice Buckland and therefore the District Judge of Hooghly was right in disregarding it and completing his proceedings.

These are the only points which have been urged on behalf of the appellants. The appeal must therefore fail and is dismissed with costs. Hearing-fee ten gold mohurs of which five gold mohurs will be paid to the insolvent and the remaining five gold mohurs to the other respondents. The connected Rule is discharged without costs.

**Mallik, J.**—I agree.

*Appeal dismissed.*
*Rule discharged.*

G.B.

---

## A. I. R. 1927 Calcutta 631

C. C. GHOSE AND GRAHAM, JJ.

*Emperor*

v.

*Rajab Ali Fakir*—Accused.

**Criminal Reference No. 4 of 1927 and Criminal Appeal No. 208 of 1927, Decided on 19th May 1927, from a reference made by the 1st Addl. S. J., Mymensingh, D/- 23rd March 1927.**

***(a) Criminal P. C., S. 297—Sessions Judge should present jury points in favour of accused and not merely read out evidence—Jury told that there was no difficulty in coming to the conclusion that accused was guilty—There is grave misdirection.***

Where, in a case under Ss. 302 and 324, the Sessions Judge, while charging the jury practically withdrew the case from the jury and told them in so many words that the case itself presented no difficulties whatsoever and that no reasonable man could have any doubt whatsoever that the accused had any intention other than that of killing the deceased or at the very least, the intention of inflicting bodily injuries sufficient, in the ordinary course of things, to cause death and in dealing with the evidence in the case the Judge did nothing more than read out the evidence to the jury and finally in dealing, with the points raised by the defence, he observed that they all seemed to be very trivial and beside the point :

*Held* : having regard to the way in which the Sessions Judge summed up the case to them, they could not but come to the conclusion that there function in the case was to register his opinion. It is not enough to merely read out the evidence to the jury : it is incumbent on the Judge to analyze that evidence and to present to the jury such points as could legitimately arise in favour of the accused and therefore there was grave misdirection. [P 632 C 1,2 ; P 633 C 1]

*(b) Criminal Trial—Trial for murder—Every procedure must be strictly followed—Penal Code, S. 302.*

It is imperative in cases where accused is being tried for his life that the provisions of the law should be strictly adhered to and that the accused should not have any manner of grievance with regard to the procedure adopted at the trial. [P 632 C 2]

*(c) Criminal P. C., S. 374—Entire case is open to High Court if trial has been according to law in Court below—Otherwise retrial should be ordered.*

No doubt the entire case is open to the High Court under S. 374, but that assumes that whatever has happened, before the case comes to the High Court, has been done in strict accordance with the provisions of the law. But if there has been no proper trial then the only course that is open to the High Court is to direct a re-trial. [P 633 C 1]

*Khundkar*—for the Crown.

*Hemendra Chandra Sen*—for Accused.

**C. C. Ghose, J.**—This is a reference under S. 374, Criminal Procedure Code, the reference being numbered 4 of 1927. There is also an appeal by the accused which is numbered 208 of 1927. The accused was charged with having committed offences punishable under Ss. 302 and 324, Indian Penal Code and the case for the prosecution shortly stated is as follows :

It appears that the accused has a younger brother named Kaseem. The latter had helped the accused for a long series of years in the cultivation of his lands, and it appears that by the profits of the successful cultivation of his lands

other lands had been acquired. Kaseem, not unnaturally put forward a claim to a share in the acquired lands, but the accused was not prepared to admit Kaseem's claim. In the end the accused got dissatisfied ; and shortly before the date of the occurrence he had separated from his brother and retained all the lands. There were therefore disputes between the brothers and their mother tried to intervene and bring about a settlement of the same. The accused, however, proved obdurate and the mother told him that she would inform the elders of the village and would ask for their mediation. This apparently made the accused very angry. It appears that the accused immediately thereafter took a dao and struck his mother on the forehead with it. There were other wounds inflicted by the accused on the mother and as the result of the injuries the mother died. While the mother was being attacked Kaseem and his wife threw themselves at the feet of the accused and implored him to stop. Kaseem was attacked by the accused and he got very serious injuries. The wife of Kaseem was literally hacked to death by the accused, the injuries inflicted on her being no less than 21 in number. She was a little girl of 16 with a four months old child in her womb. She also died.

The accused was arrested by the police and sent up for trial. The trial was held by the learned First Additional Sessions Judge of Mymensingh and a jury. It appears from the learned Judge's charge to the jury that the learned Judge practically withdrew the case from the jury and told them in so many words that the case itself presented no difficulties whatsoever and that no reasonable man could have any doubt whatsoever that the accused had any intention other than that of killing his mother and his brother's wife, or at the very least, the intention of inflicting bodily injuries sufficient, in the ordinary course of things, to cause death. The learned Judge proceeded to refer to some of the exceptions to S. 300, Indian Penal Code ; and in dealing with the charge under S. 324, Indian Penal Code, he observed that there could be no shadow of doubt that an offence under S. 324, Indian Penal Code, was committed by the accused against Kaseem and that the task of the jury was very simple. In dealing with the evidence in the case it appears that the learned Judge did nothing more than read out the evidence to the jury and finally in dealing with the points raised by the defence, he observed that they all seemed to be very trivial and beside the point. No doubt, in the beginning of the charge to the jury the learned Judge gave certain cautions to the jury but the charge taken as a whole is entirely one-sided and the jury, having regard to the way in which the learned Judge summed up the case to them, could not but come to the conclusion that their function in this case was to register the opinion of the learned Judge. We regret to have to make this observation in a case of this description, but there can be no doubt that the jury were practically told that there was no use considering the matter from any point of view other than the point of view presented by the prosecution and that in the events which had happened, there was only one course open to them, viz., to bring in a verdict of guilty. In our opinion the charge of the learned Judge to the jury offends against the most elementary rules to be observed in cases of summing up the evidence to the jury after the examination and cross-examination of the witnesses are finished and there has been no proper trial of the case in this instance. The accused was entitled, as a matter of right, to a proper summing-up of the case to the jury : in this instance he did not get that and the jury did not receive that assistance from the learned Judge which they were entitled to get.

In this view of the matter, there is no escape from the conclusion that there has been no proper trial in this case. The charge was under Ss. 302 and 324, Indian Penal Code ; the accused was being tried for his life and it is imperative in cases of this description that the provisions of the law should be strictly adhered to and that the accused should not have any manner of grievance with regard to the procedure adopted at the trial. It is not enough to merely read out the evidence to the jury : it was incumbent on the learned Judge to analyze that evidence and to present before the jury such points as could legitimately arise in favour of the accused. That has not been done ; and on

that ground alone there has been grave misdirection.

The learned Deputy Legal Remembrancer has argued that the entire case is open to us under S. 374, Criminal Procedure Code; no doubt that is so; but that assumes that whatever has happened, before the case comes to this Court, has been done in strict accordance with the provisions of the law, namely that there has been a proper trial before a Judge and jury. But if we are unable to say that there has been a proper trial in this case, then the only course that is open to us is to set aside the conviction and sentence and to direct a re-trial.

In this view of the matter we set aside the conviction and sentence and direct that the accused be re-tried before the learned Sessions Judge of Mymensingh and a jury. We very much regret that this course has been forced upon us; but as far as we can see, there is no help for it.

**Graham, J.**—I entirely agree. There are passages in the learned Additional Sessions Judge's charge the effect of which was to withdraw from the jury the determination of facts which it was their province, and their province alone, to decide. Some of these passages may be quoted :

> There might have been sufficient provocation to justify Rajab in using as much force as was necessary to turn his mother out of the bari, but I can see nothing to justify Rajab's previous and murderous attack on his mother. If Kaseem, after seeing his mother being killed before his eyes had killed Rajab, I should hold that he had indeed grave and sudden provocation.
>
> Again :
>
> The fact that it made Rajab want to kill his mother goes to show that he knew his case was bad, and that she was right, and he did not want the division discussed in a baithak.
>
> Then again
>
> As regards S. 324, I. P. C., there can be no shadow of doubt that an offence under S. 324, I. P. C. was committed against Kaseem, and again your task is simple.

These directions from the Judge are open to serious objection because they are calculated to suggest to the jury that there was practically no doubt as to the main facts; that is to say, the attack on the accused's mother and on Kaseem and Kaseem's wife. But these were obviously matters for the decision of the jury; and no matter how clear the case may have appeared to be, it was the bounden duty of the Judge to leave them to the jury to decide. It is true that at the commencement of the trial the learned Judge had told the jury that they were the judges of fact and were not bound by his opinion, but that direction cannot cure the defect, inasmuch as these passages come at a later stage in the charge, and in my judgment they must have created a wrong impression in the mind of the jury and may have induced them not to consider the evidence with that care which they would otherwise have bestowed upon it.

Another point which may be mentioned is the fact already mentioned by my learned brother that there is no proper summing-up in the charge. It is not enough merely to read out the evidence in extenso. What the learned Judge should have done was to sum up the evidence on both sides and to place the case succinctly before the jury.

For these reasons I agree with my learned brother; and much as we regret having to adopt such a course we have I think no alternative but to direct a re-trial of the case.

G.B. *Re-trial directed.*

---

## A. I. R. 1927 Calcutta 633

MUKERJI AND ROY, JJ.

*Maharaj Bahadur Singh*—Appellant.

v.

*Karani Mai*—Respondent.

Appeal No. 206 of 1926, Decided on 15th March 1927, from the appellate Order of the Dist. J., Rangpur, D/- 8th February 1926.

(a) *Bengal Tenancy Act, S. 153, Explanation—Irregularity in publishing or conducting sale also includes fraud.*

Fraud in publishing or conducting a sale cannot be kept separate from irregularities in the publication or conduct thereof for the purpose of the explanation to S. 153 : 18 *C. W. N.* 1266 and 22 *C. L. J.* 244, *Diss.*; 17 *C. W. N.* 84, *Dist.*

Where the Munsiff dismissed an application to set aside a rent sale on the ground of fraud in publishing and conducting it :

*Held* : that no appeal lay to the District Judge. [P 635 C 2]

(b) *Appeal — Competency — Lower appellate Court having no jurisdiction—Whether second appeal lies.*

Where no appeal lay to the lower appellate Court but it entertained and decided it.

*Held*: (*Per Mukerji, J.*), possibly, if no appeal lay to the lower appellate Court, an appeal lies from its decision to the High Court. [P 635, C 2]

*Naresh Chandra Sen Gupta* and *Urukramdas Chakravarti*—for Appellant.

*Jitendra Kumar Sen Gupta*—for Respondent.

**Mukerji, J.**—This appeal arises out of proceedings held for setting aside a rent sale. The application to set aside the sale was dismissed by the Munsiff. There was an appeal preferred from this order to the District Judge and the learned Judge has ordered the sale to be set aside. From the order of the learned District Judge the present appeal has been preferred by the decree-holder. An application under S. 115 of the Code of Civil Procedure directed against the said order, has also been filed on his behalf. The sale was held in execution of the decree which had been obtained in a suit for rent and the said decree as well as the order refusing to set aside the sale were passed by a Munsiff, who, it is conceded, had final jurisdiction to deal with the matter under S. 153 of the Bengal Tenancy Act.

The first ground that has been urged on behalf of the decree-holder is to the effect that the order which was passed by the Munsiff in the present case was one from which no appeal lay. It has been contended on behalf of the respondent that the order is covered by the exception contained in S. 153 as it decides a question relating to title to land or to some interest in land as between parties having conflicting claims thereto; in other words, it has been urged that the question as to whether the sale should or should not be set aside is a question which relates to title to land or to some interest in land as between the decree-holder who is the auction-purchaser in the present case and the judgment-debtor on the other and that, therefore, the order is covered by this exception. On behalf of the appellant it has been pointed out that by reason of the explanation to S. 153 a question as to the regularity of the proceedings in publishing or conducting a sale in execution of a decree for arrears of rent is not a question relating to title to land or to some interest in land as between parties having conflicting claims thereto. On behalf of the respondent in support of the contention that an appeal did lie from the decision of the Munsiff reliance has been placed upon the Full Bench decision of this Court in the case of *Kali Mandal* v. *Ramsarbaswa Chakravarti* (1). In this case it was decided by a Full Bench of this Court, one of the learned Judges who sat in that Bench dissenting, that an order setting aside or declining to set aside a sale in execution of a decree for rent, the decree-holder being the purchaser, falls within the proviso to S. 153 of the Bengal Tenancy Act, and is appealable although there could be no appeal from the decree in the suit on account of the prohibition contained in that section. The answer that is given on behalf of the appellant is that this decision is met by the explanation which was subsequently introduced by S. 153 of the Bengal Tenancy Act to which I have already referred. The respondent relies upon certain decisions of this Court to which I shall presently refer for establishing the position that notwithstanding the introduction of this explanation the effect of the aforesaid Full Bench decision has not been altogether nullified. The first case relied upon is that of *Beni Madhab Ray* v. *Bissessur Bharati* (2). This was a case in which a question arose as to whether a sale held in execution of a decree for rent was to be set aside on the ground that the judgment-debtor had applied for setting it aside after making the necessary deposit in compliance with the provisions of S. 174 of the Bengal Tenancy Act. In deciding this case the learned Judges observed thus:

> The explanation provides that a question as to regularity of the proceedings in publishing or conducting a sale in execution of a decree for arrears of rent is not a question relating to title to land or to some interest in land as between parties having conflicting claims thereto.
>
> In the case before us, no question arises as to the regularity of the proceedings in publishing or conducting the sale. The question raised is whether the judgment-debtor has complied with the requirements of S. 174 for reversal of the sale. We are therefore of opinion that the case is not covered by the explanation and that the rule laid down in *Kali Mandal* v. *Ramsarbaswa Chakravarti* (1) governs the matter.

It will be seen that the ground upon which the sale was sought to be set aside in that case was not one which can be said to relate to the regularity of the

(1) [1905] 32 Cal. 957 = 1 C. L. J. 476 = 9 C. W. N. 721 (F. B.).

(2) [1911] 17 C. W. N. 84 = 15 I. C. 436 = 16 C. L. J. 42.

proceedings in publishing or conducting the sale but that something had been done after the sale was over which under the law, entitled the judgment-debtor to claim that the sale should be set aside. The next case that has been referred to in this connexion is that of *Arjun Das* v. *Gunendra Nath Basu Mallik* (3). In that case a sale was sought to be set aside under S. 47 and O. 21, R. 90 of the Code of Civil Procedure and one of the grounds of irregularity alleged in the case was that there was no proper service of notice under O. 21, R. 22 of the Code. The Court of first instance in that case refused to set aside the sale and that order was upheld on appeal by the District Judge. From the decision of the District Judge in that case an application in revision had been filed before this Court and in dealing with that application the learned Judges observed:

> We may finally add that although the application must be deemed to have been made under S. 47 of the Code of 1908, a second appeal may at first sight seem barred under S. 153, B. T. Act, as the claim in the suit for rent was under Rs. 100; but a second appeal does lie in this case on the authority of the decision of the Full Bench in *Kali Mandal* v. *Ramsarbaswa* (1) the effect of which, as explained in *Beni Madhab* v. *Bissessur* (2) has not been completely nullified by the explanation added to S. 153.

With the utmost deference to the learned Judges I must say I do not find anything that was said in *Beni Madhab* v. *Bissessur* (2) as supporting the view that the learned Judges took. If the question that arose under O. 21, R. 22 is not a question relating to the regularity of proceedings in publishing or conducting the sale, it is not within the explanation, but as a question under S. 47 Civil Procedure Code. I find it extremely difficult to regard it as a question relating to title to land or to some interest in land as between parties having conflicting claims thereto.

The third decision to which our attention has been drawn is the case of *Nabin Chandra Chowdhury* v. *Bepin Chandra Roy Chowdhury* (4), in which one of the learned Judges expressed an opinion that the question as to fraud in publishing or conducting a sale is not covered by the Explanation to S. 153 of the Bengal Tenancy Act and that the Explanation only applies to cases where there is a question of irregularity in publishing or conducting a sale. This view was not approved by the other learned Judge who dealt with the case and he proceeded on the footing that when the Munsiff had dismissed an application made more than thirty days after the sale on the ground that S. 18 of the Limitation Act could not be availed of by the petitioner that was not a finding upon a question as to the irregularity of the proceeding in publishing or conducting a sale and the Explanation to S. 153 of the Bengal Tenancy Act consequently did not apply. With the greatest respect to both the learned Judges I am unable to agree in the view that was taken by either of them. I am not prepared to accede to the proposition that fraud in publishing or conducting a sale is meant to be kept separate from irregularities in the publication or conduct thereof for the purpose of the Explanation to S. 153 of the Bengal Tenancy Act nor am I able to subscribe to the proposition that because the Explanation to S. 153 does not cover the case of decision on the question of limitation, the said decision, therefore, necessarily amounts to a decision on a question of title or conflicting claims as between the decree-holder and the judgment-debtor.

Personally I do not feel pressed by these decisions and I am inclined to take the view that in a case like this no appeal lay from the decision of the learned Munsiff; and if the Full Bench has really decided otherwise it will, perhaps, on a proper occasion, be necessary for a much larger Bench to consider the question. In the view that I have taken of the matter I do not propose to pursue the discussion any further because I am of opinion that whether an appeal did lie to the District Judge or not the appellant is not entitled to any relief at our hands. If no appeal lay from the decision of the Munsiff then having regard to the facts to which I shall presently refer we shall not be justified in setting aside the order of the District Judge in the exercise of our powers under S. 115 of the Code of Civil Procedure. If an appeal did lie to the District Judge then there is a second appeal to this Court and possibly also, as has been held in some cases, if no appeal lay to him an appeal lies from

(3) [1914] 18 C. W. N. 1266=27 I. C. 294 = 20 C. L. J. 341.
(4) [1915] 22 C. L. J. 244 = 29 I. C. 308 = 19 C. W. N. 953.

his decision to this Court. On such an appeal it is possible to interfere with his findings on the facts.

The learned Munsiff found in the case that the evidence about service of writs of attachment and sale proclamation was very meagre and that the price fetched at the sale was grossly inadequate and the value was grossly misstated in the sale proclamation. Though he came to this finding he dismissed the application to set aside the sale on the ground that it was barred by limitation. On the question of limitation the learned Munsiff appears to have taken a wrong view as he did not take into account the principle that if there has been wilful suppression of the sale notices an inference might be drawn to the effect that there was fraud ; and if fraud was established then it was for the decree-holder to establish that the petitioner had knowledge at a time which would disentitle him to avail of the provision of S. 18 of the Limitation Act. The learned District Judge's findings are to the effect that there are indications to show that a decree was obtained against a dead man, and that the execution proceedings were certainly started against a dead man. As regards service of notices under O. 21, R. 22 and O. 21, R. 66, the learned Judge has found that there was no proper service of these notices. He has recorded a finding to the effect that the gross under-statement of value in the sale proclamation and suppression of the notices reveal a deliberate falsehood on the part of the decree-holder. These findings are proof against appeal as well as revision.

In this view of the matter the appeal must be dismissed with costs, hearing-fee being assessed at two gold mohurs and the application in revision must be rejected.

**Roy, J.**—I agree.

G.B. *Appeal and petition dismissed.*

---

## A. I. R. 1927 Calcutta 636

RANKIN, C. J., AND MAJUMDAR, J.

*Saraj Basini Debi*—Appellant.

v.

*Mohendra Nath Bhaduri* and *others*—Respondents.

Appeal No. 3 of 1927 and Civil Rule No. 98(M) of 1927, Decided on 27th April 1927, from the original order of the Dist. J., 24-Pergannas, D/- 10th September 1926.

(a) *Lunacy Act* (1922), *Ss.* 62, 40, 41, 42 *and* 64—*Application under S.* 62—*Procedure to be followed indicated—There can be no inquisition without an order directing it.*

The first thing which has to be done upon an application for directing an inquisition under R. 62 is that the Judge either with notice to the lunatic or without notice should carefully consider whether the case is one which calls for an order directing an inquisition. If he considers that it calls for an order directing an inquisition, then it is his obvious duty to record an order directing an inquisition. When he has once done that he is then, by the combined operation of S. 62 with Ss. 40, 41 and 42 of the Act, to take certain steps with regard to notice. [P 638 C 1]

It is only a preliminary investigation which is required to justify an order directing an inquisition. Then, an order having been duly made directing an inquisition, the date having arrived and proper notices having been given, the inquisition itself proceeds. Without an order directing an inquisition the inquisition itself is without jurisdiction.

[P 637 C 2, P 638 C 1]

The evidence taken at the inquisition is evidence to be given by people in the ordinary way coming as witnesses before the Court. When that inquisition terminates it terminates in a judgment which finds or does not find that the person is of unsound mind, and upon that finding the jurisdiction arises to give orders as to the custody of the lunatic and to the management of the estate. [P 638 C 2]

(b) *Lunacy Act, S.* 40—*Notice must be issued after an order for inquisition is made—No general notice is to be issued.*

The notice contemplated by S. 40 is a notice to be drawn up after there has been an order directing an inquisition. It is notice of such order and of the time and place at which the inquisition is to be held. It is not a notice of the petition. There is nothing in the Lunacy Act about general notices. [P 638 C 1, P 639 C 2]

(c) *Lunacy Act* (1922), *S.* 83—*A person adjudged lunatic upon irregular proceedings—Any relative having interest in that person's affairs can appeal.*

Where a person has been adjudged lunatic upon inquisition held in irregular and improper proceedings, any person, who is a relative and has a right to see that the alleged lunatic's estate and liberty are dealt with according to law, has a right of appeal. [P 641 C 2]

*(d) Jurisdiction—High Court—Lunacy jurisdiction—High Court has power to interfere with improper order on its own account.*

High Court has a power, on its own account under its lunacy jurisdiction to see that a person improperly dealt with as an alleged lunatic is dealt with properly and according to law.

[P 642 C 1]

*Sarat Chandra Roy Chowdhury* and *T. N. Ray*—for Appellant.

*Narendra Kumar Bose, Bireswar Pagchi, Atul Chandra Gupta* and *Probodh Nath Sanyal*—for Respondents.

**Rankin, C. J.**—This is an appeal against an order made by the learned District Judge of the 24-Pergannas, dated the 10th of September 1926.

On the 28th of August 1926 an application was made to the learned District Judge asking that

> your Honour will be pleased to direct an inquisition for the purpose of ascertaining whether Peary Mohan Roy of No. 46, Chakraberia Road, North Bhowanipur, District 24-Pergannas, is of unsound mind and incapable of managing himself and his affairs and pass necessary orders for the management of the estate of the lunatic and for the maintenance of the dependent members of his family by authorizing the Court of Wards to take charge of the whole estate or otherwise as the Court thinks just and proper.

The application was made by Mohendra Nath Bhaduri and Brojendra Mohan Moitra being sons-in-law of the alleged lunatic. The unfortunate gentleman, who was the subject of the proceedings, is a zemindar with considerable properties and is an advocate of this Court. The petition disclosed detailed facts of considerable strength. It would appear from the petition that Peary Mohan Roy had been attacked with insanity in the year 1918, again in 1922 and that in March 1926, he had again been suffering from marked mental derangement. Attached to the petition were medical certificates in very clear and definite terms by three medical gentlemen of experience and, indeed, of distinction. In the petition there was careful mention of the names and addresses of the near relatives of the alleged lunatic. No less than eleven persons are specified and their addresses are given. As a matter of fact the present appellant, who is the married sister of the alleged lunatic was not included in that list. In these circumstances I propose to state first what I conceive to be the procedure that should have been adopted by the District Judge under the Indian Lunacy Act of 1912. Having done that I will then describe the procedure that was actually adopted.

The case is one which comes directly under S. 62 of the Act which says that

> the District Court . . . . may, upon application, by order direct an inquisition for the purpose of ascertaining whether such person is of unsound mind and incapable of managing himself and his affairs.

The statute is silent as to what is to be done by the District Court before passing such an order. In the case of *Mani Lal Sil* v. *Nepal Chandra Pal* (1), this Court upheld such an order made upon a verified application without any further materials such as medical certificates. In the case of *Muhammad Yaqub* v. *Nazir Ahmed* (2), the learned Judges gave elaborate directions insisting upon the degree of care and caution that has to be employed before such an order should be made. They pointed out that an inquisition once commenced must be prosecuted to the bitter end and that it was a very serious oppression to order an inquisition into the state of mind of a person unless there were solid and substantial materials showing that such a course was really necessary.

In a case to which I was myself a party the decision of the Allahabad Court was referred to and certain observations made therein were approved. It has been suggested in the able argument for the respondents in this case that the directions given by the Allahabad High Court are unnecessarily elaborate. Mr Gupta has contended that the statute has directed one enquiry and that it is wrong for the Court by judicial decision to impose the necessity of two. In my judgment it is clear enough on the face of the Act, that there are not to be two enquiries of the same character. It is quite true that it is only a preliminary investigation which is required to justify an order directing an inquisition. I do not dissent from the proposition that in a case where there are strong medical certificates it might even be a strange and a rash thing to refuse an inquisition. Whether or not some of the observations made in the Allahabad case to which I have referred go too far is a matter upon which there may well be room for consideration. That question

(1) [1917] 22 C. W. N. 547=43 I. C. 511=27 C. L. J. 205.

(2) [1920] 42 All. 504=58 I. C. 617=18 A. L. J. 577.

does not arise in the present case, and I do not propose to prejudice that question by observations in either direction. Still it is indubitable that an order directing an inquisition into a man's state of mind is a very serious thing and that such an order is intended by the statute to be a judicial determination carefully made upon adequate materials. I do not understand how it can in general be wise to make such an order without at all events serving some sort of notice upon the lunatic first, and I should think that in this country a certain amount of care and attention, in a matter of this sort, is in no case thrown away. But the first thing which has to be done upon an application such as was presented in this case is that the learned Judge either with notice to the lunatic or without notice should carefully consider whether the case is one which calls for an order directing an inquisition. If he considers that it calls for an order directing an inquisition, then it is his obvious duty to record an order directing an inquisition. When he has once done that, then the petition is a spent petition which has served its primary purpose. When he has one done that, he is then by the combined operation of S. 64 with Ss. 40, 41 and 42 of the Act to take certain steps with regard to notices. What is the notice that has to be given under S. 40?

Notice shall be given to the alleged lunatic of the time and place at which it is proposed to hold the inquisition. If it appears that a personal service on the alleged lunatic would be ineffectual, the Court may direct such substituted service of the notice as it thinks fit. The Court may also direct a copy of such notice to be served upon any relative of the alleged lunatic or upon any other person to whom, in the opinion of the Court, notice of the application should be given.

The notice contemplated by S. 40 is a notice to be drawn up after there has been an order directing an inquisition. It is notice of such order and of the time and place at which the inquisition is to be held. It is not notice of the petition. When the learned Judge has decided to record an order directing an inquisition, he has certain matters to consider. He does not need to record so elaborate an order as is provided for in the case of a High Court by S. 38 (2); but there is a provision that in certain circumstances the inquisition directed should be held not by the District Judge himself, but by some subordinate Court nearer to the place where the lunatic happens to be; and there are provisions also with regard to assessors and other matters, which the learned District Judge may have occasion to consider at the time when he draws up the order for the inquisition. Under the jurisdiction with which we are concerned it may be worth while to notice that orders for the custody of lunatics and for the management of their estates do not come into question at all, until there has been a finding of lunacy as a result of an inquisition. There is no question of interim orders on such matters pending the determination as to the person's state of mind.

Now an order having been duly made directing an inquisition, the date having arrived and proper notice having been given the inquisition itself proceeds. The whole thing is bottomed upon the previous order directing an inquisition, and if there is no such order, then in my judgment the officer purporting to hold the inquisition is not holding an inquisition at all. He is merely a worthy gentleman wasting his own time and other people's. The proceeding in such a case, so far as I can see, have no validity or effect at all. When the inquisition proceeds, it may be true that the petition which resulted in the order directing the inquisition may be a matter upon which the deponent can be cross-examined or other people can be cross-examined; but the evidence taken at the inquisition is evidence to be given by people in the ordinary way coming as witnesses before the Court. It is not a proceeding by which every thing on the file is evidence straightway. It is a proceeding of special solemnity and importance, and the learned Judge has to deal with it from the point of view that he is now charged with the duty of looking after the interest of somebody who may be entirely unable to look after his own interest. When that inquisition terminates, it terminates in a judgment which finds or does not find that the person is of unsound mind and upon that finding the jurisdiction arises to give orders as to the custody of the lunatic and to the management of the estate.

Now in this case what happened was that a petition having been presented, the order recorded on the 28th of August 1926, is as follows: "Register. The 10th September 1926, is fixed for hearing"—

presumbly for hearing of the petition or application. "Issue general notices and special upon the other relatives." I take that to mean issuing general notices and special notices upon the relatives other than the applicants. "Applicant to pay process-fee Rs. 7-8-0 and supply notices within a week."

Before commenting upon that order it may be as well to discover what is meant by general and special notices. Notices of what and to whom? We have ascertained from the learned advocates at the Bar that the notices which were issued under this order were in a form which is now before me. It is headed:

Application for inquisition for the purpose of ascertaining whether Peary Mohan Roy is a person of unsound mind and incapable of managing himself and his affairs as also for orders of the management of the estate and for the maintenance and custody of the lunatic and for the maintenance of the dependent members, etc. The petitioners above-named having applied for inquisition and other reliefs in respect of the aforesaid lunatic's person and properties, the 10th day of September 1926 has been fixed for the hearing of the application, and notice is hereby given to.....so that if any other relative, friend, kinsman or well-wisher of the aforesaid lunatic desire to be appointed or declared guardian of the lunatic or to make any submission relating thereto, he should enter appearance in person in this Court on the aforesaid date and be prepared to adduce on that day any documentary and oral evidence he may desire to adduce in support of his claim to such appointment or declaration.

When, therefore, we come across the clause "issue general notices and special upon the other relatives" we have to take that order with the form of the notice that was employed, and the first question that the Court has to ask itself is what does all this mean? That this was such a notice as is contemplated by S. 40 of the Lunacy Act is clearly an absurd idea. The notice prescribed is a notice that the Court has determined to hold an inquisition. So far as the alleged lunatic is concerned, it is a most important notice. It is a notice which tells him that he is in such a serious position that the Court has determined to enquire into his state of mind and that his liberty and his right to manage his own affairs is now in peril by virtue of a considered judgment of a District Judge. This document is a notice, first that somebody has applied for an inquisition and, secondly, that that application is going to be heard on the 10th of September next. Then it wanders off telling about relatives, friends, kinsmen and well-wishers who are invited to come in and submit their claim—apparently to be appointed guardian of the lunatic. Some research as to the origin of this form of notice, which is wholly out of place and a complete muddle as regards procedure, has led to the following result. This notice is clearly an adaptation of the form of notice provided by this Court when an application is made for the guardianship of an infant. The form in question is one which is governed by S. 11 of the Guardians and Wards Act; and one has only to read S. 11 of the Guardians and Wards Act and the form of notice, Civil Process No. 133 of the General Rules and Circular Orders of this Court, p. 411, to see that a form of process has been taken from one kind of jurisdiction and applied without any reason at all to another. There is nothing in the Lunacy Act about general notices. There is a definite provision in the Lunacy Act for notice to the lunatic and to such relatives or other persons as the District Judge may think it desirable to give notice to. Under the Guardians and Wards Act the provision for notice to the minor is a provision about general notice, that is to say, the notice has to be affixed in the Court house and a copy has to be affixed to the permanent place of residence of the minor.

In the present case our information is that the notice to the lunatic, and the only notice to him before the date on which he was adjudicated to be of unsound mind, was the notice which I have already read which was affixed to the alleged lunatic's residence, apparently by way of analogy to S. 11 of the Guardians and Wards Act. I have some sympathy with learned District Judges and with their Peshkars in respect of the fact that it does not appear that any proper set of forms has been provided for their use in connexion with lunacy proceedings; and I have no desire to be disrespectful or unduly critical when I say that it is beyond all question that the procedure adopted in this case is entirely misconceived. Now general notices and special notices having been ordered and having been issued, on the day appointed certain relations put in what the learned Judge calls a petition of consent, that is to say, they put in a petition whereby

they stated that they quite agreed that this poor gentleman was of unsound mind and was incapable of managing his own affairs. Thereupon the learned Judge took evidence—a medical gentleman was called who gave evidence—and the learned Judge having regard to the attitude adopted by so many relatives and to the medical certificates and so forth recorded his order. He started off not by saying that on such and such a day by an order duly made it was directed that an inquisition was to be held into the state of mind of Peary Mohan Roy; he started off by referring to the petition. Having referred to the petition he says:

> In view of the circumstances set forth in the petition, I direct an inquisition under the Indian Lunacy Act (Act. 4 of 1912). In connexion with the proceedings in this matter Major Hingston, I. M. S., has been examined and he has testified to the fact that Peary Mohan Roy is a dangerous lunatic and is quite incapable of managing himself and his affairs. He considers it necessary that the lunatic should be kept in restraint and thinks it desirable that he should be sent to a Lunatic Asylum.
>
> The case is uncontested and it is agreed by all the parties concerned that Peary Mohan Roy should be sent as soon as possible to the Lunatic Asylum at Ranchi. In the circumstances stated above, I find that Peary Mohan is a person of unsound mind and is incapable of managing himself and his affairs.

With great respect to the learned Judge, at the end of the evidence and of the proceedings he was a little late to direct the inquisition. Indeed so paradoxical is this that the learned Judge's successor suggested that there had been some slip of the pen and that the word "direct" should be "directed." Unfortunately it is quite impossible to take that view. I do not think that the learned Judge had sufficiently considered what an inquisition is; but it is quite certain that if an inquisition is to be directed at all, it must be directed before it is held, and that unless there is a good direction for an inquisition no person can even begin to hold one. Accordingly the contention with which we have to deal in this case is narrowed down to this: whether the order of the 28th August 1926 can by some benevolent construction be deemed to be an informal order directing an inquisition. In my opinion, there is no way of giving validity to these proceedings after that fashion. The order of the 10th of September shows to my mind quite clearly that, at the time when the petition was first ordered to be registered, there was no intention of coming to an ex-parte conclusion as to the necessity of holding an inquisition. The fact is that the learned Judge had mistaken the nature of his duty and from the first had issued orders about notices under the impression that the matter was one to be dealt with more or less as an ordinary suit, namely notices should be given to the parties and the application should be considered in their presence.

The result is in my judgment that the proceedings adopted by the learned Judge are entirely bad. There has been, prior to the proceedings no order directing an inquisition and there has been no notice served upon the lunatic of a decision on the part of the Court to make him the subject of lunacy proceedings.

In these circumstances there would be little doubt about the duty of this Court, were it not for the fact that something remains to be considered with reference to the present appellant, the sister of the alleged lunatic. The sister of the alleged lunatic was not included in the petition as a relative to whom notice ought to go. There is no right on the part of a relative in such a case as this to get any notice at all. The matter is entirely in the discretion of the Court and the Court may omit a relative, and may include a person who is not a relative. But it is noticeable and unfortunate that this gentleman's sister is not included in rather a lengthy list of relatives. When the alleged inquisition was being held, all the parties were of one mind. So there was no person there who in fact was opposing the making of the order. Whether it is really credible that all these proceedings took place, without the sister's knowing anything at all, is a matter which may be said to be extremely doubtful, at all events if the lady was taking any particular interest in her brother. However, after the order had been made, the lady and her husband made an application to the successor of the learned Judge to set aside the finding as to lunacy and the incidental proceedings.

The learned Judge had made an order to the effect that, until the lunatic was sent to Ranchi Asylum, he should be kept in the custody of his wife; and, as regards the management of his property, it appears that there was a manager

already employed to manage the lunatic's property. He directed that after a short time this manager should give way to a certain Babu Sudhindra Nath Mukherjee whom he appointed Receiver. The vakil for the applicant said that he would file an application asking that the Court of Wards might be authorized to take charge of the estate and the order made was

> The arrangements mentioned above will continue until orders are passed with reference to that application, if and when filed.

Now, the sister took up a very curious position. She professed to be doubtful whether her brother was really a lunatic at all and in her petition she made a deplorable and abusive attack upon the alleged lunatic's wife and introduced prejudicial matters upon other topics. This makes one doubt whether her proceedings are really actuated by an opinion that they are necessary in her brother's interest.

The learned Judge who heard her application expressed his doubt as to its bona fides and some complaint has been made on her behalf that this expression of opinion is unmerited and uncalled for. So far from thinking that it is unmerited and uncalled for, I think her application and her action in this matter deserve all that the learned Judge has said about her.

Now, in these circumstances the Court has before it an appeal by this lady from the order adjudicating Peary Mohan Roy a lunatic. It has also before it a rule obtained by her asking in effect that, if the finding of insanity is maintained, the lunatic should be sent at once to Ranchi and that somebody else should be appointed Receiver and that the Court of Wards should take charge of his property. As I have said, the facts brought to our notice, in my opinion, show that the proceedings in the District Court have been entirely erroneous and improper. If therefore this lady has a right of appeal her motive would matter little to this Court, because this Court is concerned with the interest of the lunatic. The question whether she has a right of appeal is not an easy one. By S. 83 of the Act it is said:

> An appeal shall lie to the High Court from any order made by a District Court under this chapter.

That is the first thing. There can be no doubt that the lady is a person who would have been competent to apply for an inquisition because she is a "relative" within the definition given by Cl. (11) of S. 3. That matter was considered in a case which I have already referred to, namely, the case of *Mani Lal Sil* v. *Nepal Chandra Pal* (1). She is also a person who comes within the first part of the 3rd clause. of S. 40:

> The Court may also direct a copy of such notice to be served upon any relative of the alleged lunatic;

and there can be no doubt that had her name been included with the other names in the application, she too would have got notice. Under exactly the same statutory provision of the Act (Act 35 of 1858) this Court held that a relative who had received a notice and taken part in the proceedings was entitled to appeal. The question whether a relative who had not received a notice was entitled to appeal was not before the Court, though there are some expressions in the judgment which favour the view that a relative, even in such circumstances, may be entitled.

There can be no doubt that it is somewhat paradoxical to say that the sister of a person found, by an improper set of proceedings purporting to be an inquisition, to be a lunatic, has no grievance recognized by the law. I think it would be paradoxical in such a case as this, if this Court, upon the application of the sister, felt obliged to say, in spite of the character of the proceedings in the Court below, that it was unable to interfere. It appears to me that there are probably two logical lines and two only. One is to hold that the only appellants from such an order would be the applicant and the alleged lunatic, either by a next friend or otherwise, or to hold that any person who is a relative and has a right to see that the alleged lunatic's estate and liberty are dealt with according to law, has a right of appeal. I go further than that. It does seem to me that in the lunacy jurisdiction this Court, when proceedings of the character I have endeavoured to describe are brought to its notice, has a right and power on its own account to reach out its hand and ensure that this alleged lunatic is dealt with properly according to law.

It is said that if there is an appeal provided from an order even, although it is an appeal restricted to certain persons,

this Court has no right of revision under S. 115 of the Code of Civil Procedure. I doubt that extremely, but I do think that in this jurisdiction it cannot but be right to say that this Court has a power on its own account to see that a person improperly dealt with as an alleged lunatic is dealt with properly and according to law. My own view is that, taking the statute as it stands, the sister has a right to appeal on the ground that she is near relative and a person who has the right to insist upon her brother and his affairs being properly dealt with. But even if that be wrong I am of opinion that the sister may be put aside altogether and with this record before us we have a right to interfere. Accordingly, in my judgment, the correct form of order is this: I think this appeal should be allowed. I think an order must be made to the effect that all the proceedings of the District Court, from the moment this application was received on the 28th of August 1926, be set aside and that the Court be directed to take up that application from the very beginning and to deal with it according to law.

I want to make it particularly clear that if this matter is dealt with again, the fact that the application was made in August 1926 will not prevent its being the duty of the District Judge to ascertain whether at the time of this new inquisition—if an inquisition be ordered—whether at this latest time the alleged lunatic is or is not of unsound mind. The date of the presentation of the petition has nothing to do with that. The matter will have to be examined afresh, and at the time when it is examined the question is—aye or no, Is this unfortunate gentleman of unsound mind? I would point out further that one of the reasons why this case is being remanded is that the learned Judge may first of all make a proper order, after taking such steps as he thinks necessary, and serving such notices as in his discretion he thinks necessary, directing or refusing an inquisition. Having made that order he will then direct notices to be given under the Lunacy Act forgetting—if it is possible for him to forget—that such things exist as the Guardians and Wards Act or the procedure prescribed by S. 11 thereof.

I do not think that there should be any order for costs of this appeal. It will be in the discretion of the learned District Judge, when the matter goes back to him, to award or refuse costs to the petitioners before him of the abortive proceedings, as well as of the fresh proceedings, if the alleged lunatic is found to be of unsound mind. No order is made on the Rule save that it be discharged.

**Majumdar, J.**—I agree.

G.B. *Rule discharged.*

---

## * A. I. R. 1927 Calcutta 642

PAGE AND GRAHAM, JJ.

*Jagathari Saha*—Defendant—Appellant.

v.

*Medini Mohan Burdhan* and *another*—Plaintiffs—Respondents.

Appeal No. 210 of 1925, Decided on 30th May 1927, from the appellate order of the Addl. Dist. J., Tipperah, D/- 18th February 1925.

* *Civil P. C., O. 41, R. 23—Order without jurisdiction—If it purports to be one under R. 23 appeal lies—Civil P. C., O. 43, R. 1 (u).*

Although the Court ordering the remand may have had no jurisdiction under R. 23 to pass the order, nevertheless, if the order of remand as made purports to be an order under O. 41, R. 23 and appears to be in form and substance an order under that rule, it is to be regarded as an order of remand passed under R. 23 and therefore, subject to appeal: 31 *C. L. J.* 354, *Foll.* [P 643 C 2, P 644 C 1]

Where the lower appellate Court in a case which was not decided on a preliminary point, instead of retaining the appeal in his Court and referring merely an issue to be determined by the trial Court, illegally and without jurisdiction remanded the case to the trial Court for the issue of limitation to be determined and the case disposed of by that Court.

*Held*: no appeal would lie as the lower appellate Court did not purport to act under R. 23. [P 644 C 1]

*S. C. Basak* and *Bepin Chandra Basu*—for Appellant.

*Surendra Nath Guha*—for Respondents.

**Page, J.**—This is an appeal from an order of the Additional District Judge of Tipperah remanding a case for rehearing and disposal to the Munsif's Court at Comilla. Under O. 43, R. 1 (u)

an order under R. 23 of O. 41 remanding a case, where an appeal would lie from the decree of the appellate Court,

is appealable. It is conceded that an order of remand made under the Code is not appealable unless it is within the ambit of O. 41, R. 23. O. 41, R. 23 reads as follows :

Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit ; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

At the trial in the course of the proceedings out of which the present appeal arises, the plaintiff sought to recover a sum of Rs. 1,356 in respect of which a bond had been executed by Defendant No. 1 as agent and manager of Defendant No. 2. The suit was heard upon the merits, and after all the issues raised had been determined, the learned Munsif decreed the suit as against Defendant No. 2 and dismissed the suit as against Defendant No. 1. Defendant No. 2 appealed, and at the hearing before the learned District Judge he held, agreeing with the learned trial Judge, that Defendant No. 2 was prima facie liable for the sum that the plaintiff claimed. The learned District Judge having, upon the merits of the case so far as they had been investigated, expressed his opinion that the decision of the learned Munsif was correct proceeded as follows :

The next question is the question of limitation which does not appear to me to have been sufficiently explored in the lower Court. No issue was drawn under this head,

and the learned Judge added :

I think, therefore, that the issue of limitation should be expressly raised, and that definite evidence bearing expressly on that issue should, if possible, be produced. The case is, therefore, sent back for re-hearing and disposal to the learned Munsif on the issue of limitation. Both parties will be at liberty to produce evidence bearing on that issue. The costs of this appeal will be costs in the action..

Now, it is the common case, both of the appellant and the respondents, having regard to what took place at the trial and on the appeal, that the conditions set out under O. 41, R. 23, upon the fulfilment of which alone the appellate Court could remand the case under that rule, had not been fulfilled, for the learned Munsif had not disposed of the suit upon a preliminary point upon the merits, and the decree passed by the learned Munsif was not reversed on appeal by the learned District Judge. In those circumstances the learned District Judge had no jurisdiction to make an order of remand under O. 41, R. 23, and if in fact he had passed the order of remand purporting to act under R. 23, he was acting illegally, and I should have thought that the order was subject to revision under S. 115 of the Code of Civil Procedure as having been made without jurisdiction. A conclusion of the matter in that sense would be in consonance with the judgment of Walmsley and Shamsul Huda, JJ., in the case of *Mohendra Nath Chakravarti* v. *Ramtaran Bandopadhya* (1). It appears, however, that in *Basumati Devi* v. *Taritbasini Dasi* (2), Richardson and Beachcroft, JJ., in respect of the order of remand passed in that case observed :

It may be that regard being had to the terms of R. 23, this is not a case in which it was, strictly speaking, open to the learned Subordinate Judge to make an order under that rule. But whether the order was regularly made or irregularly made, it appears to me to be in form and substance an order under that rule. That being so, the order must be treated as an order under R. 23 from which an appeal lies.

This decision was prior to the decision in the case of *Mohendra Nath Chakravarti* v. *Ramtaran Bandopadhya* (1) and does not appear to have been brought to the attention of the Court in the latter case. The case of *Basumati Devi* v. *Taritbasini Dasi* (2) has been followed in a series of cases, viz , *Parbati Charan Saha* v. *Secretary of State* (3), *Bhairab Chandra Dutt* v. *Kali Kumar Dutt* (4), *Kayem Biswas* v. *Bahadur Khan* (5) . see also the case of *Gokul Prasad Har Prasad* v. *Ram Kumar* (6) and *Kulsum-un-nissa* v. *Ram Prasad* (7) and the law as it obtains at present appears to be that although the Court ordering the remand may have had no jurisdiction under R. 23 to pass the order under that

(1) [1919] 31 C. L. J. 357=55 I. C. 96=23 C. W. N. 1049.
(2) [1919] 31 C. L. J. 354=44 I. C. 416.
(3) [1921] 35 C. L. J. 445.
(4) A. I. R. 1923 Cal. 606.
(5) A. I. R 1925 Cal. 1258.
(6) A. I. R. 1922 All. 254=44 All. 176.
(7) A. I. R. 1922 All. 226=44 All. 492.

rule, nevertheless, if the order of remand as made "purports to be an order under O. 41, R. 23," and "appears to be in form and substance an order under that rule," it is to be regarded as an order of remand passed under R. 23, and, therefore, subject to appeal. For the purposes of this case it is enough to say that R. 23 makes no reference to orders which the Court has no jurisdiction to make under the rule, but which "purport to be" made under the rule. But taking the procedure laid down in the case to which I have referred (other than the case decided by Walmsley and Shamsul Huda, JJ.)., in my opinion the learned District Judge in the present case did not purport to make an order under O. 41, R, 23, but purported to pass an order under O. 41, R. 25, within the ambit of which, it is conceded by the appellant, the facts of the present case are to be found. The learned District Judge, purporting to act under O. 25, instead of retaining the appeal in his Court and referring merely an issue to be determined by the trial Court, illegally and without jurisdiction remanded the case to the trial Court for the issue of limitation to be determined and the case disposed of by that Court. The order under appeal in the present case was one which the learned District Judge had no jurisdiction to pass either under O. 41, R. 23 or under O. 41, R. 25. But, in order that an appeal should lie from the order of remand in the present suit, it is incumbent upon the appellant to satisfy the Court (taking the law for the present to be that stated in the cases to which I have referred, other than the case decided by Walmsley and Huda, JJ.) that the order was passed or "purported" to have been passed under O. 41, R. 23. For the reasons which I have stated, in my opinion, the order of remand in the present case neither was passed, nor purported to have been passed, under the provisions of O. 41, R. 23. The result is that no appeal lies from that order, and the present appeal must be dismissed with costs, the hearing-fee being assessed at two gold mohurs.

**Graham, J.**—I agree. The order appealed against in this instance was an anomalous order which, strictly speaking, cannot be brought either under R. 23 or R. 25 of O. 41 of the Code of Civil Procedure. It is clear that R. 23 can have no application, since the suit was not disposed of on a preliminary point, nor was the decree reversed on appeal. But I think that it is equally clear that the order in question could have been appropriately made under O. 41, R. 25. That rule reads as follows :

> Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the appellate Court essential to the right decision of the suit upon the merits, the appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such a case shall direct such Court to take the additional evidence required ; and such Court shall proceed to try such issues, and shall return the evidence to the appellate Court together with its findings thereon and the reasons therefor.

Now, here the issue which the Court had omitted to frame and decide was the issue of limitation, and what the learned Additional District Judge no doubt intended was to deal with the case under this rule. Instead, however, of adopting the procedure laid down in the latter part of this rule he appears to have adopted a procedure laid down under R. 23 and remanded the case to the Court below for trial of the issue.

In my judgment, on the facts of this particular case the order in question purported to be and was, though irregular in form, in substance one under R. 25 and that being so, no appeal lies to this Court, and the appeal must be dismissed.

G.B. *Appeal dismissed.*

---

## * A. I. R. 1927 Calcutta 644

CUMING AND GRAHAM, JJ.

*Mafizaddi*—Accused—Appellant.

v.

*King-Emperor*—Opposite Party.

Criminal Appeal No. 648 of 1926, Decided on 25th March 1927, from the order of the Addl. S. J., Dacca.

(a) *Penal Code, S. 366—Kidnapping is quite different from abduction.*

Kidnapping is an entirely distinct offence from abduction, the necessary ingredients being entirely different. [P 645 C 2]

* (b) *Criminal P. C., S. 172—No statement is recorded under S. 172.*

What is intended to be recorded under S. 172 is what the Police Officer did, the places where he went, the people he visited, what he saw, &c; and no statement can be recorded under this section and therefore it would not be a privileged one. [P 645 C 2]

✻ (c) *Criminal P. C. (amended 1923), S. 162—Object of amendment is that Police should not claim any privilege.*

The object of amending S. 162 is that the police should no longer claim any privilege in respect of any statement on the ground that it is a statement recorded under S. 172. It is quite immaterial whether the statement is labelled as recorded under S. 172. [P 646, C 1]

✻ (d) *Criminal P. C., S. 162—Actual words of the witness need not be recorded—Memo. of statement is enough.*

It is immaterial whether the statement recorded is the actual record of the words used by the witness. It is sufficient even if the statement is recorded in the form of a memorandum of what the witness had said to the police officer. It is not necessary, in order that an accused person may be allowed under S. 162 to contradict the witness that the statement must contain the very words used by the witness. [P 646, C 1]

(e) *Criminal P. C., S. 162 (proviso)—Trial Court refusing copy of witness' statement—Accused prejudiced by refusal—Trial is bad.*

Where the trial Court refused to allow the defence to have a copy of the statement of a witness made to the Sub-Inspector and it was found by looking at the statement that the accused had been seriously prejudiced by not being allowed to use the statement in cross-examining that witness.

*Held*: that the trial was bad. [P 646, C 2]

(f) *Penal Code, S. 366—Charge of kidnapping or abduction in one head is bad.*

Where an accused was charged in one head under one charge with 'kidnapping or abduction';

*Held*: that the ingredient of the two offences being obviously different, the accused was entitled to know which of the charges he was asked to meet. [P 646, C 2]

*Sures Chandra Talukdar* and *Amulya Chandra Sen*—for Appellant.

*Khundkar*—for the Crown.

**Cuming, J.**—This is an appeal by one Mafizaddi against the order of the learned Additional Sessions Judge of Dacca, Mr. K. N. Roy who agreeing with the verdict of the jury found the accused Mafizaddi guilty under S. 366, Indian Penal Code, and sentenced him to four years rigorous imprisonment.

I may here point out that one of the difficulties with which we are confronted in dealing with this case is that it is impossible to ascertain what is the offence of which the appellant has been found guilty. For this reason he was charged that he on or about the 26th day of November 1925 at Rahapara kidnapped or abducted Jamila Khatoon and thereby committed an offence punishable under S. 366 Indian Penal Code. The jury in delivering their verdict found the accused person guilty under S. 366 Indian Penal Code; whether, therefore, he was found guilty of kidnapping or whether he was found guilty of abduction it is impossible to say. I need hardly point out that kidnapping is an entirely distinct offence from abduction the necessary ingredients being entirely different.

The first point raised by Mr. Talukdar, which point I think must succeed, is as follows: The main witness in the case was the girl Jamila Khatun. When this witness was put into the box and was examined in chief the defence pleader desired to cross-examine this witness with the object of breaking down her testimony by putting to her certain statement which it is alleged she had made to the Sub-Inspector who investigated the case. The learned Additional Sessions Judge held that this statement was recorded by the Sub-Inspector under S. 172, Criminal P. C., and therefore it was privileged.

Speaking for myself I have always been of opinion that S. 172, Criminal P. C., does not deal with the recording of any statement by witnesses. Nor do I understand that a statement can be said to be recorded under S. 172, Criminal P. C. S. 172 (I recite merely the material portion of it) runs as follows:

Every police officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him and a statement of the circumstances ascertained through his investigation.

No mention whatever is made there of recording of any statement by a witness. Ss., 161 and 162, Criminal P. C., properly deal with the different portions of the investigation. What is intended to be recorded under S. 172, Criminal P. C., is what the Sub-Inspector did—the places where he went, the people he visited, what he saw &c. I do not think that any statement can be said to be recorded under this section and so would be a privileged one. Be that as it may, it is quite clear now that there is no distinction between a statement recorded under S. 162, Criminal P. C., and a statement recorded under S. 172, Criminal P. C., if a police officer purports to record a statement under the latter section. S. 162 now reads as follows:

No statement made by any person to a police officer in the course of an investigation under this chapter shall, if reduced to writing, be

signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any enquiry or trial in respect of any offence under investigation at the time when such statement was made.

It is quite clear that the object of amending the section is that the police should no longer claim any privilege in respect of any statement on the ground that it is a statement recorded under S. 172. It is quite immaterial whether the statement is labelled as recorded under S. 172, Criminal P. C.,

The learned Deputy Legal Remembrancer contends that in any way S. 162 contemplates only what he describes as a complete statement and that if the statement is not a complete statement recording every word uttered by the witness then the statement cannot be used under S. 162 for the purpose of contradicting. I am not prepared to accept this contention. It seems to me immaterial whether the statement as recorded is the actual record of the words used by the witness. It is sufficient, I think, even if the statement is recorded in the form of a memorandum of what the witness had said to the police officer; it is available for the purpose of contradicting the witness. It is not necessary, in order that an accused person may be allowed under S. 162 to contradict the witness, that the statement must contain the very words used by the witness.

In the present case the police diary unfortunately is not before us. But we have been able to ascertain from the evidence of the Sub-Inspector which was given in the enquiry Court but which was not allowed to be used in the Court of Sessions that the witness in question, Jamila Khatun, had made a long and detailed statement to the police officer. He states :

> I examined the girl. She told me that she had run away from her mother's custody at her own will as she was ill-treated by her mother.

Then on consulting the diary the witness further stated that the girl said that she was beaten by her mother so she had left home. She further said that she met Mafizaddi, at Dhamrai Railway station and with him she came to Dacca. She said that her mother had come to Dacca next day and had consented to marry her to Mafizaddi. She said that later she was married by Mafizaddi and that a deed of divorce was prepared of her elder sister and a kabinnama was drawn up at that time with consent of both the parties. She then said that she married Mafizaddi giving her own *ijin* as her mother and brother were not present at the time. She said that she had attained her puberty two years before. In concluding his examination the Sub-Inspector said :

> I examined her at the Mitford hospital. I asked her to tell her story and she stated.

It is quite clear from the Sub-Inspector's evidence that what was recorded by the Sub-Inspector was the statement made by the witness. Whether that statement was or was not recorded under S. 162 or S. 172 the accused person was entitled to a copy of it in order that he might cross-examine Jamila Khatun with the intention of breaking down her evidence.

Proviso No. 1 to S. 162 states as follows :

> Provided that, when any witness is called for the prosecution in such enquiry or trial whose statement has been reduced to writing as aforesaid the Court shall on the request of the accused refer to such writing and direct that the accused be furnished with a copy thereof in order that any part of such statement, if duly proved, may be used to cantradict such witness.

The learned Sessions Judge was therefore wrong in refusing to allow the defence to have a copy of the statement of this witness made to the Sub-Inspector. It is quite clear looking at the statement that the accused had been seriously prejudiced by not being allowed to use the statement in cross-examining Jamila Khatun. On this ground alone it is necessary to set aside the conviction and sentence.

There is a further point which has been brought to our notice, namely that the accused has been seriously prejudiced because he did not know what charge he had to meet. He has been charged in one head under one charge with kidnapping or abduction. The ingredients of the two offences are obviously different and the accused was entitled to know which of the charges he was asked to meet. No doubt the two offences are referred to in the same section S. 366, Indian Penal Code, but they are distinct offences and separate charges should have been drawn up if it was desired to charge him with both offences.

We therefore set aside the conviction and sentence of the appellant Mafizaddi. We leave it to the District authorities to consider whether in the circumstances of the case the appellant should be retried or not. The accused will remain on the same bail pending the order of the District authorities as to retrial.

**Graham, J.**—I agree.

D.D. *Appeal allowed.*

---

## * A. I. R. 1927 Calcutta 647

C. C. GHOSE AND BUCKLAND, JJ.

*Heeralal Agarwalla & Co.*—Appellants.

v.

*Joakim Nahapiet & Co. Ltd.*—Respondents.

Appeal No. 6 of 1927, Decided on 27th April 1927, from an order of Pearson, J., D/- 3rd December 1926.

* *Arbitration Act, S. 11—Award of Committee of appeal, on appeal from umpire according to contract by parties, can be filed—Committee are arbitrators.*

Where according to the contract between the parties, a dispute was referred firstly to arbitrators, then to an umpire and then to a Committee of appeal from him.

*Held*: (*C. C. Ghose, J.*), that the committee are really a fresh set of arbitrators called in by the parties and the award of the committee can be filed in Court. [P 649 C 2]

*Buckland, J* — Successive awards are not per se to be condemned, inasmuch as the process of infinitesimal repetition is at once arrested when the Court of law becomes entitled to give effect to the award and that the Committee is a body other than a Court of justice to whom the parties have agreed to refer their dispute. Such a proceeding is known to the law as an arbitration, and those in whom the arbitrament is lodged are known as arbitrators or an umpire, and their award as such is one which the successful party is entitled to require to be filed: *Case law referred to.* [P 651 C 2]

*N. N. Sarkar* and *R. N. Sarkar*—for Appellants.

*Langford James* and *A. K. Roy*—for Respondents.

**C. C. Ghose, J.**—This is an appeal against an order made by my learned brother Mr. Justice Pearson on the 3rd December 1926 by which he allowed an application made by the respondents to take off the file of this Court an award made under the rules of the Calcutta Baled Jute Association. The facts, shortly stated, are as follows: By a contract in writing, dated the 6th November 1925, the respondents purchased from the appellants 3,000 bales of jute, delivery in December 1925 at Rs. 126 per bale of 400 lbs. net. The contract contained an arbitration clause being Clause No. 17. It provided that in the event of any dispute arising between the parties, the same should be referred to arbitration and that each party to the dispute would be at liberty to appoint one arbitrator. If either party failed to make the appointment within three clear working days after being called upon so to do by the other party, the arbitrator appointed by such other party should act as the sole arbitrator and proceed accordingly. In default of the appointment by the arbitrators, if more than one, of an umpire within 7 days of the appointment of the arbitrator first nominated, the Committee of the Calcutta Baled Jute Association should be notified accordingly and should before the reference is entered upon nominate an umpire.

It was also provided that if the arbitrators should fail to make their award in writing within 40 days of the appointment of the arbitrator first nominated or on or before any later date to which the arbitrators in writing signed by them might from time to time enlarge the time for making the award, the umpire should forthwith enter on the reference in lieu of the arbitrators. The award made by the arbitrators or the umpire respectively, if no appeal therefrom should be admitted by the committee, or the award of the committee made on appeal therefrom, as provided for in the Association's rules and bye-laws, should be final. The Association's rules and bye-laws, which are printed on the reverse of the contract, form part of the contract between the parties. Rules 28 and 29 are as follows:

28. The committee may at the discretion and upon payment of the prescribed fees hear appeals from arbitrators' awards, provided they proceed in conformity with the bye-laws of the Association.

29. The award of the committee in any appeal considered by them confirming, varying or setting aside the award of arbitrators or umpire shall be accepted as finally binding on all parties.

It appears that disputes and differences arose between the parties and thereupon they were referred to arbitration. The two arbitrators appointed by the two

parties failed to agree whereupon the matter was referred to the umpire who had been appointed as such by the arbitrators. The umpire heard the reference and made an award on the 25th June 1926. That award was in favour of the present respondents. Thereafter the present appellants appealed to the Committee of the Calcutta Baled Jute Association against the award of the said umpire. The Committee heard the appeal and made an award on the 23rd September 1926. This award is printed on pages 21 and 22 of the paper-book and the material portion thereof is as follows :

And whereas in accordance with the terms of the said contract Messrs. Heeralal Agarwalla & Co. were entitled to appeal and did so appeal against the award of the umpire to the Committee of the Calcutta Baled Jute Association. Now we, being a quorum of the said Committee, having taken upon ourselves the burden of the said reference on appeal and having duly weighed and considered the several allegations of the said parties and the proofs and documents laid before us, do hereby make and publish this our award concerning the matter so referred to us in manner following, that is to say :

(i) we find an award that the buyers Messrs. Joakim Nahapiet & Co. shall pay to the sellers Messrs. Heeralal Agarwalla & Co. the sum of Rs. 21,000 in full settlement of their claim under the contract ;

(ii) we also award and direct that Messrs. Joakim Nahapiet & Co. shall pay the costs of the umpire's award, dated 25th June 1926, which were fixed at the sum of Rs. 247-8-0 ;

(iii) we further award and direct that Messrs. Joakim Nahapiet & Co., Ltd. shall pay the costs of this appeal which we fix at Rs. 116.

On the 15th November 1926 the Committee of the Calcutta Baled Jute Association transmitted the said award to this Court in order that the same might be filed. Thereupon on the 19th November 1926 the present respondents made an application, as stated above, to this Court for an order that the said award of the Committee of the Calcutta Baled Jute Association should be taken off the file of this Court.

Mr. Justice Pearson held that the award made by a Committee of the Calcutta Baled Jute Association sitting in an appeal on an award made by an umpire did not conform to the scheme of the Indian Arbitration Act and that the same could not be filed under the Act. He was further of opinion that having regard to the language used in Ss. 10 to 15, the only persons or tribunals considered as having seisin of the arbitration were the " arbitrators or umpire, " and that there was no recognition in the Act of an award by a tribunal superior to the umpire.

On behalf of the appellants, the argument is presented in this way : It is pointed out that the intention of the parties is to be gathered from the whole of the document, namely, the contract between the parties and that when the arbitration clause is properly construed, there cannot be any doubt that what the parties contemplated was that, in the first instance, the dispute between the parties should be arbitrated upon by two arbitrators and, in the event of their failing to agree or failing to make an award within the time limited therefor, by the umpire appointed as such by the arbitrators, and that, in the event of the dispute between the parties still subsisting even after the date of the umpire's award or of the parties not having agreed to treat the umpire's award as final, the parties should be at liberty to go before the Committee of the Calcutta Baled Jute Association, the latter being regarded as a fresh set of arbitrators agreed upon by the parties and who would enter upon the reference with a full knowledge of what had gone before, i. e., of what had been done by the arbitrators and the umpire, and that if the arbitration clause is viewed in this light, there is nothing whatsoever in the scheme of the Indian Arbitration Act which prevents an award of the Committee of the Calcutta Baled Jute Association, made in such circumstances, being filed in this Court.

On the other hand, it has been strenuously argued before us on behalf of the respondents that according to the scheme of the Indian Arbitration Act and particularly having regard to the language of S. 11 of the Act, although there is nothing to prevent the parties from agreeing that the award made by an umpire should be reviewed or revised or considered by an appellate authority, the award made by such appellate authority cannot be filed in this Court. It is argued that the language of the English Arbitration Act is different from that of the Indian Arbitration Act and that the Indian Act does not contemplate a series of awards except as indicated in the Act itself.

This form of contract has been frequently before the Courts [see in this

connexion *Sassoon & Co.* v. *Ram Dutt* (1) and *Surajmull Askaran* v. *Chandmull Mulchand* (1)], but the point raised was, as far as I am aware, never raised before. In England, similar forms of contract are used in certain trades and in at least one case the question now raised was sought to be argued: see *In re Keighley Maxstead & Co.* and *Durant & Co.* (3). In that case the dispute arose out of a contract for the sale of a cargo of wheat made between Keighley Maxstead & Co. as purchasers and Bryan Durant & Co. as sellers, the purchasers having refused to accept the wheat when tendered to them. The contract contained a clause that all disputes arising out of it should be from time to time referred to two arbitrators, who should have power to call in a third, the award of any two of them to be binding and conclusive, with a proviso that in case either party was dissatisfied with the award, they might appeal to the appeal committee of the London Corn Trade Association subject to the rules of that Association. It was argued that it was a scheme of arbitration not provided for by the Arbitration Act, 1889. Lord Esher, M. R., observed as follows:

In the contract the parties had agreed, in case a dispute should arise, to refer it to the arbitration of certain persons as arbitrators and under certain conditions, if no objection was taken by either party to the award, it was of course to be final; but if either party wished to take the matter to an umpire or by way of appeal, as the parties call it, then the umpire was to be the appeal committee of the London Corn Trade Association. The case accordingly went to arbitration and one of the parties being dissatisfied with the award wished the case to go before the umpire. Now the parties had not only agreed that the committee should be the umpire but that they had agreed that it should act according to the rules of the London Corn Trade Association which were well known, and when the committee, which consisted of 25 persons, came to be umpire, they, acting under their rules, exercised their duty by appointing, out of their own body, a committee of 5 to act as umpire in the dispute.

Apparently the point sought to be canvassed in that case did not find favour with the Court and the actual decision turned on the question whether having regard to discovery of new evidence the Divisional Court in the exercise of its discretion was right in sending the case back to the umpire. The Court of appeal held that the Divisional Court was right.

There is, as indeed is recognized by the respondents, nothing to prevent the parties from agreeing to a submission such as is contained in the contract before us. In other words there is nothing to prevent the parties from agreeing to a submission containing in it a further submission to arbitration. No doubt in S. 11 of the Indian Arbitration Act, there is not to be found any reference to arbitration by a committee; but in my view it does not matter in the slightest whether the committee is described as committee of appeal or whether they are described as a fresh set of arbitrators; the substance of the matter has got to be looked at, and giving to the sections of the Indian Arbitration Act my very best consideration I can find nothing in it which would prevent an award by a committee of the Calcutta Baled Jute Association, being the final award contemplated by the parties in certain eventualities, being filed in this Court. I think the contention put forward on behalf of the appellants is correct and that the committee are really a fresh set of arbitrators called in by the parties. In other words, the contract contains as it were two submissions or a submission within a submission. The question was discussed during the course of the argument as to whether the award of the umpire could also be filed in circumstances such as have happened in this case. That point is not before us, and it is unnecessary in my opinion to go into that. The point immediately before us is whether the award of the committee can be filed, and in my opinion the answer is in the affirmative. I do not desire to be drawn into a discussion as to the competing merits of an award by the umpire and an award by the committee of the Calcutta Baled Jute Association should ever the two awards be filed together.

In my view the judgment and order of Mr. Justice Pearson should be set aside and this appeal allowed with costs.

**Buckland, J.**—The appellants have appealed against the judgment of Mr. Justice Pearson, dated the 3rd December 1926, on an application to take an award off the file. (After setting out the

(1) A. I. R. 1922 P.C. 374=50 Cal. 1=49 I.A. 366 (P.C.).
(2) A. I. R. 1927 Cal. 601.
(3) [1893] 1 Q. B. 405=62 L. J. Q. B. 105=68 L. T. 61=4 R. 136=7 Asp. M. C. 268=41 W. R. 437.

the facts as stated in the previous judgment his Lordship proceded.) The respondents applied before Mr. Justice Pearson, on notice of motion, to have the award taken off the file. The learned Judge has so directed on the ground that the award is not one to which the provisions of the Arbitration Act can apply so that it may be filed thereunder. His reasons for so holding were that under the Act an award must be made by arbitrators or an umpire, that they must cause it to be filed under S. 11, that the body which made this award is not within either of the terms "arbitrators" or "umpire" and therefore it is not an award which conforms to the scheme of the Act, and it cannot be filed.

It may be said that my learned brother's reasons rather lead to the conclusion that the committee had no power to make or to file the award, for its procedure has not been challenged and the terms of the award itself have not been impugned. Be that as it may, the judgment fully indicates the question which has to be determined. That there was a submission to arbitration is incontestable. Equally incontestable is the fact that there has been an award, made under that submission, and that it has been filed.

On behalf of the respondents it has been argued that though under the more limited terms of the Arbitration Act, 1889, S. 12, it would suffice to produce the submission and the award in order to obtain leave to enforce it; under S. 11 of the Indian Arbitration Act, the preliminaries to the filing of the award and the filing itself must be done by arbitrators or an umpire, and that the committee of the Calcutta Baled Jute Association is not within the expressions "arbitrators or umpire." The argument in support of the latter proposition is based in a great measure upon the successive courses which under the contract, the rules and bye-laws, the reference may follow. It is not argued that the appellants may not otherwise be able to enforce their rights under the award: the argument is limited to the application of S. 11 to an award so made.

Before considering the question I desire to dispose of one point to which allusion was made in the course of argument. There are cases, in particular *In re Smith and Nelson* (4), in which it was held that the terms of the submission were such that the Court had no power under the Arbitration Act, 1889, to order a party to appoint an arbitrator. No analogous question arises here as it has been conceded on behalf of the respondents for the present purpose that, provided the person or persons acting under S. 11 are an umpire or arbitrators, no exception could be taken to their so acting on the ground that their number or constitution is such, or on any other ground, that the aid of the Court could not have been invoked should occasion have arisen a an earlier stage, when, but for such reason, any necessary order might have been obtained. A matter may be within the section of the Act immediately applicable, even though it should be the case that circumstances are such that in some other respect the Act could not be called in aid [*Manchester Ship Canal Co.* v. *S. Pearson & Son, Ltd.* (5).

Reverting to the argument for the respondents, it is contended that the section is exhausted by applying it, first to the arbitrators who failed to agree, and secondly, to the umpire who made his award on the 25th June 1926. Rule No. 29 and Bye-law No. 5, it is said, exclude the possibility of the committee being within either of these terms, for they refer to: (1) the committee; (2) the arbitrators; and (3) the umpire, whereas the section recognises only the last two.

Now the procedure laid down by the arbitration clause and the rules and bye-laws, viz. a reference to arbitrators, and then, in appropriate cases, to an umpire, which may be succeeded by an appeal to another body, is no novelty. *In re Keighly Maxtead & Co. and Durant & Co.* (3) is not wholly in point, because there it appears that between the arbitrators and the appeal committee of the London Corn Trade Association there was no umpire as usually understood. There is, however, this resemblance, that even though there had been an award by arbitrators, effective until set aside, it was open to an aggrieved party to take the matter further and obtain the decision of the committee.

(4) [1890] 25 Q. B.D. 545=59 L. J. Q B. 533=63 L.T. 475=6 Asp.M.C. 555=39 W.R.117.
(5) [1900] 2 Q. B. 606=69 L. J. Q. B. 852=48 W. R. 689=83 L. T. 45.

This case turned upon the question of remitting the case to the umpire as the committee was described, but the judgments of the learned Lord Justices contain no comment on a procedure which involves reconsideration of an award by another lay tribunal.

*Produce Brokers Co., Ltd.* v. *Olympia Oil and Cake Co., Ltd.* (6) was a case in which the contract contained a clause hardly to be distinguished from that with which this appeal is concerned. It was there provided as follows:

> All disputes from time to time arising out of this contract, including any question of law appearing in the proceedings.....shall be referred to arbitration according to the rules endorsed on this contract.

By these rules it was provided that the reference should be to two arbitrators, one to be appointed by each party and an umpire whose decision in case of disagreement should be final and that in case either party should be dissatisfied with the award an appeal should lie to the committee of appeal of the incorporated Oil Seed Association.

In *Chandanmull* v. *Donald Campbell & Co.* (7) the submission gave a right of appeal from the award of the arbitrators to the London Jute Association, and in *Surajmull Askaran* v. *Chandmull Mulchand* (2) the terms of the arbitration clause were similar to those with which we have now to deal.

In all these cases the award ultimately made is treated as though it were an award made by arbitrators or an umpire. In that last cited the judgment of the Court of first instance was supported, but the learned Chief Justice, in his judgment, discussed the matter from the standpoint of the duty of the committee to receive evidence as though arbitrators or an umpire. In the *Produce Brokers Company's* case (6), so far from regarding the appeal committee as anything but arbitrators, the respondents, in the House of Lords, in moving the Divisional Court to set aside the award averred that the members of the appeal committee misconducted themselves as arbitrators" and in his speech Lord Loreburn evidently so regarded them when he said :

> The third and fourth grounds, which allege misconduct by the arbitral committee, disappear.

(6) [1916] 1 A. C. 314=85 L. J. K. B. 160=114 L. T. 94=21 Com. Cas. 320=32 T. L. R. 115=60 S. J. 74.
(7) [1916] 23 C. W. N. 707 N.

Similarly, in cases where the appeal lies directly from the arbitrators to a committee, the fact that there has been an award already made, valid and capable of being enforced, unless set aside, has not prevented the Court from recognizing the final tribunal as an umpire: see *In re Keighley Maxstead & Co. and Durant & Co.* (3).

In the course of argument the status of the first award in this case was touched upon, and it was suggested that the fact of there having been two awards was an additional reason for the view submitted. I am not concerned directly with the first award, and should on any future occasion a party who has obtained an award which has since been set aside in similar circumstances succeed in inducing those who made it to file it, I have little doubt that the law would be adequate, should occasion arise, to do justice between the rival claimants. But successive awards are not per se to be condemned and though certain observations of Lord Loreburn in *Chandanmull* v. *Donald Campbell & Co.* (7) were based on different facts, I nonetheless think that they are apposite to this case when he observed ;

> Sir John Simon pointed out the danger of allowing arbitrations upon arbitrations, and so ad infinitum, each arbitration being upon the validity of the previous award. The answer to this ingenious but unconvincing argument is that when an award assumes a shape which makes it available for a judgment enforcing it in a Court of law, the process of infinitesimal repetition is at once arrested because there is nothing left for an arbitrator when the Court of law becomes entitled to give effect to the award.

The procedure whereby the dispute comes before the committee is called an appeal. What it is called is of no consequence ; the fact remains that the committee is a body other than a Court of justice to whom the parties have agreed to refer their dispute. Such a proceeding is known to the law as an arbitration and those in whom the arbitrament is lodged are known as arbitrators or an umpire. In my judgment the committee were arbitrators or, it may be said, an umpire, and their award as such is one which the successful party is entitled to require to be filed. For these reasons I agree that the appeal should be allowed with costs.

R.D. *Appeal allowed.*

## A. I. R. 1927 Calcutta 652

MUKERJI AND ROY, JJ.

*Bal Mukunda Bisseswarlal*—Decree-holder—Appellant.

v.

*Bengal-Nagpur Railway Co., Ltd.*—Judgment-debtors—Respondents.

Appeal No. 293 of 1925, Decided on 30th March 1927, from original order of the 1st Sub-J., 24-Pargannas, D/- 30th March 1925.

*Civil P. C., O.* 20, *R.* 10—*Decree in terms of R.* 10—*Procedure in O.* 21, *R.* 31, *must be followed.*

Holders of a decree in terms of O. 20, R. 10, cannot execute the money portion of it without having recourse to the procedure prescribed by O. 21, R. 31 ; 13 *M. L. J.* 444, *Foll.* and 16 *W. R.* 240, *Ref.* [P 653 C 1]

The priciple that "it is the duty of a judgment-debtor to find out the judgment-creditor and pay him the amount of the judgment debt so long as the latter is within the realm" relates to a judgment-debt capable of being discharged by payment. It has to a certain extent been adopted in O. 21, R. 1, Civil P. C., in which modes of paying money under a decree are prescribed : *A. I. R.* 1925 *P. C.* 290, *Ref.* [P 653 C 2]

*Profulla Chandra Chakravarti* — for Appellant.

*Nasim Ali* and *Diptendra Mohan Ghose*—for Respondents.

**Mukerji, J.**—This appeal has been preferred from an order passed by the Subordinate Judge, 1st Court, Alipore, dismissing the appellant's application for execution of a decree.

The decree was passed in a suit in which the plaintiffs prayed that they might be given a decree for Rs. 5,000 as compensation for destroying certain godown and buildings and for Rs. 500 as compensation for wrongfully taking away certain articles which were kept therein. The Subordinate Judge who tried the suit passed a decree in this form :

It is ordered and decreed that the suit be and the same is hereby decreed in part after contest for the recovery of Rs. 3500 as damages and for the recovery of the moveables claimed in the Sch. Ka of the plaint ; that if the moveables be not delivered the plaintiffs shall recover Rs. 500 as price thereof ; that the said decretal amount and the sum of Rs. 490-5-0 only being the proportionate costs of this suit be paid by the defendants to the plaintiffs with interest at the rate of 6 per cent per annum from this date to date of realization.

It was passed on the 21st June 1919. From this decree, the defendants appealed to this Court. They valued the appeal at Rs. 2,500 and challenged that part of the decree which related to the compensation for destroying the godown and buildings. This Court dismissed the appeal with costs on the 20th February 1923.

The decree-holders applied for execution on the 9th August 1924. In this application they stated that they had demanded delivery of the articles by a letter dated 22nd July 1919 and payment of the money, viz., Rs. 500, by a letter, dated 23rd February 1923 and failed to obtain either, and as the articles had become spoilt and unfit for use, they asked for realization of Rs. 500 by attachment of the judgment-debtors' moveables. This application being refused the present appeal has been preferred. The findings of fact arrived at by the Subordinate Judge and the view of the law taken by him have been challenged before us on behalf of the appellant and the appeal has been argued in great detail on both sides.

On the facts it must be held that the evidence as regards the non-receipt of the letter of the 22nd July 1919 addressed to the Sub-divisional Officer of the B. N. Railway at Gondia by the latter is extremely unsatisfactory, but, on the other hand, the evidence as to its posting is not such as would warrant the presumption that it reached its destination. We are not prepared to agree with the Subordinate Judge in the suspicion which he seems to have entertained as to the genuinenesss of the copy (Ex. A) of this letter that has been filed on behalf of the appellants, or of the letter (Ex. B) that was received by the appellants from Abdul Karim Haji Abdul Shakoor. The contents of the letter, however, have not been duly proved. In the circumstances it must be held that the demand alleged to have been made by the letter of the 22nd July 1919 and the non-compliance with it on the part of the judgment-debtors have not been proved. It is not necessary therefore to go into the question whether the letter addressed to the Sub-divisional Officer, who is the head of the department at Gondia, was sufficient or not for the purpose of a demand on the judgment-debtors.

The next demand was by the letter of the 23rd February 1923 (Ex. C-1) and in answer to it the judgment-debtors paid the decree-holders' claim in full except, as regards the Rs. 500, by a cheque for Rs. 5,011-5-0 some time in

July 1923. They took up the attitude that they were ever ready to deliver the articles and that accordingly, under the terms of the decree they were not liable to pay the said Rs. 500. This appears from Ex. 3, dated the 2nd August 1925, which refers to a letter, dated the 14th July 1923, as also from Ex. 1 (d), dated the 7th August 1923. It may be mentioned here that the defendants in their written statement expressed their readiness to make over such of the articles as they had to the plaintiffs or their authorized agents: (vide para. 16 thereof) It may also be stated that in the judgment of the trial Court in the suit it was observed that the schedule in the plaint was proved and that the articles had not deteriorated in value.

These being our findings the question that arises is whether in the circumstances the application for execution of the decree, in so far as it relates to the recovery of Rs. 500, is maintainable. The decree is in the form suggested by Or. 20, R. 10, Civil P. C. O. 42, R. 1 of the Rules of the Supreme Court, 1883, to which our attention has been drawn, contemplates a decree directing payment of money or delivery of properties, and under that rule, in the case of such a decree, no demand would be necessary but the defendant against whom it is passed is bound to obey. The principle of that rule therefore cannot be invoked in the present case. If the decree had directed the defendants to deliver the articles within a specified time and provided that, in default of such delivery, the plaintiffs would be entitled to recover the money, the decree-holders would have been entitled to maintain an application for execution for recovery of the money on such default having happened. But the case of a decree which follows O. 20, R. 10, Civil P. C., is specifically provided for, so far as its mode of execution is concerned, in O. 21, R. 31, Civil P. C., and that procedure has not been adopted by the decree-holders.

That the holder of such a decree cannot execute the money portion of it without taking recourse to the procedure prescribed by O. 21. R. 31, Civil P. C., has been held in the case of *Manavikraman* v. *Moyankutti* (1). Whether the procedure prescribed in that rule is so rigid that it must be followed in a case where the moveables are admittedly not in existence is a question which does not arise here; but in the circumstances of the present case, in our opinion, the application to realize the money in the first instance does not lie. The history of the rule O. 20, R. 10, Civil P. C., is to be found in the case of *Kashee Nath Kooer* v. *Deb Kristo Ramanuj Doss* (2), in which it has been said that

> the words of the rule are in strict accordance with the provisions of the English Law that a certain amount of money should be allowed as an alternative if delivery of the chattel in dispute cannot be had; if the goods are capable of delivery they must be delivered; if they are not capable of delivery then assessed damages should be paid.

It does not appear that there is any authority for the view that the plaintiff has an option not to take delivery but to fall back upon the money part of the decree.

A high ground has then been taken on behalf of the appellants, and it has been urged that it is the judgment-debtors who should have offered the articles immediately as the decree was passed, and they not having done so, the appellants were entitled to maintain this application for execution. The principle that

> it is the duty of a judgment-debtor to find out the judgment-creditor and pay him the amount of the judgment-debt so long as the latter is within the realm

is found in very old authorities, Coke upon Littleton and Shephard's Touchstone, and has been undoubtedly affirmed and reiterated in more modern authorities: *In re a Debtor* (3) and *Bansilal Abirchand* v. *Ghulam Mahbub Khan* (4), but it relates to a judgment-debt capable of being discharged by payment, a principle that has to a certain extent been adopted in O. 21, R. 1, Civil P. C. in which modes of paying money under a decree are prescribed.

On behalf of the decree-holders it has been urged that the execution is barred as the part of the decree now sought to be executed was not the part of it that was appealed from, and that the appeal that was preferred not having imperilled this part of the decree there was no reason why the decree-holders should not have applied for execution within three

(1) [1903] 13 M. L. J. 444.

(2) [1871] 16 W. R. 240.

(3) [1912] 1 K. B. 53=81 L. J. K. B. 107=19 Manson 12=105 L. T. 610=28 T. L. R. 9=56 S. J. 36.

(4) A. I. R. 1925 P. C. 290=53 Cal. 83=53 I. A. 58 (P. C.).

years from the date of the decree. The objection on the face of it, does not appear to be a frivolous one, but we do not think it necessary to pronounce any definite opinion on it, because we do not think that the judgment-debtors will care to take shelter under this plea, having all along expressed their willingness to deliver the articles which admittedly belonged to the decree-holders and because this objection has been put forward only as an alternative argument in order to support the order of the lower Court.

In our opinion, the order of the Court below is right, and we accordingly dismiss the appeal with costs, hearing-fee being assessed at two gold mohurs.

**Roy, J.**—I agree.

D D. *Appeal dismissed.*

---

## * A. I. R. 1927 Calcutta 654

RANKIN, C. J., AND MAJUMDAR, J.

*Mt. Girija Bala* and *others*—Appellants.

v.

*Manindra Lal Singha*—Respondent.

Appeal No. 219 of 1925, Decided on 25th March 1927.

* (a) *Probate and Administration Act*, (1881) *Ss. 42 and 44—Grant of letters in respect of a portion of the estate—There cannot be another grant except in respect of the whole balance.*

Different people cannot get individual grants of letters of administration limited to the particular property which they happen to claim.

Where there has been one partial grant already, it would seem unreasonable that there should be any other grant save with reference to the rest of the estate. [P 654 C 2]

(b) *Probate and Administration Act, Ss. 41 and 85—Case under Hindu Wills Act governed by S. 85—Grant of letters cannot be refused, but if applicants are not next of kin or legatees, proper case under S. 41 must be made out.*

In a case under the Hindu Wills Act, to which S. 85 of the Probate and Administration Act applies, it is not open to the Court to order that no administration grant shall be made. However, if persons, who are not next of kin and are not legatees, come before the Court asking for grant, then the Court is entitled under S. 41 to say that a proper case must be made out for making such a grant to persons to whom ordinarily no grant is made. [P 656 C 2]

*Narendra Kumar Das*—for Appellants.

*Chandra Sekhar Sen*—for Respondent.

**Rankin, C. J.**—This is an appeal from a decision of the District Judge of Chittagong in an application for grant of letters of administration with the Will annexed to the estate of one Ram Das Dutta who died in 1879. The learned District Judge has made a partial or limited grant to the applicants in respect of the properties comprised in Schs. 3 and 4 of the Will. The applicants appeal on the ground that they desire a grant which would cover Schs. 1 and 2 as well. The matter is one of some complication and a good deal of misconception seems to have encrusted round it.

The Will of Ram Das divided his properties into five schedules. The 5th Schedule property was left to his nephew Ram Kumar, and in 1915 a grant of letters was made to Ram Kumar limited to properties comprised in Sch. 5. So far as I understand the only power to grant letters of administration with the Will annexed, limited to certain specific assets, is the power conferred by S. 42 of the Probate and Administration Act. Whether this was or was not a proper order in this case is not a matter on which this Court need at this time of day pronounce. The nature of that order, however, is a matter of some importance in these proceedings but it has not been produced before us and is in no way discussed in the lower Court. What the exact form of it was I do not know but I presume that the learned Judge was satisfied that the Will was a Will duly made and was merely desirous of limiting the intromissions of Ram Kumar with the testator's estate to this particular schedule. In these circumstances whether in order to establish the title of a legatee to other property it is in the least necessary for some one else to get another grant is a question. There having been a grant limited under S. 42, any other application for grant of letters to this estate would, I should have thought, come under S. 44 which deals with the case :

Whenever a grant with exceptions of probate or letters of administration with or without the Will annexed has been made, the person entitled to probate or administration of the remainder of the deceased's estate may take a grant of probate or letters of administration, as the case may be, of the rest of the deceased's estate.

If there is one thing which requires to be stopped peremptorily, it is the idea that different people are going to get individual grants of letters of administration limited to the particular property which they happen to claim and that is

a course which seems to have been adopted as the correct course in the District Court at Chittagong, so far as this estate is concerned. For myself I protest against it entirely. The only application that I should be prepared, in the absence of extraordinarily strong facts, to entertain would be an application under S. 41 for a grant of letters of administration to the rest of the testator's estate.

It appears that Ram Das Dutt, the testator, died leaving a widow, three daughters and a sister's son called Becharam. The widow died long ago, apparently towards the end of the nineteenth century. The three daughters were first of all Satyabati, Rukmini and Tirteswari. Rukhmini's daughter is Biroja and Tirteswari's daughter is Girija. The present applicants for letters are the daughter Satayabati and the two grand-daughters or daughters' daughters Biroja and Girija. Biroja like Satyabati is a sonless widow. Neither Biroja nor Girija as daughter's daughter is next of kin. The learned District Judge has disposed of this application without taking any evidence. There are two petitions but there is no evidence at all in any proper form, it being stated that all the facts are admitted.

By the Will of Ram Das he left the property mentioned in Sch. 1 to his widow with certain instructions that she should not alienate it without the consent of one Kali Kinkar and with the direction that if any portion of it remained till her death, then his legal heirs would get the same. There are other provisions in the case of a son, which I need not mention. Sch. 2 dealt with other lands and provided that no one would be entitled to transfer the land ; if he had no son, then these properties would be in charge of his wife, but such of his sapindas who resided after the death of his wife in his dwelling-house would hold and enjoy the same equally. Before the word sapinda there is apparently a part of the original Will, which is torn. There seems to be no reason whatever to supply that gap with the words " daughters or daughters' daughters." Sch. 3 is not disposed of by the Will. The Will says that

> the lands of Sch. 3 below have been given to my daughter Rukmini by the kabala dated 26th Falgun 1239 B. S.

So they do not pass under the Will at all. The same is true if the lands of Sch. 4 which were given to Satyabati by a kabala, dated 28th Aghrayan 1239. As regards lands of Sch. 5 I have dealt with these already.

After the death of the testator various litigations occurred : some of them are pending still. It seems, to begin with, that there was a suit commenced in 1911 by one Matanga, to whom Becharam, claiming to be a reversioner on the death of the widow had sold properties comprised in Schs. 1 and 2 ; and in 1911 Matanga brought a suit against the present applicants to insist upon her right of possession. That suit was first dismissed. After remand it was decreed in 1914 and that decree was upheld by the High Court in 1917. At the time that suit was started there had been no probate of this Will at all. And in the end in this Court apparently it was not thought that the letters granted to Ram Kumar could be availed of on behalf of the defendants.

Thereupon an application was made to get letters of administration with this Will annexed. The grant was directed to issue and the grantees thereupon, being the present applicants, brought a suit against Manindra Lal Singha, the transferee from Matanga, to recover possession of the lands which they had lost by the former suit. That suit succeeded in the first Court and an appeal is still pending in that matter in this Court.

Then the grant of letters was attacked by Manindra Lal. The learned District Judge revoked the grant and that matter came up on appeal to this Court. This Court took the view that the District Judge was right to revoke the grant, but it also seems, to my surprise, to have taken the view that the District Judge ought not to have contented himself with ordering a revocation. This High Court in effect by its order set the parties by the ears once again directing that the original application for grant of probate should be restored in the presence of Manindra and should be continued. That is the matter which is now before this Court on appeal from the judgment of the learned District Judge.

The learned District Judge has dealt with the matter in this way : He says first of all that Manindra does not object to a grant being made in respect of the

properties of Schs. 3 and 4 and so he lets the applicants to have a grant in respect of these two schedules. In my opinion that is wrong. First of all the properties of Schs. 3 and 4 did not pass under the Will and nobody requires the Will to make out a title to them. They passed by kabalas which this Will for convenience happens to mention. Secondly, the learned District Judge has not considered that as there has been partial grant in this estate already, it would seem unreasonable that there should be any other grant save with reference to the rest of the estate. Thirdly, he has not considered that even if we treat the three applicants as in the position of legatees (they certainly are not legatees and they merely claim to be in the shoes of legatees), there is a plain direction in the Probate and Administration Act, which prevents the Court giving administration with the Will annexed to a legatee unless a citation has been issued calling upon the next of kin to accept or refuse letters of administration.

In the last place he does not appear to have considered that if he was intending to act under the power given by S. 41, it was for him to be satisfied that it was necessary or convenient that he should make a grant to these particular applicants in respect of this estate in order that it might be administered. In my opinion that part of the learned Judge's order was made merely because no one who appeared before him objected. On this appeal I consider that we have power to discharge it.

Now, the main object of the applicants was a grant in respect of the properties in Schs. 1 and 2. So far as can be ascertained, Biroja claimed some right to the properties in Sch. 2 on the hypothesis that the missing words in that schedule may be of some use to her. It is perfectly certain that she was not a sapinda. Satyabati as regards Schs. 1 and 2 has no claim at all, direct or indirect, under this Will so far as it is possible to make out. Biroja appears to claim part of the properties in Sch. 1 as being purchaser for legal necessity from Renuka. Now the position is this: The learned Judge as to that part has dismissed the application on the ground that the purpose of the applicants was to re-open the litigation between Matanga and themselves. He says that they were bound to prove that there was a proper probate of this Will at the time Matanga or Manindra was suing them for possession. But not having done this in time they are estopped by the judgment in that suit from re-opening the matter by these administration proceedings. To my mind that reason is wrong. As regards everything apart from the properties in Sch. 5 there has been no administration of this estate at all. The case is one under the Hindu Wills Act and S. 85 of the Probate and Administration Act applies. It is not a case in which it is open to the Court to put its foot down and to order that no administration grant shall be made to this estate. On the other hand if persons who are not next of kin and are not legatees come before the Court asking for grant, then the Court is entitled under S. 41 to say that a proper case must be made out for making such a grant to persons to whom ordinarily no grant is made. Section 41 says that

> when a person dies intestate or leaving a Will, of which there is no executor, and it appears to the Court to be necessary or convenient to appoint some person to administer the estate or any part thereof other than the person who under the ordinary circumstances would be entitled to a grant of administration, the Judge may in his discretion having regard to the consanguinity and amount of interest, the safety of the estate and probability that it will be properly administered appoint such person as he thinks fit to be administrator.

Under that section of the Probate and Administration Act, it appears to me that the applicants have made no case at all and that any case adumbrated on their behalf is supported by no evidence. In my judgment the proper order which the learned Judge should have made on this application is the order which we now make in this appeal, namely that it is entirely dismissed. There is no necessity to act under S. 41 of the Probate and Administration Act. So far as I can see the applicants are in no way entitled under any of the other sections. The order of the learned Judge is set aside and the application is dismissed. Save as aforesaid this appeal is dismissed. We make no order as to costs either in this Court or in the Court below.

**Majumdar, J.**—I agree.

G.B. *Order set aside.*

## * A. I. R. 1927 Calcutta 657

MUKERJI AND ROY, JJ.

*Satyendra Nath Choudhury*—Appellant.

v.

*Charu Chandra Majumdar* and *others*—Respondents.

Appeal No. 164 of 1926, Decided on 11th March 1927, from the order of the Sub-J., Pabna and Bogra, D/- 19th December 1925.

*(a) Civil P. C., O. 21, R. 90 — Order setting aside or refusing to set aside sale—Matter between decree-holder and judgment-debtor—No second appeal lies—Civil P. C., S. 47, O. 43 and S. 104.*

No second appeal lies against an order setting aside or refusing to set aside a sale, although the matter is one between the decree-holder auction purchaser and judgment-debtor; *A. I. R. 1926 Cal. 798 (F. B.), Expl.* [P 657, C 2]

*(b) Practice—Precedents—A case is authority for what it actually decides.*

Every judgment must be read as applicable to the particular facts proved or assumed to be proved. A case is only an authority for what it actually decides and cannot be quoted for a proposition that may seem to follow logically from it. *Queen v. Leathem*, (1901) *A. C. 459 Foll.* [P 658, C 1]

*(c) Civil P. C., S. 151—Section should be resorted to only when Code provides no other remedy.*

Section 151 was enacted only to provide remedies in cases where the provisions of the Code are not ample or sufficient to give such remedies and in cases in which a remedy is not provided for by the Code. [P 658, C 2]

*Radha Binode Pal* and *Ramesh Chandra Pal*—for Appellant.

*Jatindra Nath Sanyal*—for Respondents.

**Mukerji, J.**—One of the judgment-debtors is the appellant in this appeal. The appeal arises out of certain proceedings under O. 21, R. 90, Code of Civil Procedure, for setting aside a sale on the ground that there was no proper service of the writ of attachment or the sale proclamation and that property really worth Rs. 1,500 fetched a price of Rs. 100 only at the sale. The decree-holder was the purchaser at the auction so held. The Munsiff allowed the application under O. 21, R. 90, Code of Civil Procedure, and set aside the sale. On an appeal being preferred from this decision, the District Judge, being of opinion that there were no clear findings upon the questions that arose in the judgment of the learned Munsiff, sent back the record to the Court of the latter with directions to record clear findings on all such points and ordered that the findings should be re-submitted with the record to his Court within a certain period. When the matter went down to the Court of the learned Munsiff, it was taken up by a different officer and he recorded his findings on the point that arose and re-submitted the record with those findings to the appellate Court. The District Judge thereupon transferred the appeal to the file of a Subordinate Judge and the latter allowed the appeal and dismissed the applications under O. 21, R. 90, Code of Civil Procedure. It is against this order of the learned Subordinate Judge that the present appeal has been preferred to this Court.

The appellant seeks to maintain this appeal, although it arises out of proceedings under O. 21, R. 90, Code of Civil Procedure by a reference to the decision of a Full Bench of this Court in the case of *Kailash Chandra Tarafdar* v. *Gopal Chandra Poddar* (1). The contention, shortly put, on behalf of the appellant, is that, inasmuch as in the said Full Bench decision it has been held that when the decree-holder is the auction-purchaser an order passed on an application for delivery of possession under O. 21, R. 95, Code of Civil Procedure, is an order under S. 47 of the Code, there is no reason why under similar circumstances an order setting aside or refusing to set aside a sale should not be regarded as an order relating to the execution or satisfaction of the decree and, therefore, an order coming within the purview of S. 47, Code of Civil Procedure, and appealable as a decree within the meaning of the Civil Procedure Code. I am unable to say that this argument is an altogether ill-conceived one. But the difficulty in accepting this argument is that the Code expressly puts an order under O. 21, R. 90 upon a different category from orders passed under S. 47 of the Code. Under S. 104 of the Code, an appeal lies from those orders only which are expressly mentioned in the said section, and it is stated that

> save as otherwise expressly provided in the body of this Code or by any law for the time being in force, no appeal shall lie from any other orders

and S. 104 sub-S. (1), Cl. (1) provides for appeals from orders made under rules

(1) A. I. R. 1926 Cal. 798=53 Cal. 781 (F. B.).

from which an appeal is expressly allowed by the rules.

Appealable orders provided for by the rules are to be found in O. 43 of the First Schedule to the Code and, under sub-S. (2) of S. 104:

> no appeal shall lie from any order passed in appeal under this section.

To accede to the petitioner's contention, therefore, would be to nullify the effect of S. 104 read with O. 43 of the First Schedule of the Code to which I have referred. Besides, the Full Bench case deals expressly with an order or application for delivery of possession under O. 21, R. 95, Code of Civil Procedure and, assuming that the contention which the appellant puts forward logically follows from the dictum of the Full Bench, it does not necessarily follow that that contention must be regarded as well founded for, as has been observed by Lord Halsbury, Lord Chancellor, in the case of *Queen* v. *Leathem* (2),

> every judgment must be read as applicable to the particular facts, proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. Another thing is that the case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code whereas every lawyer must acknowledge that the law is not always logical at all.

I am accordingly of opinion that no second appeal lies in this case. The appeal must, therefore, be dismissed with costs—hearing fee: one gold mohur.

The question that then arises is what order should be passed on the application under S. 115 of Civil P. C. that has been filed along with the appeal which is directed against the same order from which the appeal has been preferred. The grounds upon which this application is pressed before us are two. The first ground is to the effect that the order which the learned District Judge passed was really an order made under the provisions of O. 41, R. 25, of Civil Procedure Code, and, therefore, it should have contained a direction upon the Court of first instance to take additional evidence, and that, inasmuch as there was no such direction in the order, and also because the additional evidence that was sought to be adduced was not allowed to be given, the said order was without jurisdiction. This argument assumes that the order was really passed under the provisions of O. 41, R. 25. There is a good deal no doubt to be said in favour of the view that the only two provisions which the Code provides for making an order of remand, when that order is made by a Court of appeal, are to be found in O. 41, R. 23 and O. 41, R. 25 and that the order of the District Judge, by which the case was sent back to the Court of the learned Munsiff, bears greater analogy to an order which the Code contemplates in O. 41, R. 25; but I am unable to hold, in view of the terms in which that order was passed, that the learned District Judge meant to pass it under the provisions of O. 41, R. 25. The order appears to me to be one of those anomalous orders which the appellate Courts are very fond of passing notwithstanding that the Code has expressly laid down the form in which these orders should be couched. There is a tendency in the Courts to resort to the provisions of S. 151 of the Code, notwithstanding that they are not able to find that orders properly passed under R. 23 or R. 25 would not meet the ends of justice. S. 151 was not enacted for that purpose, but only to provide remedies in cases where the provisions of the Code are not ample or sufficient to give such remedies, and in case in which a remedy is not provided for by the Code. I am therefore of opinion that the order of the District Judge was not one passed under O. 41, R. 25, and the petitioner's argument on this head cannot be accepted as well founded.

The next ground upon which this application has been pressed is to the effect that the District Judge was wrong in transferring the appeal to the Court of the Subordinate Judge. In this connexion, reference has been made to the provisions of O. 41, R. 26 of the Code and reliance has been placed upon the decision of the Allahabad High Court in the case of *Udit Narain Singh* v. *Jhanda* (3). The answer to this contention again is that it proceeds upon the assumption that the order of the District Judge was passed under R. 25 of O. 41, which I am unable to accept. In my opinion,

(2) [1901] A. C. 459.

(3) [1893] 15 All. 315=(1893) A. W. N. 108.

therefore, the application under S. 115, Code of Civil Procedure, should also be rejected, and I order accordingly.

**Roy J.**—I agree.

G.B. *Appeal* and *Petition dismissed.*

---

## A. I. R. 1927 Calcutta 659

RANKIN, C. J., BUCKLAND AND CAMMIADE, JJ.

*Corporation of the Town of Calcutta*—Defendant—Appellant.

v.

*Ashutosh De*—Plaintiff—Respondent.

Appeal No. 3 of 1926, Decided on 17th May 1927, from the original order of the Calcutta Small Cause Court, C. J., D/- 7th July 1925.

(a) *Calcutta Municipal Act* (1923), *S.* 131 (1) —*Assessment cannot be increased above the standard rent under Calcutta Rent Act* (1920), *S.* 26.

*Per Rankin, C. J., Buckland and Cammiade, JJ., agreeing with Mukerji, J., Roy, J., dissenting.*—The Corporation of Calcutta, in assessing certain premises under S. 131, sub-S. (1) of the Calcutta Municipal Act, while the Calcutta Rent Act, 1920, is in force, are not competent to increase the assessment above the standard rent under S. 2, sub-S. (f), Cl. (i) of the Calcutta Rent Act, 1920. [P 663, C 2, P 665, C 1]

(b) *Calcutta Municipal Act* (1923), *S.* 127—*Annual value—Method of determination indicated—"Reasonably expected to let"—Meaning.*

*Per Mukerji and Roy, JJ.*—For purposes of determining the annual value under S. 127, the standard value upon which the rates have to be calculated is the value of the property to the owner which is to be measured, whether he occupies the property himself or lets it to a tenant, by the amount of rent per annum it would be worth to a hypothetical tenant. And to find out what a hypothetical tenant will give, such a tenant must not be taken who does not want the premises for the use for which they are built, but wants to use them for some other purpose, unless it can first be shown that they cannot be let for the purpose for which they are built. *The Queen* v. *London* and *North-Western Railway Company* (1874) 9 *Q. B.* 134; *The Queen* v. *The School Board for London*; (1886) 17 *Q. B. D.* 738 and 10 *Mad.* 38, *Rel. on.* [P 660, C 1]

(c) *Calcutta Municipal Act* (1923), *Ss.* 141 *and* 142—*Appeal to Small Cause Court—Evidence should be recorded in full.*

*Per Mukerji, J.*—The law having provided for an appeal from the decision of the Small Cause Court Judge, it is desirable that the evidence should in such cases be recorded in full.

[P 661, C 2]

*Brojo Lal Chakravarti, Baranashibashi Mookerjee, Rajendra Lal Mookerji* and *Krishna Lal Banerji*—for Appellant.

*Debendra Nath Kumar* and *Narendra Nath Choudhri*—for Respondent.

**Mukerji, J.**—This is an appeal preferred by the Corporation of Calcutta under S. 142, sub-S. (3) of the Calcutta Municipal Act.

The facts of the case are not disputed. The respondent is the owner of Premises No. 3, Gour De Lane, which is a plot of land with a tile-roofed structure consisting of 14 rooms. He has let it out to one Giribala at a rent of Rs. 32 per month. Giribala has sub-let some of the rooms to different persons, keeping one room vacant and the rest for herself. At the time of assessment in 1924, which was a six-yearly assessment under S. 131, sub-S. (1) of the Calcutta Municipal Act, the officers of the Corporation held a local enquiry and calculated the rent on the basis of that paid by the sub-tenants and what Giribala ought to pay for the rooms that she was occupying as well as for the room that she kept vacant. This came up to Rs. 51-4-0 a month. Making certain deductions the annual value was fixed at Rs. 447 as against Rs. 261 which was the annual value assessed in 1918. On an objection preferred by the respondent the Deputy Executive Officer reduced it to Rs. 393. The respondent then appealed to the Court of Small Causes under S. 141 of the Calcutta Municipal Act. The learned Chief Judge has held that the premises used to fetch a rent of Rs. 28 a month on the 1st November 1918, and that was the "standard rent" under S. 2, sub-S. (f), Cl. (i) of the Calcutta Rent Act, 1920, and that under S. 26 of that Act the assessment of the premises could not be made above the said standard rent. Calculating on that basis he fixed the annual value at Rs. 272-9-4. It is conceded on behalf of the respondent that there is an error in the calculation and the amount calculated in this way should be Rs. 295-10-5.

The appellants' first contention is that the learned Judge has not adopted the right principle that should be adopted in making the assessment. Now, the words of S. 127, Cl. (a) of the Calcutta Municipal Act are these :

> The annual value ..... shall be deemed to be the gross annual rent at which the land or building might at the time of assessment reasonably be expected to let from year to year less, etc.

The words "reasonably be expected to let" also occur in the Parochial Assessments Act (6 and 7 Will. IV, Cap. 96) and in the City of Madras Municipal Act 1 of 1884. Upon the interpretation of these words in the Parochial Assessments Act in the cases of *The Queen* v. *London and North-Western Ry. Co.* (1) and *The Queen* v. *The School Board for London* (2) and other cases it has been held that the standard value upon which the rates have to be calculated is the value of the property to the owner which is to be measured, whether he occupies the property himself or lets it to a tenant, by the amount of rent per annum it would be worth to a hypothetical tenant; and when you want to find what a hypothetical tenant will give, you must not take a man who does not want the premises for the use for which they are built, but wants to use them for some other purpose, unless you can first show that they cannot be let for the purpose for which they are built. These principles were adopted in interpreting the expression as used in S. 123 of the City of Madras Municipal Act in *Secretary of State* v. *Madras Municipality* (3). The learned Judge in the present case had no occasion to adopt these principles in the view that he took of the matter, but if they are to be applied it may be conceded that the officers of the Corporation proceeded on right lines and the assessment made by the Deputy Executive Officer is fair and reasonable.

The next contention of the appellants is to the effect that the learned Judge is entirely in error in taking into account the provisions of the Calcutta Rent Act, 1920, and in holding that S. 26 of that Act stands in the way of enhancing the assessment above the standard rent. The authority relied upon in this connexion is the House of Lords case of *Assessment Committee of the Metropolitan Borough of Poplar* v. *Roberts* (4). In that case Lord Buckmaster, Lord Atkinson, Lord Sumner and Lord Parmoor (Lord Carson dissenting) held that in arriving at the valuation for the purposes of the Valuation (Metropolis) Act, 1869, of an hereditament to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applies, the maximum gross value to be assigned to that hereditament is not limited to the standard rent of the hereditament together with the additions thereto permitted by the latter Act. It was further held by Lord Buckmaster, Lord Atkinson and Lord Parmoor (Lord Sumner expressing no opinion on the point) that the Act of 1920 is not to be taken into account in determining the valuation for rating purposes of the hereditaments to which it applies. In substance what was held in this case was, as Lord Buckmaster put it,

> that the rent which the tenant might reasonably be expected to pay is the rent which apart from all conditions affecting or limiting its receipt in the hands of the landlord would be regarded as a reasonable rent for the tenant who occupied under the conditions which the Statute of 1869 imposes.

Section 4 of the Valuation (Metropolis) Act, 1869, it may be mentioned here, defined "gross value" as the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament if the tenant undertook to pay all usual tenant's rates and taxes and the landlord undertook to bear the cost of the repairs and insurance, and "rateable value" as the gross value after deducting the probable annual cost of repairs and insurance.

Now, the meaning of the words of S. 127 of the Calcutta Municipal Act—

> The gross annual rent at which the land or building might at the time of the assessment reasonably be expected to let from year to year—

to my mind is not exactly what is conveyed by the expression "annual rent which a tenant might reasonably be expected, taking one year with another, to pay," which occurs in the Statute of 1869. "Letting" connotes a contract which must mean a contract enforceable at law and in that way the restrictive prohibitions of the Calcutta Rent Act, 1920, come in for consideration, while "paying" is an act which may be done voluntarily by the tenant without the aid of or unfettered by any provision of law. The words "at the time of the assessment" clearly indicate that the condition of things in 1924 has to be

(1) [1874] 9 Q. B. 134.
(2) [1886] 17 Q. B. D. 738.
(3) [1886] 10 Mad. 38.
(4) [1922] 2 A. C. 93.

taken into account. The Calcutta Rent Act, 1920, was in force then.

But assuming that the two expressions to which I have referred mean the same thing there is S. 26 of the Calcutta Rent Act, 1920, that has to be reckoned with. The like of it is not to be found in the Increase of Rent and Mortgage Interest (Restrictions) Act. 1920. Section 26 says :

> During the continuance of this Act the Corporation of Calcutta or any other local authority shall not raise its assessment of any premises above the standard rent on the ground of increase of value.

It has been contended on behalf of the appellants that the assessment of 1924 was not an assessment on the ground of the increase of value such as is contemplated by S. 26. I confess I do not understand this argument. The assessment no doubt is made on the basis of actual occupation, but the assessment is raised only because the value has increased. In my opinion the words "on the ground of the increase of value" in S. 26 save only such assessments as are made on alterations and improvements and the like. It may be said that S. 7 of the Act contemplates an increase of assessment since the 1st day of November 1918, and, therefore, militates against this view of S. 26. It is well-known that the Courts have often met with difficulties in interpreting the provisions of this Act, and as observed in the case of *Rawlinson* v. *Algar* (5), the English Act, on the lines of which this Act closely follows, is not always easy of interpretation. It may be that S. 7 contemplates a case of raising of the assessment above the standard rent in cases where alterations have been effected or improvements have been made. However, that may be, the provisions of S. 26 are, in my opinion, plain, and without doing violence to its language it is not possible to hold that the Corporation is at liberty to increase the assessment above the standard rent. Rs. 28 is the standard rent of the premises within the meaning of S. 2, sub-S. (f), Cl. (i) of the Act, the other clauses having no application to the case. I do not see any indication that the words "standard rent" in S. 26 were not meant to refer to Cl. (i) where the other clauses are not applicable, I am, therefore, of opinion that the view taken by the learned Judge is right.

(5) [1921] 90 L. J. K. B. 497.

It has been argued on behalf of the appellants that the contention based on S. 26 was not put foward on behalf of the respondent at any earlier stage of the proceedings. This is quite true, but I do not think the appellants have in any way been prejudiced, the question involved being one of law only.

I desire to say one word more and that is with regard to the recording of the evidence in these cases. The law having provided for an appeal from the decision of the learned Judge, it is desirable that the evidence should in these cases be recorded in full.

The result is that in my opinion the order of the learned Judge should be varied by raising the annual value to Rs. 295-10-5 pies and subject to this modification this appeal should be dismissed.

**Roy, J.**—This appeal is from the decision of the learned Chief Judge of the Court of Small Causes, Calcutta. The plaintiff Ashutosh De owns the premises No. 3, Gour De Dane in Calcutta. It is a structure with a tiled-roof which has about 15 rooms. The plaintiff has let it out to one Giribala at a rate of Rs. 32 per month inclusive of taxes. Formerly the plaintiff used to get Rs. 28 as rent. The period for which assessment was made under the old Calcutta Municipal Act having expired at the close of 1924, a fresh assessment was made by an officer of the Corporation. It appears that Giribala lives in some of the rooms and lets the rest out on hire to sub-tenants. The officer of the Corporation held a local enquiry and questioned the sub-tenants and made his assessment on the basis of occupation by Giribala and the sub-tenants. The rent calculated per mensem was Rs. 51-4-0 per month, after making certain deductions the assessment came to be Rs. 447 per annum as against Rs. 261, the assessment in 1918. The plaintiff lodged an objection and the Deputy Executive Officer reduced the assessment to Rs. 393.

The plaintiff was dissatisfied with this order and he appealed to the Small Cause Court under S. 141 of the Calcutta Municipal Act of 1923. At the trial the argument seems to have been advanced that the Corporation cannot raise the assessment under S. 26 of the Calcutta Rent Act, 1920, which prevents any increase beyond the standard rent of the

premises. The learned Judge accepted this plea and he held that Rs. 28 being the rent payable in November 1918 it should be taken as the standard rent and that, therefore, the assessment should be made on this basis and he gave his decision accordingly.

From this decision the Corporation of Calcutta has come up in appeal here and the learned vakil on its behalf contends that the question of standard rent has no application in the case, that the Calcutta Rent Act, 1920, is expiring at once and cannot control an assessment which is going to last for several years, and that the restriction imposed by the Act is only against the landlord and has nothing to do with the assessment which is to be made on the basis of occupation. It is argued that the real question has been lost sight of, viz., that it is not the rent payable to the landlord which determines the mode of assessment but the rent paid by the actual occupiers of the house.

Reference was made to the principles of rating which obtain in England, and the following cases were cited, viz., *Secretary of State* v. *Madras Municipality* (3) and *Poplar Assessment Committee* v. *Roberts* (4), and the observations of Lord Esher in the case of *Queen* v. *School Board for London* (2). The learned vakil appearing for the respondent has argued that the respondent is entitled to fall back on the Calcutta Rent Act which was in force when the assessment was made, and though in this case no standard rent was fixed, the law itself shows what the standard rent should be. It is urged that the standard rent in this case was Rs. 28 plus 10 per cent. allowed by the Act, and this should form the basis of assessment. In answer to the argument that the basis of assessment should be the measure of the beneficial occupation it is argued that a tenant might realize large sums from sub-tenants by sub-letting, but it would be very hard on the landlord if the Municipal assessment was fixed on what was being realized by the lessee.

The contention that the real question has escaped notice appears to be well founded. The Corporation claimed that the assessment should be on the rent paid or payable by the tenants in occupation. The respondent in his plaint claimed that the valuation should be on the basis of the rent he was getting as landlord, viz., Rs. 32. The learned Judge held that the rent which the owner receives is the criterion, and, that further, the figure should be what the owner used to get in November 1918. S. 127 of the Calcutta Municipal Act, 1923, lays down the method of assessment. It says:

> For the purpose of assessing land and buildings to the consolidated rate the annual value of land and the annual value of any building ordinarily let shall be deemed to be the gross annual rent at which the land or building might, at the time of assessment, reasonably be expected to let from year to year less 10 per cent. for the cost of repairs and other expenses. Annual value is the term in use in the English Rating Act and has always been held to mean the annual letting value. The actual rent paid may be considered, but it need not be the annual value contemplated by the Act. It contemplates a hypothetical tenant and a hypothetical rent. In any case you take up you find it *ad passim* that the ground of a man's liability is that he is in beneficial occupation. The case of *Poplar Assessment Committee* v. *Roberts* (4), for one, may be referred to. Lord Buckmaster said:
>
> From the earliest time it is the inhabitant who has to be taxed. It is in respect of his occupation that the rate is levied.

Lord Sumner said:

> Rating is a process between an occupier and a rating authority to the determination of which the landlord and the lessee are strangers.

The object of the whole system of rating law in England, which we have followed in India, is to assess occupiers of rateable property equally in proportion to the value of their occupation. The value is stated by statute in the form of a hypothetical annual rent payable by the occupier for the right to use and enjoy the property occupied. It is the beneficial occupier who has to be considered and the value of his occupation.

The landlord in this case happens to be a middleman. His lessee lives in a part of the structure and lets out the other rooms and realizes rent from the tenants occupying these rooms. It is not said that the rents realized from the occupiers are extravagant or that they are rents which would not ordinarily be paid for these rooms by this class of tenants. I do not think, therefore, that it was unreasonable on

the part of the Municipality to hold that the basis of assessment should be the actual rental paid by the tenants in occupation. The actual rental came to Rs. 51-4-0 per month. Handsome deductions were given with the result that the assessment stood finally at the figure of Rs. 393. This is a little more than the actual rent realized by the landlord. The Calcutta Municipal Act itself takes note of the possibility of the annual value being more than the actual rental. S. 150 of the Act gives relief to the landlord in such a case and provides a method by which he can realize the extra sum from the tenant. The actual rent paid by the lessee is not the criterion for making the assessment. The assessment should be on the value of the beneficial occupation. It may be said then that the assessment made by the Corporation in this case is not unfair. It seems reasonable and should, therefore, be maintained.

There remains the question advanced at the last moment, which appealed to the learned Judge, viz., that the Calcutta Rent Act (which has now expired) stood in the way of any increase in the assessment. S. 26 of the Calcutta Rent Act, 1920, which was in force when the assessment was made laid down that during the continuance of the Act the Corporation of Calcutta shall not raise its assessment of any premises above the standard rent on the ground of the increase of value. The idea in framing the section, I believe, was that, since the landlord could not get more than the standard rent, he should not be liable for any increased assessment on the ground that the land had gone up in value. It is a mistake, if I may say so with great respect, to suppose that the Calcutta Rent Act stopped all increase in assessments. On the other hand it took due note of the fact that the periodical assessments increased the rates, and S. 7 of the Calcutta Rent Act was, therefore, enacted to enable the landlord to raise the standard rent to the extent of the increase in the assessment in cases where the landlord paid the rents and taxes. The Calcutta Rent Act was a measure against the landlord, and it is not clear how he can fall back on the standard rent, i. e., rent payable on 1st November 1918, when he himself is realizing a higher rent. Section 26 of the Act prevents an increase of assessment on the ground of an increase in value. The assessment in question here has nothing to do with the rise in land value of the premises in question. The assessment proceeded on the basis of the value of the occupation; in fact on the actual rents paid by the occupiers. In my opinion therefore the reference in this case to S. 26 of the Calcutta Rent Act was misconceived.

The appeal therefore in my opinion should be allowed and the decree of the learned Judge set aside and assessment made by the Corporation restored.

## Order.

In this appeal we have agreed to differ on a point of law which may be stated in these words for the purposes of the proviso to S. 98 of the Civil Procedure Code :

Whether the Corporation of Calcutta, in assessing certain premises under S. 131, sub-S. (1) of the Calcutta Municipal Act in 1924 when the Calcutta Rent Act, 1920, was in force, were competent to increase the assessment above the rent at which the premises were let on the 1st November 1918 and which under S. 2, Sub-S. (f), Cl. (i) of the Calcutta Rent Act, 1920, was the standard rent of those premises.

The papers will be laid before the Hon'ble the Chief Justice.

(The appeal was then heard by Rankin, C. J., and Buckland and Cammiade, JJ., who delivered the following judgments.)

**Rankin, C. J.** — (His Lordship after stating the facts continued). On one point the two learned Judges were in agreement. That point is not before us and it is no part of our intention to express any opinion whatsoever upon it. On another point they were in disagreement and accordingly they took action under the proviso to sub-S. (2) of S. 98 Civil P C., and stated the point of law upon which they differed for the opinion of this Court. That point of law so stated is as follows :

Whether the Corporation of Calcutta, in assessing certain premises under S. 131, sub- S. (1) of the Calcutta Municipal Act in 1924 when the Calcutta Rent Act, 1920, was in force, were competent to increase the assessment above the rent at which the premises were let on the 1st November 1918 and which under S. 2 sub-S. (f), Cl. (i) of the Calcutta Rent Act, 1920, was the standard rent of those premises.

Now the terms of S. 26 of the Calcutta Rent Act are these :

> During the continuance of this Act, the Corporation of Calcutta, or any other local authority, shall not raise its assessment of any premises above the standard rent on the ground of the increase of value.

In order to apply that section in any particular case or to decide upon its applicability it is necessary to bear in mind the terms of S. 127 of the Calcutta Municipal Act of 1923. The clause of S. 127 which applies to this case is Cl. (a) and the section provides :

> For the purpose of assessing land and buildings to the consolidated rate the annual value of land and the annual value of any building erected for letting purposes or ordinarily let shall be deemed to be the gross annual rent at which the land or building might at the time of assessment reasonably be expected to let from year to year, less, in the case of a building, an allowance of ten per cent. for the cost of repairs and for all other expenses necessary to maintain the building in state to command such gross rent.

Under that section what has to be determined is the annual value and what the section says is that you are to put a figure upon the premises as being their annual value by finding out what would be the gross annual rent at which the building might reasonably be expected to let from year to year ; in other words, there is one way and only one way in which under this Act the annual value can be computed. It is to be computed on the basis of what the building can reasonably be expected to let at from year to year. It is quite true that when one is enquiring at what figure it can reasonably be expected that the building should be let out from year to year, it is very good evidence, in most cases probably the best evidence, to show what, in fact, tenants—presumably reasonable people—are paying and are willing to pay. If you find the tenant of a house paying a certain rent and that this arrangement is an ordinary business arrangement with which he is content then, at all events it is reasonably clear that the building can be expected reasonably to fetch that amount of rent per year. Now, in this case what has happened is shortly this: Under the previous valuation which obtained until 1924 it was decided that the annual value was Rs. 30 a month. That was the rent which it was then decided might reasonably be expected to be got from tenants. Under the proposed valuation Rs. 51-4-0 was to be the basis of the valuation, and unless violence is to be done to the statute that can only be upon the footing that this building can reasonably be expected to be let at Rs. 51-4-0 per month. It would seem, therefore, difficult to resist the conclusion that this is an increase of assessment on the ground of increase of value as that word is used in S. 127 of the Calcutta Municipal Act. However it be put, the assessing officer is necessarily in the position of saying that whereas in 1918 it was decided that you could reasonably expect to get no more than Rs. 30 per month, now you can reasonably expect to let it for Rs. 51-4-0. No doubt it would be different if the increase of assessment had been on the ground that the premises had been much altered and improved. No doubt it would be different if the increase of assessment had been due to some different method of calculating the allowances. But nothing of this sort is suggested in this case.

What is said on behalf of the Corporation is this : that the old assessment based on a valuation of Rs. 30 was no doubt calculated upon the actual rents obtained from the actual occupiers of the building in 1918, that in 1924 the actual rents obtained from the actual occupiers of the building plus a fair rent from Giribala herself amounted to Rs. 51-4-0 and that this increase of assessment is not because of increase of value at all, but it is because of an increase in the actual receipts known to be obtained not by the owner but by the tenant Giribala from the property. In my judgment for the reasons which Mr. Justice Mukerji has very clearly given that contention must be rejected altogether. Whatever light is thrown upon the amount of rent that can reasonably be expected to be obtained for this property by looking to what tenants or sub-tenants in fact are willing to pay, the only reason which under the statute justifies the assessment of the property at a particular figure is the reason which Cl. (a) of S. 127 sets forth :

> The annual value of any building erected for letting purposes or ordinarily let shall be deemed to be the gross annual rent at which the land or building might at the time of assessment reasonably be expected to let from year to year.

I would refer in particular to the following passage in the judgment of Mr. Justice Mukerji in which I agree. He says :

> It has been contended on behalf of the appellants that the assessment of 1924 was not an assessment on the ground of the increase of value such as is contemplated by S. 26. I confess I do not understand this argument. The assessment no doubt is made on the basis of actual occupation, but the assessment is raised only because the value has increased. In my opinion the words 'on the ground of the increase of value' in S. 26 save only such assessments as are made on alterations and improvements and the like.

It has been suggested that S. 7 of the Act of 1920 militates against this construction. That is a section which is taken from the English Act of 1920, at all events in its general idea. It is quite clear that in view of S. 26 the only way in which S. 7 can well come into play is in a case where there has been an increase in the percentage or in the number of annas in the rupee which have to be paid by way of rate upon the figure of the assessment. In such a case as that S. 7 may well have application but there is nothing in S. 7 which would justify any different construction of S. 26.

In these circumstances we have to answer the single question which I have already stated. In my opinion the answer to that question is in the negative—the Corporation of Calcutta are not competent to increase the assessment above the rent at which the premises were let on the 1st of November 1918. By the terms of S. 98 of the Code of Civil Procedure, where

> the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it.

Accordingly in this case the appeal falls to be determined in accordance with a negative answer to the question which has been put to us. It may be that the result of this is the result which Mr. Justice Mukerji indicated at the end of his judgment, because it was agreed before the Division Bench and it was agreed before us that if one takes the figure of the rental which the Small Cause Court Chief Judge took, then the correct figure of assessment is Rs. 295-10- 5. But that question is for the Division Bench.

This case will go back to the Division Bench who heard it in order that they might finally record an order upon the basis of the answer which we give to the question propounded to us.

The Corporation of Calcutta will pay to the assessee his costs of this hearing. We assess the hearing fee at ten gold mohurs. The costs before the learned Judges will be dealt with when the case finally goes before them.

**Buckland, J.**—I agree.

**Cammiade, J.**—I agree.

(The case then went back to the Division Bench and that Bench fixed Rs. 295-10-5 as the annual value of the premises).

G.B. *Appeal dismissed.*

---

## * A. I. R. 1927 Calcutta 665

RANKIN, C. J., AND MAJUMDAR, J.

*Behari Lal Sen*—Defendant No. 1—Appellant.

v.

*Indra Narayan Bandopadya* and *others*—Plaintiffs—Respondent.

Appeal No. 251 of 1925, Decided on 31st March 1927, from the Original Decree of the Sub-J., Birbhum, D/- 7th September 1925.

* (a) *Hindu Law—Joint family—Mortgage by some members agreeing to be liable jointly and severally—Suit against all except one barred—His share is liable for whole debt—Transfer of Property Act, S. 60—Co-mortgagors.*

Where some of the members of the joint family mortgage the joint properties, each of them representing to the mortgagee that he had whatever share or interest did not belong to the others, it is no defence to a suit on the mortgage against one of them that the suit is time barred as against others in view of the covenant to pay jointly and severally. In such a case one of the mortgagors can be made liable for the whole debt and he can have his remedy by contribution against other mortgagors. [P 666, C 2]

(b) *Transfer of Property Act, S. 43—A member of Hindu joint family mortgaging joint property representing to be his—His share as at the date of decree will be liable.*

Where some members of a joint Hindu family mortgaged the joint family properties, each representing to the mortgagee that whatever interest did not belong to others, belonged to him, and the mortgagee brought a suit on his mortgage against one of them, the suit being timebarred against others.

*Held*: that whatever share the defendant got by inheritance after the institution of the suit, would be liable for the mortgage debt: 25 *All.* 46; 5 *Cal.* 253 and 3 *C. W. N.* 323, *Rel. on.* [P 668 C 2]

* (c) *Contract Act, S. 69—Co-mortgagors—The fact that mortgage suit against defendant was barred is no defence to a suit for contribution.*

The right of contribution is an independent equity which arises between the co-mortgagors and the mere circumstance that the mortgagee's right is barred as against certain of the mortgagors is not an obstacle to a suit for contribution by a mortgagor, nor is it possible to maintain that the cause of action in a suit for contribution would not arise upon payment being made. [P 667 C 2]

*S. C. Bose, Hira Lal Chakravarti, Gopendra Nath Das* and *Satindra Nath Roy Chowdhury*—for Appellant.

*Bankim Chandra Mukherjee, Santimay Majumdar* and *Hari Prosanna Mukherjee*—for Respondents.

**Rankin, C. J.**—This is an appeal by the Defendant No. 1 against a decree of the Subordinate Judge of Birbhum, whereby a preliminary decree for sale on mortgage has been passed against the interest of Defendant No. 1 in certain properties belonging to the defendant's family. The interest of the Defendant No. 1, which by this decree has been made answerable for the mortgage money, is a 5/12ths interest in the mortgaged properties.

The position is this: There were two brothers belonging to the Dayabhaga School. One brother died leaving three sons, Behari Lal Sen, Defendant No. 1, Tarini Raman Sen, Defendant No. 2, and Bepin Behari Sen. Bepin died leaving Bahuballav Sen, Defendant No. 3, and Defendants Nos. 5 and 6 who were minors. The other brother, when he died, left a widow who was Defendant No. 4, and the mortgage transaction was constituted by a registered mortgage bond executed by Behari, Tarini and Bahuballav. That was a document dated the 24th June 1908 and the form of the document is this: that various family properties (which included certain shares in properties) were scheduled to the deed; that those three persons were the borrowers putting forward all the family properties as belonging to themselves. It is stated that

> as security for the satisfaction of the said amount, we mortgage the zemindary, putni and nishkar properties owned and possessed by us and described in the schedule below.

In my opinion these three persons put themselves forward, each of them representing to the mortgagee that he had whatever share or interest did not belong to the other two. The Defendant No. 1, for example, must be taken as representing that if there was any interest in that property beyond the interest of Tarini and Bahuballav it belonged to him. What has happened is that Defendants Nos. 2 and 3 made no payment of interest on the mortgage. Consequently it has been found that, so far as they are concerned, the 12 years' period of limitation protects them from a suit to enforce the security as between themselves and the mortgagee. Defendant No. 1, however, did make certain payments, and, within a few days apparently of the expiry of 12 years from the date of the last payment, the present suit was brought, namely on the 24th November 1923.

The first question raised is as to the right of the plaintiff against Defendant No. 1. The Subordinate Judge has found several things against the plaintiff, but the plaintiff has not brought any cross-objection, and has not complained against those findings. He has found, for example, that the purpose for which the bond was taken was not one of necessity, and that therefore the other members of the family, who were no parties to the transaction, cannot have their shares made answerable for the loan on the basis that the loan was obtained on their behalf by the karta of the family. The appellant says that it is not right that upon his share in the mortgaged property the whole of the mortgage debt should be visited, but that he should only be made to pay a rateable part of the debt. The second point is this: After the suit had been instituted Defendant No. 4 died and Defendant No. 1's share in the property which previously was 1/6th became 5/12ths. He says that that acquisition of interest (however it may be described), this inheritance, which he obtained on the death of Defendant No. 4, was not comprised in the mortgage and cannot be made answerable for the mortgage money.

It makes a good deal of difference to the rights of the mortgagee if subsequent to the mortgage the various co-mortgagors have effected a portion of the mortgaged properties between them-

selves. The mortgagee in the case of any particular mortgaged share would have to follow the particular allotment that was made to the mortgagor out of the family property. The first thing that one sees when one reads the pleadings and the issues in this case is that there was no issue raised to the effect that the rights of the parties ought to be determined in view of a partition subsequent to the mortgage deed. In the written statement originally filed by Defendant No. 4 there was certain loose talk about people being and not being in joint mess. The Defendant No. 1 has, however, filed a written statement of his own after the death of Defendant No. 4 and it is impossible to discover from what is alleged in that written statement any intelligible case to the effect that at such and such a date, after the mortgage bond, the parties made a partition of their properties by which the Defendant No. 1's interest was limited to particular properties or allotments. The issues framed contain no such question. When the Judge came to deal with the case he did so on the basis that the Defendant No. 1 had still got a 5/12th interest in the mortgaged property. I, therefore, put any question of partition out of the case.

The mere circumstance that plaintiff's claim is statute barred as against the other defendants does not offer any defence to Defendant No. 1 in view of the circumstances that there is a covenant to pay not merely joint but joint and several. There can be no doubt therefore that his debt was not released. Is there any reason why the whole of that debt should not be recovered from the share of Defendant No. 1?. We have had cited to us certain decisions, and the learned Judge in his judgment mentions some observations made in the case of *Mir Eusuff Ali Haji* v. *Panchanan Chatterjee* (1). Now, the line of cases which has been relied upon in this appeal goes upon this principle, that a mortgagee who has a security upon two or more properties which he knows to belong to different persons cannot release his lien upon one so as to increase the burden upon the other without the privity or consent of the persons affected. The Subordinate Judge points out that that line of cases is not at all applicable as between the original parties to the mortgage and that

> it is a firmly settled doctrine that, as between the original parties, the release of a part of the premises does not affect the lien of the mortgagee upon the residue which is bound for the whole debt.

The case where others have a lien upon the remainder is different. It may be that the mortgagee has no right to release any portion of the mortgaged premises to the injury of the owners of such liens. Whether the case of a mortgage debt becoming statute barred as against one of several co-mortgagors is the same as a release by the mortgagee of a portion of the mortgaged premises is a matter on which I reserve my opinion. Whether any subsequent incumbrancers from one of several co-mortgagors can possibly say that a mortgagee's failure to enforce his mortgage within the time limited by the Limitation Act is negligence or laches or breach of any duty owed by the mortgagee to him is a serious question to say the least.

But we are not concerned with that, line of cases at all. In the present case we are concerned with this that one of the three persons who claimed to be a co-owner of a certain property and who made himself individually liable for the debt has had a decree passed against him on the basis that his share is responsible for the whole of the debt. It has been suggested that this is wrong because the Defendant No 1 would have great difficulty in getting any contribution from the other sharers. I fail to see that there is any difficulty in his way, if he discharges his debt, to prevent his having a right to sue his co-debtors even though it be true that the plaintiff could not succeed against the co-debtors directly. It was pointed out in the case of *Abraham Servai* v. *Raphial Muthirian* (2) that in such cases the right of contribution is an independent equity which arises between the co-mortgagors and the mere circumstance that the plaintiff's right is barred as against certain of the mortgagors is not an obstacle to suit for contribution, nor is it possible to maintain that the cause of action in a suit for contribution would not arise upon payment being made.

(1) [1910] 11 C. L. J. 639=6 I. C. 842=15 C. W. N. 800.

(2) [1916] 39 Mad. 288=27 I. C. 337=27 M. L. J. 746.

The only remaining question in this appeal is with reference to the additional share which came to Defendant No. 1 upon the death of his aunt Defendant No. 4. That question has been dealt with by the learned Judge on the basis of S. 43 of the Transfer of Property Act. S. 43 of the Transfer of Property Act is is as follows :

> Where a person erroneously represents that he is authorized to transfer certain immovable property, and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferrer may acquire in such property at any time during which the contract of transfer subsists.

That is one principle. Another principle to be borne in mind is the principle that any enlargement of the mortgagor's interest in the mortgaged premises usually enures for the benefit of the mortgagee. We have to consider whether the learned Judge has rightly he subjected to the mortgage the whole of the 5/12ths interest. In my judgment has rightly done so. It appears to me that as between the mortgagor and the mortgagee we have to remember first that by the mortgage deed itself the Defendant No. 1 claimed to be entitled to whatever interest was not vested in his brothers Tarini and Bahuballa v. There is a representation on the part of each of these three persons that any interest which is not in the other two is in himself. But, apart from that, we must consider the principle which has been applied to India on the authority of the Privy Council in the case of *Raja Kishendatt Ram* v. *Raja Mumtaz Ali Khan* (3), where it was held that English Law as regards this matter is found in justice and may be applied to an Indian mortgage. The Judicial Committee referred to *Doed. Gibbons* v. *Pott* (4), where a mortgagor being lord of a manor, purchased certain copy-hold interests enured to the benefit of the mortgagee. Again in the case of *Ajudhia Prasad* v. *Man Singh* (5) there was a mortgage and a sub-mortgage. The mortgagee bought the equity of redemption and it was held that that enured to the benefit of the sub-mortgagee. The earliest case in which the principle was applied was the case of *Shyama* v. *Ananda* (6) before Mr. Justice Tottenham, and there is the further case of *Deolie Chand* v. *Nirban Singh* (7). I will refer to two cases only.

First, *Surja* v. *Nanda Lal Sinha* (8), where it was held that, apart from any question of S. 111 of the Transfer of Property Act or from any question of merger, where A mortgaged a chak and subsequently acquired the maurashi mokarari interest in the chak, the purchase of the mokarari was an accession to the mortgaged property under S. 70 of the Transfer of Property Act. The case of *Ajijuddin* v. *Sheik Budan* (9) was even stronger because there the acquisition took place after the decree, but in that case the interest of a Mahomedan lady, who had covenanted very much in the same way as the Defendant No. 1 has covenanted in the present case, was held bound by the mortgage in respect of that part of it to which she had become entitled on the death of one of her children, that is to say, the Court held the the share which she had inherited since the date of the mortgage was bound by the mortgage. In my judgment this is a case in which the mortgagee is entitled to have recourse to the whole of the interest which in fact was possessed by Defendant No. 1 at the time the decree was made.

I think therefore that this appeal fails and must be dismissed with costs to the plaintiff-respondent.

**Majumdar, J.**—I agree.

G.B. *Appeal dismissed.*

(3) [1879] 5 Cal. 198=6 I. A. 145=5 C. L. R. 213=4 Sar 17 (P. C.).
(4) [1781] 2 Dong. 710.
(5) [1902] 25 All. 46=(1902) A. W. N. 176.
(6) [1880] 3 C. W. N. 323.
(7) [1879] 5 Cal. 253.
(8) [1906] 33 Cal. 1212.
(9) [1895] 18 Mad. 492.

---

## * A. I. R. 1927 Calcutta 668

PAGE, J.

*Holmes Wilson & Co. Ltd.*—Plaintiff.

v.

*Bata Kristo De*—Defendant.

Original Civil Suit No. 3281 of 1922, Decided on 9th March 1927.

*(a) Contract—Construction—Mercantile contract—Evidence of usage in particular locality is admissible only if necessary to explain ambiguous terms—If such usage is repugnant to the terms of written contract it is inadmissible—Evidence Act, S. 91.*

Where ambiguous terms or phrases are found in a mercantile contract evidence of usage is

admissible to explain the meaning of the expressions in the particular trade or locality, and where a contract is silent in respect of some incidental term or condition which, according to the course of business established in a particular trade it is customary to find included in such a contract, evidence of the custom is admissible to prove that such term or condition formed part of the contract, unless the incorporation of the term or condition in the contract will have the effect of introducing something repugnant to or inconsistent with the tenor of the written agreement. But where the parties to a contract have expressed the agreement at which they have arrived in a written document the terms of which are capable of a reasonable interpretation, according to the natural meaning of the words that are used, a trade usage which, if it regulated the rights and obligation of the parties, would alter fundamentally the nature and character of the contract as expressed in the written agreement, can neither determine nor affect the rights and obligations of the parties engaged in the transaction; and, as it is inconsistent with the terms of the written agreement evidence of such an usage is inadmissible: *Humprey* v. *Dale*, (1857) 7 *E.* and *B.* 266 and *Mollet* v. *Robinson*, *L. R.* 5 *C.P.*, 646, *Rel on.* [P 670 C 1, 2]

Where plaintiff contracted to supply certain goods to the defendants and the indent provided: "I the undersigned, request you to purchase yourselves or through your agent on my account and risk the whole or any part of the undermentioned goods on the terms and conditions stated below":

*Held*: under the indent the relationship of principal and agent was created between the defendant and the plaintiff; and unless the defendant assented to some other mode of performance, it was the duty of the plaintiff under the indent to create privity of contract between the defendant and the foreign supplier for the purchase of the indent. [P 672 C 1, 2]

*Held*: *further*, that the usage that a merchant who under an indent agrees to purchase goods from abroad for and on account of a dealer, "C. I. F. no commission," is entitled to purchase the goods from the supplier as a principal on any terms that he may arrange, and to resell the goods to the dealer upon the terms of the indent, the difference between the price at which the merchant buys from the supplier and the price at which he sells to the dealer being his remuneration for obtaining the goods for the dealer, would be wholly inconsistent with the terms of the indent and would be inadmissible in evidence whether defendant was aware or ignorant of it: *Mollet* v. *Robinson*, (1870) *L. R.* 5 *C. P.* 646 and *May & Hart* v. *Angeli*, (1898) 14 *T. L. R.* 551, *Rel on.* [P 671 C 1]

(b) *Principal and Agent—Agent employed to effect purchase on behalf of principal from third person—Principal is not bound if agent sells his own goods to him unless principal has assented to that mode—If principal assents, relationship of vendor and purchaser is created.*

If an agent employed to effect a purchase on behalf of his principal from a third person upon certain terms either sells his own goods to his principal or as agent buys from a third person upon other terms, the principal thereby is not bound, and in either event, is at liberty to repudiate the act of his agent in effecting the contract. But if the agent sells his own goods, and the principal assents to the mode in which the agent has carried out his mandate after the purchase has been effected the relationship of the parties quoad the contract of sale ceases to be that of principal and agent, and ripens into that of vendor and purchaser, though it may be necessary to refer to some other agreement, for instance, the agreement of agency, in order to ascertain the terms and conditions of the contract of sale. [P 671 C 2, P 672 C 1]

*T. Ameer Ali* and *S. C. Mitter*—for Plaintiff.

*N. N. Sircar* and *B. K. Ghose*—for Defendant.

**Page, J.**—I have taken time to consider this case because it involves an inquiry into the legal position of indent merchants who import goods into India and, therefore, is of considerable importance to the mercantile community. In the course of my judgment I shall refer to the foreign seller (who may or may not be the manufacturer of the goods) as the supplier, the person who imports the goods as the merchant, and the person upon whose indent or order the goods are imported as the dealer. Now, the rights and obligations of the parties to an indent transaction depend upon the contract into which they have entered; but for many years past doubts have been felt as to whether the legal relationship of the merchant to the dealer under an indent is that of an agent or a principal. The uncertainty as to the legal position of indent traders has been created mainly, because persons engaged in the indent trade evince a strange disregard for the significance of the language that they use in framing their contracts. For instance, they appear to treat "limit and fixed price," "client and customer," "commission and profit," "buy on my account," and "sell to me," as synonymous terms with a levity bewildering to anyone who attaches importance to the meaning of words. The traders, however, are not alone to blame for the looseness of the language in which they couch their agreements. The tenderness with which the Courts have been wont to treat commercial usages and phraseology to some extent may have conduced to the belief that it is prevalent among commercial men that, so long as the course of business is established and the

usages of a trade are well understood, the rights and obligations of the persons who carry on the trade will be regulated by its established practice and usage, irrespective of the form of the contract into which they have entered. I am glad that the tide is now turning, and that the present tendency of the Courts is to hold the parties to a mercantile contract more strictly to the terms in which they have purported to express the agreement that has been concluded between them.

Lord Birkenhead, L. C., observed in a recent case :

> The learned Judge . . . has in effect declared that a custom may be given effect to in commercial matters which is entirely inconsistent with the plain words of an agreement into which commercial men, certainly acquainted with so well-known a custom, have nevertheless thought proper to enter. Much evidence would be necessary to convince me of the existence of such a custom, and, if it were forthcoming, I should nevertheless hold the custom to be bad on grounds which seem to me to be both notorious and elementary. *Affretures Renis* v. *Leopold Walford* (1), see also *Miller Gibb & Co.* v. *Smith and Tyrer* (2), *Palgravie Brown & Son, Ltd.* v. *Owners of SS. "Turid"* (3).

No doubt, where the ambiguous terms or phrases are found in a mercantile contract evidence of usage is admissible to explain the meaning of the expressions in the particular trade or locality ; and, where a contract is silent in respect of some incidental term or condition which, according to the course of business established in a particular trade it is customary to find included in such a contract, evidence of the custom is admissible to prove that such term or condition formed part of the contract, unless the incorporation of the term or condition in the contract will have the effect "of introducing something repugnant to or inconsistent with the tenor of the written agreement": per Lord Campbell, C. J. in *Humfrey* v. *Dale* (4). But where the parties to a contract have expressed the agreement at which they arrived in a written document the terms of which are capable of a reasonable interpretation according to the natural meaning of the words that are used, a trade usage which, if it regulated the rights and obligations of the parties, would alter fundamentally the nature and character of the contract as expressed in the written agreement, can neither determine nor affect the rights and obligations of the parties, engaged in the transaction :and as it is inconsistent with the terms of the written agreement evidence of such a usage is inadmissible both under the provisions of the Indian Evidence Act and the principles of the Common Law. Willes J., thus enunciated the rule :

> It is also an elementary proposition that a custom of trade may control the mode of performance of a contract, but cannot change its intrinsic character. It may regulate as extrinsic what is done in the market, where the contract does not provide otherwise. It cannot overrule what is agreed upon between the parties, whether intrinsic or extrinsic. The agent may perform the business he is engaged for according to the usages of the market in matters of detail, although the principal be unaware of such a usage; because every authority to do a thing, not specifying the way, implies authority to do it in a reasonable way which the usual way *prima facie* is. But no usage unknown to the principal can justify a broker in converting himself into a principal seller. *Mollet* v. *Robinson* (5).

I would add that in my opinion such a usage will not bind the principal or become admissible in evidence merely because the principal is aware of it. Indeed, the more fully the principal was aware of the usage the less likely is it that he would have contracted in terms inconsistent with the usage, unless he was minded to preclude the usage from regulating the rights of the parties to the cantract. I am of opinion that the principal would not be bound by such a usage, whether he knew of it or not, unless it is provided or admitted that the principal consented to the agent performing the contract in the manner sanctioned by the usage.

This statement of the law may come as a surprise to business men ; but if, as a result of this suit, persons engaged in the indent trade are induced so to alter the terms of their contracts that they are made to conform to the meaning that the parties intend to express, the time and labour that has been expended upon the trial will not have been wasted.

The plaintiffs in the suit are merchants, and they claim to recover damages from the defendant, who is a dealer, for failing to take delivery of

(1) [1919] A C. 801.
(2) [1917] 2 K. B. 141=86 L. J. K. B. 1259=33 T. L. R. 295=116 L. T. 753=22 Com. Cas. 320.
(3) [1922] 1 A. C. 397.
(4) [1857] 7 E. & B. 266.
(5) [1870] 5 C. P. 646.

goods sold to him by the plaintiffs; in the alternative, the plaintiffs, as agents, claim an idemnity from the defendant to their principal. The plaintiffs' claim is based upon four contracts, the terms and conditions of which are set out in a common form of printed indent or order, each indent (Nos. 74, 75, 78 and 88) being completed by the dealer, who wrote below the printed matter the particular details of the order. A large number of indent forms in use among persons concerned in the indent trade at Calcutta were adduced in evidence, but they were substantially the same as the forms used for the purpose of the transactions in suit. Indent No. 74 was to the following effect:

Indent No. 74 Messrs. Holmes Wilson & Co. Ltd., 22nd October 1919.

I (we) the undersigned, request you to purchase yourselves of through your agent .... on my (our) account and risk the whole or any part of the undermentioned goods on the terms and condition stated below:

2. I (we) authorize you, your agents or whoever you or they may appoint, to draw on me (us) for invoice amount calculated on the terms of this indent, and I (we) agree with you, and as a separate agreement with your agents, to accept such draft or drafts on presentation and to pay the same at maturity. No interest to be allowed on part payment made against such draft or drafts.

3. Should I (we) fail to accept on presentation or to pay at maturity such bill or biils, I (we) hereby authorise you to dispose of the documents or goods either by private sale or public auction on my (our) account and risk without notice and I (we) hereby bind myself (ourselves) to make good any loss or deficiency th.t may arise from such sale together with all expenses and usual brokerage and interest, waiving all claim to any advantage thereon. I (we) agree to pay you a commission of 5 per cent. on proceeds of such goods resold together with 12 per cent. interest, on the draft amount from date of maturity till realization thereof.

4. Should I (we) fail to pay any D·A draft on due date, you are hereby authorized to have all subsequent drafts "en route" or otherwise, altered to or drawn on D. P. terms, whether the relative indents have been accepted on D-A terms or not, and I (we) agree to accept such and to retire same on or before the due date.

5. We agree to pay interest at 12 per cent. per annum on any draft or acceptance from date of maturity, which has become overdue, till date of payment. (The judgment then set out other provisions of the indent and proceeded.)

The first issue to be determined is whether upon a true construction of these contracts the plaintiffs agreed to purchase the goods in suit from the suppliers upon the terms and conditions of the indents as agents for and on account of the defendants, or whether under the terms of the contracts the plaintiffs were entitled as principals to purchase the goods, from the suppliers on any terms that they might arrange, and then to resell the goods to the defendant upon the terms and conditions of the indents. In other words, in effecting the contracts by which the defendant purchased the goods were the plaintiffs to be regarded vis-a-vis the defendant as agents or principals? Learned counsel for the plaintiffs during the course of the trial was disposed to argue upon the authority of certain passages in the judgment of Blackburn, J., in *Ireland* v. *Livingston* (6) that in respect of these sales the relationship of the plaintiffs to the defendant was that both of agent and principal, but, in my opinion, those passages do not support the proposition for which they were cited.

In *Robinson* v. *Mollett* (7) Blackburn, J., in expressing an opinion contrary to that of Brett, J., and other learned Judges appeared to think that an agent might purchase goods for his principal without himself being the vendor or creating privity of contract between his principal and a third person. But the view that found favour with Blackburn, J., as I understand *Robinson* v. *Mollett* (7), was not accepted by the House of Lords, and I am clearly of opinion that under the contracts of sale by which the defendant purchased the goods in suit the plaintiffs inevitably must have been either principals or the agents of the defendant, and in the eye of the law cannot be regarded as filling at the same time both capacities. It may be that the agreement between the plaintiffs as merchants and the defendant as a dealer for whom they were acting at the outset was one of principal and agent, and that so long as the contract remained executory the relationship of principal and agent subsisted between them.

Moreover, if an agent employed to effect a purchase on behalf of his principal from a third person upon certain terms either sells his own goods to his principal or as agent buys from a third person upon other terms, the principal thereby is not bound, and in either

(6) [1872] 5 H. L. 395=41 L. J. Q. B. 201=27 L. T. 79.
(7) [1874] 7 H. L. 802=44 L. J. C. P. 352=33 L. T. 544.

event is at liberty to repudiate the act of his agent in effecting the contract. But if the agent sells his own goods, and the principal assents to the mode in which the agent has carried out his mandate, in my opinion, after the purchase has been effected the relationship of the parties quoad the contract of sale ceases to be that of principal and agent, and ripens into that of vendor and purchaser; though it may be necessary to refer to some other agreement, for instance, the agreement of agency, in order to ascertain the terms and conditions of the contract of sale. If the law were to be otherwise the result would be that in so far as the agent was acting as a vendor he would be under no obligation to account to the other party to the contract in respect of any profit that he might have made through buying or selling the goods in question to that other party. On the other hand, in so far as he was acting as the agent of a principal, he would be liable to account to his principal in respect of any profit in excess of the agreed commission payable by his principal (if any) that he might have made out of the transaction. In my opinion, where goods are purchased through A by B, A inevitably must either have sold the goods to B on his own account as a principal, or as agent for B, have created privity of contract between B and a third person: *Feise* v. *Wray* (8), *Ireland* v. *Livingston* (6), *Robinson* v. *Mollett* (7), *Cassaboglou* v. *Gibb* (9), *Ex-parte Miles* (10), *Blackburn on Sale*, 3rd Ed. 52.

I proceed, therefore, to consider the question whether under the terms of the contracts in suit the plaintiffs were bound to purchase the goods from a third person as agents for the defendant, or whether they were entitled to sell their own goods to the defendant upon the terms and conditions contained in the indent. I am clearly of opinion that under the four indents in suit the relationship of principal and agent was created between the defendant and the plaintiff, and unless the defendant assented to some other mode of performance, that it was the duty of the plaintiffs under the indents to create privity of contract between the defendant and the foreign supplier for the purchase of the goods upon the terms and conditions of the indents. Under these indents the order given to the merchants by the dealer is "to purchase yourself or through your agents on my account and risk." Both in common parlance, and as interpreted by Courts of law, these words denote an agreement for agency, and are wholly inconsistent with the notion that the person to whom they are addressed is thereby invited or entitled to sell his own goods to the person who has given him an order in this form. It is unnecessary to elaborate this matter; for, as Willes, J., pointed out in *Mollett* v. *Robinson* (5):

> Here the authority of the brokers was to buy as brokers for their principal, not to sell to him. If the sale had been consummated in the course insisted upon by the brokers, the principal would have obtained goods and paid for them; that is, would have bought them. Of whom? Of his own brokers, and no one else. That ought not to be, without the knowledge and consent of the principal. It is an axiom of the law of principal and agent that a broker employed to sell cannot himself become the buyer, nor can a broker employed to buy become himself the seller, without distinct notice to the principal, so that the latter may object if he think proper. A different rule would give the broker an interest against his duty, to pass off a bad bargain or inferior goods.

Learned counsel for the plaintiffs further strenuously urged that because the goods were to be bought by the dealer at a stated price C.I.F., and no commission was payable by the dealer, the contract was one of sale, and could not be one of agency. I am unable to appreciate the force of that contention. There is no magic in the term C.I.F., the meaning of which is free from ambiguity and well understood, and merely indicates compendiously the sum that the dealer will have to pay for the actual cost of the goods, insurance, and freight. And a contract of sale C.I.F., in which no provision is made for paying commission is equivalent to a contract of sale C.I.F.C., C.I,F., and C.I.F.C., indicating that the dealer is willing to pay the sum stated but no more for the actual cost, insurance, freight, and commission, whether payable to the merchant or by the merchant in order to obtain the goods. It was further contended that the conditions of sale set out in the indents were inapplicable to a contract of agency. Construed as a whole, how-

(8) [1802] 3 East. 93=6 R. R. 551.
(9) [1883] 11 Q. B. D. 797=52 L. J.Q.B. 538=48 L. T. 850=32 W. R. 138.
(10) [1885] 15 Q. B. D. 39.

ever, the terms and conditions of the indents do not appear to be incompatible with agency. Indeed, some of the clauses of the indent (for instance, Cl. 3) would be superfluous and unnecessary if the contract was one of sale between principals. Again, it is common ground that it is customary in the indent trade to use the printed form of indent in suit in transactions in which the parties intend that the merchant shall act as the agent of the dealer, and whether the goods are to be purchased F.O.B. or C.I.F.: see Cl. 18. Further, the printed form of invoice used by the plaintiffs in these and similar contracts in which it is stated that the goods are "consigned unto order for account and risk of" the defendant also tends to show that the printed form of indent is applicable to a transaction in which the merchant is the agent of the dealer. Learned counsel for the defendant relied upon certain admissions by Mr. Holmes in a written statement in answer to a claim by the defendant in another suit, No. 1835 of 1923, relating to other indents.

I do not think it necessary to refer to the pleadings in that suit, both because the facts in that suit, may well be different from those in the present suit, and may have to be investigated hereafter, and also because it may be urged with plausibility that in that suit the present defendant framed his claim upon the footing that the plaintiffs had contracted to sell the goods to him otherwise than as agents. But in the course of certain arbitration proceedings, in respect of the contracts in suit it is clear that the plaintiffs insisted that under the contracts their position was that of agents and not of principals. It is, of course, to be remembered that during the arbitration proceedings and thereafter, the plaintiffs have been acting under legal advice, and in accordance with the opinion as to their legal position which commended itself to their legal advisers; but the fact remains that until the present suit was launched the plaintiffs adopted the view that under the indents the relationship of principal and agent was created between the defendant and themselves. In my opinion, it is idle to contend that under the terms of the contracts in suit the plaintiffs did not become the agents of the defendant to purchase goods from the suppliers for and on account of the defendant upon the terms and conditions of the indent. It is conceded by the plaintiffs, if they were under an obligation in the circumstances obtaining in this case as agents for the defendant, to effect contracts between the defendant and the suppliers for the purchase of the goods in suit upon the terms and conditions of the indents, that they have not performed their part of the contracts, and that the claim in the suit for damages or for an indemnity must fail.

Learned counsel for the defendant further contended that in these transactions the plaintiffs throughout were acting as agents for the defendant, and that privity of contract was established between the suppliers and the defendant. But I refrain from discussing the interesting question of law that was mooted at the trial as to whether, if the plaintiffs purchased the goods from the suppliers as agents for the defendant without disclosing the name of their principal, privity of contract thereby was created between the defendant and the United States Steel Products Co. of America who supplied the goods; because upon the oral and documentary evidence that has been adduced I am satisfied: (1) that the plaintiffs did not purchase the goods in suit from the United States Steel Products Co., as the agents of the defendant but as principals on their own account, and, therefore, that privity of contract was not created between the United States Products Co. and the defendant under the contracts whereby the plaintiffs purchased the goods from the suppliers; (2) that the terms of the contracts of sale between the United States Steel Products Co. and the plaintiffs differed in material respects from the terms and conditions of the indents, and that the plaintiffs were not authorized under the indents to enter into any such contracts as agents for the defendant.

The course taken by the plaintiffs on receipt of the defendant's indents was to communicate with the Calcutta office of the United States Steel Products Co. and endeavour to arrange with them for the goods to be sold to the plaintiffs at a price lower than that set out in the defendant's indents. The plaintiffs in

order to carry out indents 'Nos. 74 and 75, bought from the United States Steel Products Co. C. I. F. Calcutta 48 tons of 3/16" mild steel plates at 97·60 per ton and 52 tons of ¼" mild steel plates at 92 per ton; to fulfil indent No. 78 the plaintiffs bought from the United States Products Co. C. I. F. Calcutta 48 tons of ¼" mild steel plates at 94 per ton and 52 tons of 3/16" mild steel plates at 99·60per ton, and against indent No. 88, 103 tons of steel joists at 90 per ton. These goods were all bought subject inter alia to the suppliers' printed conditions of sale which were different from the terms and conditions of the defendant's indents and were less favourable to the purchaser. After the suppliers had agreed to sell the goods to the plaintiffs the plaintiffs sent the placement reports to the defendants. I find that the contracts under which the plaintiffs bought from the United States Steel Products Co. were concluded between the suppliers and the plaintiffs as principals, and that the suppliers gave credit solely to the plaintiffs, and regarded the plaintiffs alone as the purchasers of the goods.

Under the contracts the goods were shipped by the suppliers, and the bills-of-lading were made out to the orders of the shippers, and were endorsed "notify Holmes Wilson Calcutta." The invoices for the goods were sent to the plaintiffs, and drafts were drawn by the suppliers upon the plaintiffs who met them upon the arrival of the goods in Calcutta. The plaintiffs did not communicate to the defendant the terms upon which the goods had been purchased from the suppliers, and they sent their own invoices to the defendant in which the goods were charged at the indent prices. Nevertheless learned counsel for the defendant contended that the effect of the evidence was that the plaintiffs in purchasing the goods from the United Steel Products Co. must be held to have acted as the agents of the defendant. In this connexion the defendant placed much reliance upon the terms of the plaintiffs' invoices and the placement reports. The invoices, however, were on a printed form which was used indifferently for all indent business, and whether the plaintiffs were acting as agents or as principals. I do not think in the circumstances that much importance should be attached to the printed form of invoice that was used: see per Blackburn, J., in *Armstrong* v. *Strokes* (11).

As regards the placement reports learned counsel for the defendant urged that if the plaintiffs had purchased the goods from the United States Steel Products Co. as principals it was unnecessary that any reference should have been made in the placement reports to the acceptance of the orders by the Works. I am not prepared to accept that contention, for it appears to me that it was natural and reasonable that the plaintiffs should have informed the defendant that the United States Steel Products Co. from whom the defendant desired that the goods should be obtained had agreed to supply the goods. In respect of the placement report for indent No. 78, in which it is stated "Works have accepted ¼" plates at 100, 3/16." plates at 106 per ton C. I. F.", it is enough that I accept Mr. Holmes' explanation that these were the terms upon which the plaintiffs were prepared to supply the goods to the defendant, and that in due course the plaintiffs charged the defendant for the goods at the prices set out in this placement report. I do not think that it is either necessary or desirable that I should burden my judgment by discussing further in detail the evidence upon this matter. It is enough that I should hold that the effect of the transactions in fact and in law was that the plaintiffs purchased the goods in suit from the suppliers upon their own account as principals and resold them to the defendant.

The plaintiffs sought to justify their action upon three grounds: (1) that upon a true construction of the indents they became principals and not agents vis-a-vis the defendant; (2) that according to the established usage of the indent trade in Calcutta, known to the defendant, a merchant who under an indent agrees to purchase goods from abroad for and on account of a dealer "C. I. F. no commission" is entitled to purchase the goods from the supplier as a principal on any terms that he may arrange, and to resell the goods to the dealer upon the terms of the indent, the difference between the price at which the merchant buys from the supplier and the price at which he sells to the dealer being his remunera-

(11) [1872] 7 Q. B. 598=41 L. J. Q. B. 253=26 L. T. 872=21 W. R. 52.

tion for obtaining the goods for the dealer; (3) that the defendant well understood and assented to the mode in which the plaintiffs proposed to execute the indents, and cannot now be heard to deny that the plaintiffs had the authority of the defendant for the mode in which they carried out his mandate.

As regards the first ground of justification for the reasons that I have stated I am of opinion that under the terms of the indents the plaintiffs were bound to purchase the goods from the suppliers as agents for the defendant and not as principals. In connexion with the second ground many authorities were cited by the parties, but I am relieved from discussing these decisions in detail because admittedly the two cases upon which the plaintiffs mainly relied were *Mollett* v. *Robinson* (5) and *Paul Beier* v. *Chotalal* (12). In my opinion, even if the usage pleaded were to be proved the effect of the incorporation of such usage into the written agreement that had been concluded between the plaintiffs and the defendant would be to "change its intrinsic character." Evidence of the usage, therefore, is inadmissible for the purpose of varying the terms of the written agreement; and it is equally inadmissible whether the defendant was aware of it or was ignorant of its existence. Why should it be presumed, merely because the parties were aware of a trade usage, that they intended that their rights and obligations should be controlled by the usage, when they had concluded a contract the terms of which are fundamentally inconsistent with the usage that it is sought to incorporate in the contract. Commonsense and, in my opinion, the Common Law alike are opposed to any such presumption. Lord Halsbury, L. C., in *May and Hart* v. *Angeli* (13), observed:

> I have no doubt, and I do not think it is susceptible of doubt, that when there is only the relation of broker and customer the broker cannot satisfy the terms of his employment by selling his own goods to the customer who is employing him as broker; and apart from the special circumstances of the case *Robinson* v. *Mollett* (7) establishes no more. The special circumstances of that case had relation, so far as the contention in it was concerned, to the peculiarities of a particular business, and which was supposed to take the case out of the ordinary rule. But no one doubted, as I think no one can doubt, the ordinary rule to be what I have stated.

It may be, of course that the defendant assented to the plaintiffs performing the contracts of agency in the manner sanctioned by the usage, but no case has been cited to me, except possibly *Paul Beier* v. *Chotalal* (12), in which an usage such as the one pleaded in this case has been held to be binding upon a party to a contract the nature of which differs fundamentally from that of the usage, merely because the party was aware of the usage at the time when he entered into the contract. If such a case was brought to my notice I should refuse to follow it unless it was an authority binding upon me; for I hold that the admissibility of such an usage cannot be squared either with the Common Law principle *expressum facit cessare tacitum*, or with the provisions of the Indian Evidence Act.

In *Mollett* v. *Robinson* (5), the party whom it was sought to bind by the usage was not aware of its existence, and the decision in that case is not an authority for the proposition that the party would have been bound by the usage then under consideration if he had been aware of it. The true view, in my opinion, is that expressed by Willes, J., in *Mollett* v. *Robinson* (5), that an agent who has agreed to purchase goods on behalf of his principal would not be entitled to sell his own goods to his principal "without the knowledge and consent of the principal." Lord Lyndhurst stated the rule in the same way:

> Where an agent employed to sell becomes himself the purchaser, he must show that this was with the knowledge and consent of his employer: *Charter* v. *Trevelyan* (14).

I must now endeavour to ascertain and explain what really was decided in *Paul Beier* v. *Chotalal* (12). The printed form of the indent in that case commenced with the words

> $\frac{\text{We}}{\text{I}}$ hereby request and authorize you to order, and, if possible, buy and send $\frac{\text{us}}{\text{me}}$ the undermentioned goods on $\frac{\text{our}}{\text{my}}$ account and risk and $\frac{\text{we}}{\text{I}}$ bind $\frac{\text{ourselves}}{\text{myself}}$ to pay for the same at the prices and conditions specified below.

and then additional printed terms and conditions are set out. After the printed

(12) [1904] 30 Bom. 1=6 Bom. L. R. 948.
(13) [1898] 14 L. T. R. 551.
(14) [1844] 11 C. & F. 714.

mat ter there was added in writting inter alia :

12 cases each containing 16 pieces of 25/30 yd$^{s}$ at 1*s*. 9*d*. per yard nett free godown including duty ; 60 days 6 per cent. interest after due date.

The question that arose in that case was whether the merchants were bound to account to the dealer for the difference between the price paid to the supplier and price mentioned in the indent. As I apprehend the judgment of Jenkins, C. J., the Court was of opinion that under the terms of the indent the contract between the merchants and the dealer was one of sale and not of agency. If that were so *cadit quaestio*, and the correctness of the decision cannot be questioned. But Jenkins, C. J., in the course of his judgment, observed :

In the view, however, that I take of the case it is not necessary nor is it desirable that we should decide whether on the acceptance of the indent the relations of the parties became crystallized into those of vendors and purchasers pure and simple ; for, apart from that, I hold that on the terms of the indent viewed in the light of the custom of trade in Bombay the plaintiffs are under no obligation to account.

The learned Judge thus described the custom of trade then under consideration.

Taking the whole of the evidence into consideration the conclusion to which I come is that, according to the custom of trade in Bombay, when a merchant requests or authorizes a firm to order and to buy and send goods to him from Europe at a fixed price nett free godown including duty, or free Bombay Harbour and no rate of remuneration is specifically mentioned, the firm is not bound to account for the price at which the goods were sold to the firm by the manufacturer.

The reason why Jenkins C. J. refrained from determining whether under the indent, the relationship of the marchant to the dealer was that of an agent or a principal appears to be that in the opinion of the learned Chief Justice, provided the custom was established, it was a matter of indifference whether the merchants were principals or agents vis-a-vis the dealer. But in considering the rights and obligations of the parties was it permissible to treat the relationship between them created under the indent as an irrelevant matter that could be ignored ? Jenkins, C. J. accepted the view, as I read the judgment, "that direct relations were not established between the indentor and the maker" ; that the supliers sold the goods to the merchants as principals and that under the indent the merchants did not become the agents of the dealer. His Lordship observed :

There is no express term that accounts shall be rendered ; it can only be claimed that the obligation exists by implying or importing into the contract an incident of the relations between a principal and his agent. Moreover the argument assumes that contract between the parties was that of agency.

Under these circumstances I should have thought that it was of vital importance to determine the relationship of the parties under the written contract into which they had entered. If the Court had come to the conclusion that under the terms of the indent the merchants had agreed to buy the goods from the suppliers as agents for the dealers and on his account and risk, the usage upon which the merchants relied in that case, (based as it necessarily must have been upon the supposition that the merchants were entitled to make a profit by buying from the suppliers at a lower rate than that fixed by the indent, and then delivering the goods at the indent price to the dealer), was inconsistent with the contract of agency. If it had come to that conclusion, in my opinion, the Court ought to have held that evidence of the custom was inadmissible, both because it sanctioned a situation in which the agents' interest conflicted with their duty and also because if incorporated in the contract the usage would change the intrinsic character of the written contract that had been concluded between the merchants and the dealer. Notwithstanding the great respect that I entertain for the opinion of Sir Lawrence Jenkins I confess that in my judgment, the case of *Paul Beier* v. *Chotalal* (12), far from dissolving the doubts as to their legal position that have been perplexing indent traders tended to foster an erroneous belief that the rights and obligations of persons concerned in the indent trade are to be determined by the usage and course of business established in that trade, and that where the terms of the indent conflict with the usage of the trade the contract is to be deemed subordinate to the usage and pro tanto its terms are to be disregarded.

It is clear from the evidence that this fallacious view of their legal position permeated the minds of Mr. Holmes and the other merchants who were called as witnesses to prove the alleged custom in the present case, and that it determines

the course that they follow in transacting business. These witnesses did not pretend that any usage exists in the indent trade that an agent employed to buy on his principal's account is entitled to buy goods on his own account and then to resell them to his principal. The position that they took up, as I understand their evidence, was that the course of business in the indent trade was established and well understood by all persons concerned in the trade, and that the rights and obligations of persons who imported goods from abroad upon indents were determined by the course of business and the usages of the trade; and in so far as the terms for an indent were inconsistent with the rights and obligations created or sanctioned by the terms of the trade the usage was to prevail and the terms of the indent were to be treated as of no account.

Now, from the evidence adduced in this case I find the course of business that I am about to describe well established in the indent trade in Calcutta. When goods are ordered from abroad by a dealer under an indent at a price and rate of commission therein stated it is the duty of the merchant as agent for the dealer to buy the goods from the supplier upon the terms and conditions of the indent at the lowest price obtainable not exceeding the price set out in the indent. The dealer receives the supplier's invoice and the supplier draws upon the dealer for the price of the goods. In such a transaction the merchant acts throughout as the agent of the dealer, and is entitled to commission from the dealer at the indent rate. Owing to the unwillingness of foreign suppliers, however, to enter into direct relations for the supply of goods with bazar dealers this course of business, in which the merchant acts merely as a middleman in the transaction usually, is not resorted to and one or other of the following alternative methods of supply is followed. The merchant agrees as agent for the dealer to buy the goods from the supplier on the indent terms F. O. B. or C. I. F., the price being stated in the indent, but no commission being payable by the dealer. In that case, according to the usage of the trade, the parties are understood to agree that the merchant shall be entitled to obtain remuneration by making an arrangement with the foreign supplier for the payment to the merchant of a return commission; but the amount of this return commission does not concern the dealer, the rate of the commission being fixed by agreement between the merchant and the supplier, and being paid by means of credit slips either at the time when the goods are supplied, or at a periodical adjustment of accounts, as may be arranged. Under the alternative method of supply in which no commission is payable by the dealer the dealer orders the goods to be imported by the merchant at a fixed price C. I. F. or F. O. B, and according to the usage of the trade the parties are understood to agree that the merchant may buy the goods on his own account from the foreign supplier without disclosing the dealer's name or acting as his agent, and then resell them at the indent price to the dealer upon the terms of the indent. Under this method the merchant obtains his remuneration by retaining the difference between the price at which he buys from the supplier and the indent price of the goods.

It appears from the evidence that under indents where no commission is payable by the dealer it is the customary course of business that one or other of these two methods of supply should be adopted, and Mr. Holmes stated that about 50 per cent., of such indents are carried out by the one method, and 50 per cent., by the other. The defendant stated that he was fully aware of the usage by which a merchant obtains his remuneration by way of return commission, but that he never had heard of a usage by which the merchant obtained his remuneration by what I may call the difference in price method. Bearing in mind what I have already stated with respect to the indifference with which indent traders regard the wording of their contracts, it is not a matter of surprise that the customary form of indent commencing with the words:

> We/I, the undersigned request you to purchase yourself or through your agents on my/our account and risk

are used by indent traders whichever method of supply they may employ, and whether according to the course of business the merchant is acting as a principal or as the agent of a dealer. (His Lordship then dealt with the evidence and proceeded). In my opinion,

the usage proved in this case that where goods are ordered by a dealer at a fixed price "C. I. F., commission nil" the merchant is entitled to make and retain a profit by buying from the supplier at one price and selling to the dealer at the indent price is fundamentally inconsistent with the terms of the contract into which the plaintiffs and the defendant have entered, and is inadmissible in evidence, whether the defendant was aware of it or not.

The question that remains to be determined is in connexion with the third ground upon which the plaintiffs sought to justify the mode in which they performed the indents. It is one of fact, namely, whether the defendant consented to the plaintiffs performing the contracts in suit in the manner sanctioned by the said usage; for I hold that the plaintiffs in executing the indents in suit have followed the well-established course of business in the indent trade in Calcutta. (His Lordship after examining the evidence proceeded.) I am of course, aware of the cases that lay down that where it is alleged that the principal has consented to an agent selling to him his own goods in fufilment of a contract under which the agent has agreed to purchase goods on behalf of the principal, the consent of the principal must clearly be proved. But, to my mind, the evidence in this case leads irresistibly to the conclusion—and I find without doubt or hesitation—that the defendant consented to the plaintiffs executing the indents by the difference in price method and must be taken to have authorized the acts of the plaintiffs in carrying out the indents by purchasing the goods from the supplier and reselling them to the defendant. I find that the goods required to fulfil each of the indents in suit arrived in Calcutta, and I find also that the goods were shipped in due time, and that the plaintiffs at all material times were ready and willing to deliver the goods to the defendant as agreed between them. The plaintiffs, however, after accepting and paying for a portion of the goods delivered under Indent No. 75 have refused to accept or pay for the balance of the goods. In my opinion, the defence to the plaintiffs' claim upon which the defendant relied at the trial was ingenious, but not genuine. I believe that the defendant refused to take delivery of the balance of the goods that he had ordered not because he did not approve of the manner in which the plaintiffs had executed the indents, but because the rate of exchange had gone against him, and if he had taken delivery of the goods at the indent price the transaction would have resulted in a heavy loss.

At the end of 1919 the rate of exchange with the United States stood at Rs. 240 to a $100·00; at the end of 1920 it had risen to Rs. 400 to a $100·00; and in July 1920 the rate was Rs. 445 to a $100·00. In these adverse circumstances the defendant endeavoured to obtain the cancellation of the indents, and Mr. Holmes was approached by the defendant for the purpose of effecting the cancellation of the indents or the resale in the United States of the goods that the defendant had ordered.

The plaintiffs appear to have made strenuous efforts to minimize, even if they could not obviate, the loss that the defendant must suffer if he was forced to take delivery; but at the same time by their letters of the 1st and 4th November 1920, the plaintiffs made it clear to the defendant that they would only consent to cancel the indents if the suppliers were willing to forgo their rights under the contracts that they had made with the plaintiffs. When the suppliers remained obdurate, and insisted upon the transactions being completed, the defendant, as appears from his letter of the 9th February 1921, decided to refuse to take further delivery upon the ground of late shipment; and in the arbitration proceedings that followed pleaded inter alia late shipment as a defence to the plaintiffs' claim. The arbitration, however, was abortive; and at the hearing of the suit the defendant abandoned the plea of late shipment, which obviously would have militated against the defence upon which he was advised to rely at the trial, namely, that the plaintiffs were his agents in the transaction, and had committed various breaches of duty as agents, and in particular had made secret profits out of the indent transactions. An examination of the plaintiffs' books, however, supported Mr. Holmes' assurance that the plaintiffs had received no remuneration from the suppliers by way of return commission or otherwise, and that the only profit

that they could make out of the transaction would be the difference between the indent price and the price at which they purchased the goods from the suppliers. As I have found that the defendant consented to the plaintiffs executing the indents by the difference in price method, in my opinion, there is no defence to the plaintiffs' claim.

The plaintiffs are entitled to recover the damages that they have suffered by reason of the failure of the defendant to accept delivery and pay for the balance of the goods ordered under the indents, and upon that basis a decree will be passed in favour of the plaintiffs.

G.B. *Suit decreed.*

---

## A. I. R. 1927 Calcutta 679

SUHRAWARDY AND DUVAL, JJ.

*Sheik Alijan* and *others*—Appellants.

v.

*King-Emperor*—Opposite Party.

Criminal Appeal No. 833 of 1925, Decided on 21st May 1926, from an order of the Assistant S. J., 24-Pergannahs, D/- 5th December 1925.

*Evidence Act, S. 33—Examining the doctor is not an essential condition when a witness is ill.*

Facilities for obtaining qualified doctors in England are very different from those in India, and thus it cannot be accepted as a proposition of law that it is absolutely necessary to examine a qualified medical practitioner before evidence can be accepted under S. 33 of the Evidence Act when the witness is ill and thus unable to attend. [P 680, C 1]

*Debendra Narayan Bhattacharji* and *Anil Chandra Dutt*—for Appellants.

*Khundkar*—for the Crown.

**Judgment.**—In this case three accused persons were put on their trial under charges under Ss. 394 and 397, I. P. C., before the Assistant Sessions Judge of Alipur sitting with a jury. The jury brought in a majority verdict of 3 : 2, finding the accused guilty under S. 394, I. P. C., i. e., of robbery and causing hurt. The first two accused have been sentenced to five years rigorous imprisonment and the third accused against whom a previous charge for theft had been proved has been sentenced to seven years' rigorous imprisonment. He has also been directed to report to the police any change of address under S. 565, Criminal P. C., for a period of two years after the expiry of the term of imprisonment.

The case for the prosecution is that the accused persons persuaded one Satis Chandra Biswas to meet them and go to see a tank for the purpose of dealing in fish. He borrowed some money from one Surajballi, went with his partner Jiban Krishna Das and met the accused at the Beliaghata station. They then went to Dhakuria where they got out of the train. After this when they were walking down the line, the three accused persons set on them and robbed them of Rs. 124 which Satis had, one of them using a knife, and decamped.

The verdict of the jury has been assailed on three grounds. The first allegation is that as a matter of fact when the jury first came in to declare their verdict the Judge asked them if they were unanimous. They said they were not. But it is alleged that they added they were not unanimous as their verdict was "not guilty by 3 : 2." The Judge then asked them to retire and they brought in a verdict of "guilty" by a majority of 3 to 2. Now as to this allegation which is supported by an affidavit, it is remarkable that no objection was taken before the Judge at the time. We therefore thought it necessary to make a reference to the learned Judge as to whether there was any such incident as was alleged. The learned Judge denies that there was any such incident at all. He has pointed out that what is his usual practice is that he writes the question first on paper and then puts it to the jury and records the answer; and that he only recorded what the jury said, that is, there was no verdict that the accused were not guilty. This is a point which the Judge would certainly have remembered and we have not the slightest hesitation in finding that this affidavit is not worth the paper on which it is written and accept the statement of the Judge.

The next point urged is as to the admissibility of the evidence of one Surajballi. Surajballi, as we have said, is the man from whom Satis borrowed the money which was taken away by the accused. He was examined in the lower Court. When the case came up to the Sessions Court one witness (P. W. 9.)

said that he was ill. But it appears from his cross-examination that he did not see him for about 1½ months. The Sub-Inspector, however, stated that he had seen him and had found him confined to bed and unable to move and he produced a certificate from a Kabiraj who, however, has not been examined to show the nature of his illness and that he was then bed-ridden. On this the Judge has admitted this evidence under S. 33 of the Evidence Act. It is urged that he had no power to do this and that it was incumbent on the Crown to examine the Kabiraj. Reliance has been placed for this proposition on a case in England and a paragraph from "Kosac on Evidence." I need hardly say that facilities for obtaining qualified doctors in England are very different from those in this country and we do not think we should accept as a proposition of law that it is absolutely necessary to examine a qualified medical practitioner before evidence can be accepted under S. 33 of the Evidence Act. We would add that in this case the witness was cross-examined in the lower Court and so there is the less reason to show that the accused has been prejudiced in the least by the admission of this evidence.

The last point urged was that the Judge did not put all the improbabilities of the case before the jury. This point has not been pressed.

In the result we find no reason to disturb the finding of the jury on the ground of any misdirection or illegality in the trial and dismiss the appeal. The accused must surrender to their bail to serve out the unexpired portion of the sentence.

D.D. *Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 680

RANKIN, C. J., AND C. C. GHOSE, J.

*Haji Ayub Mandal*—Appellant.

v.

*Emperor*—Opposite Party.

Criminal Appeals Nos. 626 and 668 of 1926, Decided on 31st January 1927, from the order of the S. J., Murshidabad, D/- 24th August 1926.

*(a) Criminal P. C., S. 337—One of the accused tendered pardon—By mistake his name included among accused and his plea taken in Sessions Court—His subsequent removal from the dock and examinination as prosecution witness is not illegal.*

Although a pardon had been tendered to and had been accepted by one of the accused in the committing Magistrate's Court he was still considered as an accused who was to take his trial. His name was in the category of the accused and at the opening of the trial in the Sessions Court his plea was taken (the plea being one of guilty). When it was brought to the notice of the Sessions Judge that a pardon was tendered to that accused, and was accepted by him he was removed from the dock. The trial then proceeded and he was examined as a prosecution witness.

*Held* : that he was competent to give evidence and his evidence was admissible. [P 681, C 1]

*(b) Criminal Trial—Trial by jury—Appeal.*

Verdict of jury will not be set aside unless failure of justice has been caused. [P 682, C 2]

*Narendra Kumar Basu* and *Sukumar Dey*—for Appellant.

*Debendra Narain Bhattacharjee* for *N. A. Khundkar*—for the Crown.

**C. C. Ghose, J.**—In Appeal No. 626, the appellant is Haji Ayub Mandal and in Appeal No. 668 the appellants are Nityananda and Deresh. The last named persons have preferred Appeal No. 668 from jail, but the appeal of Haji Ayub Mandal (No. 626) has been placed before us at considerable length by Mr. Basu. The two sets of appellants were convicted by the learned Sessions Judge of Murshidabad and a jury under S. 395 of the Indian Penal Code and the learned Judge agreeing with the verdict of the jury sentenced the appellant Haji Ayub Mandal to four years, the appellant Nityananda to five years and the appellant Deresh to two years' rigorous imprisonment.

It appears from the evidence on the side of the prosecution that on or about the 18th of March 1923 there was a dacoity in the house of one Radhaballav who resided in village Goas, police station Raninagar in the district of Murshidabad. On the 19th of March one Jamini Kanta Saha, a nephew of Radhaballav, lodged the first information report at the thana about the occurrence. Then followed a police investigation but nothing came out of that because the police were unable to trace the persons who had taken part in the dacoity. In July 1925, however, the police, who had mean while been engaged

in investigating into the circumstances leading to the occurrence, submitted a charge sheet against Ayub and three other persons and they were committed to the Sessions Court to take their trial for having committed an offence punishable under S. 395 of the Indian Penal Code.

One of the accused was a man named Jorap. In the Court of the committing Magistrate, Jorap was tendered a pardon under the provisions of S. 337 of the Code of Criminal Procedure, and he accepted such pardon. Thereafter he was examined as a witness for the prosecution; but although he was examined as a witness for the prosecution, after a pardon had been tendered to him and after the pardon had been accepted by him it appeared that when the case reached the Sessions Court his name was still in the category of the accused. On the first day of the trial in the Sessions Court there were, therefore, before the learned Sessions Judge and the jury four accused, i. e., Ayub, the two appellants in Appeal No. 668 and Jorap. They were asked to plead and after their pleas had been taken the Public Prosecutor drew the attention of the learned Sessions Judge to the fact that the accused Jorap who was in the dock had been tendered a pardon, that he had accepted such pardon, and that in the events which had happened the case against this accused was to be deemed as having been withdrawn. The learned Sessions Judge's attention being drawn, he recorded the following order:

> As it appeared from the order sheet of the committing Magistrate, dated 23rd November 1925, that a pardon was tendered to and accepted by Accused No. 4, Jorap Mandal, he was removed from the dock. He will remain in custody as before till the termination of the trial.

The trial in the Sessions Court thereafter proceeded and the accused Jorap gave evidence on behalf of the prosecution. The trial ended, as stated above, in the conviction of the three accused whose names have already been stated.

On behalf of the appellant Ayub, the first point that has been taken before us by Mr. Basu is that the evidence of Jorap in the Sessions Court was not admissible in evidence. The argument is put in this way: It is argued that although a pardon had been tendered to and had been accepted by Jorap in the Committing Magistrate's Court, apparently what happened was that he was still considered as an accused who was to take his trial. His name was in the category of the accused and at the opening of the trial in the Sessions Court his plea was taken by the learned Sessions Judge. The plea of the accused Jorap having been taken (the plea being one of guilty) and no sentence having been passed, he could not in law be treated as a person who was entitled to give evidence on behalf of the prosecution. In support of Mr. Basu's contention our attention has been drawn to a number of cases; but the point for decision does not really depend upon the decisions to which our attention has been drawn, but on the facts of this particular case; and when one examines the facts of this particular case, it is abundantly clear from the record that owing to a mistake on the part of some one the name of the accused Jorap had not been removed from the category of the accused and that as soon as the learned Sessions Judge's attention was drawn to the fact that this man Jorap had been tendered a pardon and that such pardon had been accepted by him in accordance with the terms of S. 337 of the Code of Criminal Procedure the learned Sessions Judge at once directed that he should be removed from the dock. The effect of that was that, so far as this case was concerned, at the Sessions Court there was really in the dock no accused of the name of Jorap ready to take his trial. He was, therefore, treated, having regard to what had gone before, as a witness who was entitled to give evidence on behalf of the prosecution. The only thing that had to be observed was that he was not, until the orders of the Sessions Judge had been obtained in that behalf, to be released from custody. Therefore, so far as the facts of this case are concerned, I am satisfied that the point urged by Mr. Basu is without any substance whatsoever and that no prejudice of any description has been caused to the accused by reason of the procedure which has been adopted in the learned Sessions Judge's Court.

The second point that has been urged by Mr. Basu is that the charge delivered by the learned Sessions Judge to the Jury is defective and misleading because

the attention of the jury has not been drawn in a sufficiently pointed manner to the requirements of the law and to what has been observed as the practice for many years past in dealing with the evidence of an approver. (His Lordship after examining the evidence proceeded.) As I have said taking the charge as a whole, I think the learned Sessions judge has not only complied with the law in this behalf but has placed the cases of the individual accused before the Jury in a sufficiently lengthy and satisfactory manner.

There now remains the third point to be noticed which was taken by Mr. Basu. It is said that at the first identification of the suspects Ayub was not identified at all. In the second place, it is said that the complainant stated to the police that he could recognize three men only as having taken part in the dacoity and that Ayub was not one of them.

Now, so far the first contention under this head is concerned, it really depends upon the evidence of the investigating officer P. W. 26. It is true that there was fairly long delay before the suspects could be brought forward for identification, but that was because of the fact that the police were not able to submit a charge-sheet till July 1925.

With reference to the second of Mr. Basu's contentions under this head, the only comment that need be made is that the evidence of the prosecution witness, the investigating officer, must be read as a whole, and if one turns to an earlier portion of that evidence it is clear that Radhaballav did mention to the police, in addition to the three men of whom particulars had been given by him, that there was another man who broke open the iron chest. It is also clear from the evidence of P. W. No. 26 that a description of the man who had broken open the iron chest was supplied by Radhaballav on the following day. That being so, it is impossible to contend that only three men were spoken of by Radhaballav and that there was no mention whatsoever of Ayub. It may be that the evidence such as I have referred to was not prominently brought forward in the concluding portion of the learned Judge's charge to the Jury; but it is not to be supposed for one second that this evidence was not in the minds of the jury, at the time when they were considering the whole case; and, indeed, there is internal evidence in the charge itself that the evidence of the prosecution witnesses must have been referred to when the learned Sessions Judge was addressing the jury. In these circumstances, it being a jury trial, we cannot lightly interfere with or set aside the verdict of the jury unless we are satisfied that there has been such misdirection as, in our opinion, has occasioned a failure of justice. In my opinion there has been no such misdirection and there has been no failure of justice.

With these observations, I am of opinion that these appeals should stand dismissed.

**Rankin, C. J.**—I agree.

G.B. *Appeals dismissed.*

---

## A. I. R. 1927 Calcutta 682

RANKIN, C. J., AND MUKERJI, J.

*J. D. Jones & Co. Ltd.*—Appellants.

v.

*Ranjit Roy* and *others*—Respondents.

Appeal No. 114 of 1926, Decided on 22nd November 1926, from the Original Civil Suit by C. C. Ghose, J.

*Companies Act* (1913), *S.* 9—*Charge created on all machinery, implements, utensils, furniture, stock-in-trade, raw materials, etc.—All such property to be in possession and control of lender Company—Borrower Company not to alienate such property or in case of necessity to alienate undertaking to replace the same by another property of equal value—No floating charge is created.*

A floating security is not a specific mortgage of the assets, plus a license to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallize into a fixed security; *Evans* v. *Rival Granite Quarries, Ltd.* (1910) 2 *K. B.* 979, *Rel. on.* [P 685, C 2]

A deed of charge provided, "The borrower company doth hereby charge to and in favour of the lender company all that the machinery, plant, implements, utensils, furniture and articles manufactured or in course of manufacture, stock-in-trade, raw materials, stores, and other movable effects and things, now or at any time hereafter, during the continuance of this security, belonging to or used in connexion with the said business. The said properties shall be in the lender company's possession and under its control in such manner that such possession and control may be

apparent and indisputable. The said properties shall be under the care of a Babu of the lender company." It was further provided: "The borrower company shall not sell, alienate or alter the said properties, machinery, raw materials, stocks, stores and premises without the permission of the lender company except in the usual course of trade or business, and when such sale, alienation and alteration of such articles shall be rendered necessary . . . . shall replace such article by another of at least of equal value." Possession was actually given to the lender company as provided:

*Held*: the element of possession which was contemplated by this deed, and which was actually given at the time, would prevent the charge from being a purely equitable charge of a character coming fairly within the description of a floating charge; (*English case law Ref. to*).

[P 683 C 2, P 684 C 1, P 686 C 1]

*W. W. K. Page*—for Appellants.

*J. C. Hazra* and *A. K. Roy*—for Respondents.

**Rankin, C. J.**—In my opinion this appeal must be allowed.

The question for decision is whether the security created by the deed, dated the 9th day of September 1924, made between the Eureka Belting Works, Ltd., now in liquidation, and the company called J. D. Jones & Co., Ltd., is a "floating charge" within the meaning of that expression which occurs in S. 109 of the Indian Companies Act.

It may be as well to say at once that S. 109 is a repetition of S. 93 of the English Companies Act of 1908; but, in repeating S. 93, the Indian Legislature has omitted to enact any equivalent for Sub.-Cl. (c) of the English section, plainly enough for the reason that as there were no Bills of Sale Acts in India governing securities upon moveable properties given in the case of private individuals, it was not possbile to employ the same terms with reference to the Indian Companies Act. This is a matter of some importance as the omission of the clause which is found in the English Act may have considerable consequences as regards the purpose and the policy to be attributed to the Indian sections.

It appears, though not clearly, from the materials before us that the respondents, the Eureka Belting Works, Ltd., manufactured and sold belting for machinery. Messrs. J. D. Jones & Co., Ltd., carried on business of some sort no doubt, but the nature of their business does not really appear. They were, however, going to accept certain bills or drafts on behalf of the Eureka Belting Works, Ltd., and the document in question was granted by way of security to Messrs. J. D. Jones & Co., Ltd., in respect of that transaction. The operative words of the assignment contained in the indenture are these:

> The borrower company doth hereby charge to and in favour of the lender company All that the machinery plant implements utensils furniture and articles manufactured or in course of manufacture stock-in-trade raw materials stores and other moveable effects and things now or at any time hereafter during the continuance of this security belonging to or used in connexion with the said business in or upon the said premises of the Borrower Company at 17, Ezra Street Calcutta and 96, Grand Trunk Road Howrah aforesaid.

The word "premises" occurs in the subsequent clauses, but it is not contended that this deed was intended as a mortgage upon immovable property at either place.

The scheme of the document is this: that the borrower company were to repay the loan by equal monthly instalments of Rs. 1,250 on the first day of every month. They were to pay also monthly interest at the rate of 12 per cent. per annum with monthly rests and they were to pay all costs which might be incurred by the lender company. The document contains two important clauses. Clause (2) is that:

> The said properties and premises shall be in the Lender Company's possession and under its control in such manner that such possession and control may be apparent and indisputable and the same shall be a security for the repayment of the moneys due by the Borrower Company to the Lender Company hereunder.

and Cl. (3) is that

> the said properties and premises shall be under the care of a Babu of the Lender Company and the wages of the said Babu shall be paid by the Borrower Company.

Clause (4) gives the lender company a right to have the properties valued from time to time.

Clause (5) requires the borrower company to furnish a weekly statement of all stocks and raw materials and finished articles, and full particulars of all accounts sent out for payment and moneys received by the borrower company.

Clause (6) says that the borrower company is to keep the subject-matter insured and clauses (7) and (8) are so important that they must be referred to specifically.

Clause (7) says:

> The Borrower Company shall not sell, alienate or alter the said properties, machinery, raw materials, stocks, stores and premises without

the permission in writing of the Lender Company except in the usual course of trade or business and when such sale, alienation and alteration of such articles shall be rendered necessary by the same being worn out and injured and in such case shall replace such article by another of at least of equal value. Provided always that the liberty hereby given to the Borrower Company to sell, alienate or remove any of the said articles in the ordinary course of business shall not authorize or enable the Borrower Company to create any mortgage or charge thereon ranking in priority to or pari passu with these presents.

It will be observed with reference to this clause that the first question to be answered is whether it requires upon a sale by the company of the stock-in-trade in the usual course of business that other articles of equal value should be at once procured and substituted by the borrower company. Speaking for myself I do not think that it does. It is clear enough that the probable meaning of the clause is that the reference to articles being worn out and injured as distinct from the articles sold in the usual course of business is a reference to plant, machinery or implements as distinct from the stock-in-trade; and it seems to me to be the probable or right construction that there is no provision there on the part of the company to keep the stock-in-trade at any particular value.

As regards Cl. (8), the only thing which deserves to be noticed is this that in stating what the lender company's rights shall be the only default upon which the clause proceeds is default in payment of any sum of money due by the borrower to the lender company. Substantially speaking, therefore, the rights given by Cl. (8) would be exercised only upon the failure of the borrower company to make the monthly repayments which they had promised. It is to be observed also that Cl. (8), consistently with Cls. (2) and (3) does not say that upon such default the lender company shall be entitled to take possession of the articles; but it says, assuming that the lender company has possession or will have possession that it shall be entitled to sell them itself if necessary.

With reference to the second and third clauses it is necessary to state that it appears to be clear that at the time this security came into effect, namely at the time of the execution of the indenture, the lender company did appoint a durwan who went into the premises by way of taking possession of the moveable effects comprised in the security. It will be observed that there is no assignment here of book-debts. Although book-debts are one of the things that the weekly statement has to disclose there is no way of making out that the document itself warrants a charge upon the book-debts.

The question before the Court is whether or not this document not having been registered is void as a security altogether and the only ground which is put forward is that it is a floating charge on the property of the company. It is not disputed that if it is a floating charge on some of the properties of the company it requires registration. It appears to be the intention of the instrument that a babu or a durwan should be in possession on behalf of the lender of the stock-in-trade. machinery, plant, furniture and all the rest of the subject matters of the deed. One might suppose, having regard to the language used in English cases, that anything of that sort would necessarily put an end to all possibility of the company carrying on its business in any reasonable way at all. If one looks to the terms of this security one finds that there is very little to show that under Cl. (7) the power of the borrower company over the stock-in-trade was in any effective manner to be restricted. It is quite possible of course, that with a durwan in possession on behalf of the lender company the borrower company would go on selling without any control being exercised over them, without their being in any way hampered by the durwan's presence. There is no stipulation as to a durwan or a babu being there for the purpose of refusing to let the borrower company have the stock-in-trade until he is satisfied that the value of the remainder is up to a certain amount. It hardly appears that a durwan on Rs. 17 a month could be intended to exercise any effective check upon the management either of the manufacturing part of the business or of the sales.

The term "floating charge" is not a term of art. It is a term which has been much discussed and it has to be regarded as applying to a commercial document; one has undoubtedly in this case to look at the substance of the matter. At the same time if there are two ways of

doing very much the same thing and, a particular mortgagee has not chosen a way which the statute forbids, the Court cannot upset the security on the ground that it is in effect very much the same as something else. In this case one has to remember that although the restriction put upon the borrower company in disposing of their stock-in-trade in the ordinary way of business was not very great to all appearances, the articles comprised in the security were not entirely the stock-in-trade. There were plant, machinery, implements, utensils, furniture and so forth. The lender company was to continue in possession, but the lender company's representative would not prevent the business being carried on in the ordinary way. The security is designed to interfere as little as possible with the carrying on of the borrower company's business but at the same time to make it impossible to say that the security floats at all. If one has regard to what Lord Justice Vaughan Williams said *In re Yorkshire Woolcombers Association* (1), one would have to say that this did not satisfy his notion of a specific security. On the other hand, if one has regard to the definition of "floating charge" given in the numerous cases it does seem to be clear that this security cannot, in the proper sense of the word, be said to float. Thus in the case of *Tailby* v. *Official Receiver* (2), which was a pure case as to assignment of future book-debts, Lord Macnaghten intending to describe a "floating charge" said :

> It is a floating security reaching over all the trade assets of the mortgagor for the time being, and intended to fasten upon and bind the assets in existence at the time when the mortgagee intervenes. In other words, the mortgagor makes himself trustee of his business for the purpose of the security. But the trust is to remain dormant until the mortgagee calls it into operation.

He was not dealing with a case in which there was any element of possession and it is a little difficult to say how at a time when there is by agreement between the parties possession given to the mortgagee the trust can be said to be remaining dormant at all. In the same way if one looks to what was said in *The Government Stock and Other Securities Investment Co. Ltd.* v. *The Manilla Railway Co. Ltd.* (3), which was a case of an ordinary debenture where after default the right of the debenture-holders was suspended for a time, one finds Lord Macnaghten saying this :

> A floating security is an equitable charge on the assets for the time being of a going concern It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes.

It is quite true that in several cases, for instance in the case already referred to, i.e., the case of the *Yorkshire Woolcombers Association, Limited* (1), it has been pointed out that :

> a charge on all book-debts which may now be or at any time hereafter become charged or assigned, leaving the mortgagor or assignor free to deal with them as he pleases until the mortgagee or assignee intervenes, is not a specific charge, and cannot be. The very essence of a specific charge is that the assignee takes possession, and is the person entitled to receive the book-debts at once. So long as he licenses the mortgagor to go on receiving the book debts and carry on the business, it is within the exact definition of a floating security.

It is quite true, therefore, that an ordinary carrying on of business has been held in many cases to be a conclusive reason for regarding a security as intended to be of a floating character ; but I cannot find that in any of those cases there was any element of possession and when one comes to the case of *Evans* v. *Rival Granite Quarries, Limited* (4), one finds it expressly laid down by Lord Justice Buckley that

> a floating security is not a specific mortgage of the assets, plus a license to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallize into a fixed security.

The result is, therefore, that although in this case the security may not be in the fullest sense a specific security, it is also not entitled to be described as coming within the proper definition of a floating security. It is possible to hold that anything may be regarded as a floating security until the full rights of the mortgagee settle or fasten on or bind the subject-matter finally : but it

(1) [1903] 2 Ch. 284.
(2) [1888] 13 A. C. 523=58 L. J. Q. B. 75=60 L. T. 162=37 W. R. 513.
(3) [1897] A. C. 81=66 L. J. Ch. 102=75 L.T. 553=45 W. R. 353.
(4) [1910] 2 K. B. 979=79 L. J. K. B. 970=26 T. L. R. 509=54 S. J. 580.

seems to me that in a case of this character the element of possession which is contemplated by this deed, and which, according to the evidence was actually given at the time prevents our holding that we have before us a purely equitable charge of a character coming fairly within the description of a floating charge. The case of the *Bank of Baroda Ltd.* v. *H. B. Shivdasani* (5), was, I think, a stronger case in favour of the mortgagee than the present case is on the facts. It will be seen that the security in that case was taken to put a real restriction upon the business of the mortgagors. The present application was brought by the present respondents not upon any allegation that the document according to its true construction was one thing and the real intention of the parties was another but merely on the footing that the document itself disclosed an intention to grant a floating charge. In my judgment, the case before us is not an equitable charge in so far as the assets have been handed over to the possession of the mortgagee. It is quite true that future moveables can only be assigned in equity but here no charge attached to any articles until they were brought upon the premises and put into possession of the mortgagee. Prior to that there was a mere promise or covenant to charge which could no doubt in a proper case have been specifically enforced.

It does not seem to me, therefore, that this is an equitable charge and it does not seem to me that the charge was intended in the proper sense of the word to float, that is to say, to have no immediate effect upon any particular item comprised in it until the mortgagees should become entitled to intervene and should, in fact, intervene. In a case of this character we are administering and must administer somewhat strictly the provisions of the law which avoids a charge altogether unless it is registered.

For these reasons, I think, this appeal should be allowed and the summons taken out by the present respondents should be dismissed with costs to the appellants against Mr. Hazra's clients. We do not disturb the terms of the consent order made by Gregory. J.

**Mukerji, J.**—I agree.

G.B. *Appeal allowed.*

(5) A. I. R. 1926 Bom. 427=50 Bom. 547.

## A. I. R. 1927 Calcutta 686

PANTON AND MITTER, JJ.

*New Beerbhoom Coal Co., Ltd.*—Defendants—Appellants.

v.

*Jyoti Prosad Singh Deo*—Plaintiff—Respondent.

Appeal No. 2127 of 1924, Decided on 16th March 1927,

*Bengal Tenancy Act, S.* 109—*Proceedings under S.* 105—*Revenue Court applying presumption under S.* 50—*Appellate Court holding that presumption was rebutted and remanding the case for settling fair rent—Appellate Court's order is decision under S.* 109 *and second appeal lies—Order of appellate Court is final and not interlocutory—Bengal Tenancy Act, S.* 50.

Plaintiff commenced proceedings under S. 105 for settlement of fair and equitable rent in respect of certain lands. The defendants contested the case on the ground that they held the lands in dispute on a fixed rental as a permanent, heritable, transferable and mokarari tenure. The settlement officer held that the defendants were entitled to the presumption under S. 50 and evidence adduced by the plaintiff was not sufficient to rebut the presumption. Against this decision an appeal was preferred to the Special Judge and he came to the conclusion that the holding in suit was a non-mokurari tenure and liable to enhancement of rent, and after so holding he remanded the case to the lower Court for assessment of fair and equitable rent.

*Held* : that the issue whether the defendants were non-mokarari tenure-holders or they were permanent tenure-holders paying rent which is fixed in perpetuity, being the cardinal issue in the proceeding, the order of the Special Judge was a decision under S. 109A and, therefore, second appeal was competent.

*Held* : further, that with regard to the question as to whether the tenure was liable to enhancement of rent or not, the decision of the Special Judge was a final decision and the order was final and not interlocutory and, therefore, right of appeal from this order would not cease with disposal of the suit : 7 *C. W. N.* 440 *Dist.*

*P. C. Mitter* and *Ambicapada Chowdhury*—for Appellants.

*Karunamoy Ghose* and *Krishna Chaitanya Ghose*—for Respondent.

**Mitter, J.**—This is an appeal from a decision of the learned District Judge of Burdwan, dated the 23rd June 1924, which reversed a decision of the revenue officer of Asansole, dated the 23rd September 1922. The appeal arises out of proceedings commenced by the plaintiff who is now respondent before us under S. 105 of the Bengal Tenancy Act, for settlement of fair and equitable rent in respect of lands recorded in Khatian No. 110 of village Kulla Thana, Asansole, in the names of the defendants as permanent non-mokarari tenure-holders

under the plaintiff-respondent. The defendants-appellants contested the case on the ground that they are holding the disputed land in respect of which proceedings under S. 105 were started on a fixed rental as a permanent, heritable, transferable and mokarari kheraji brahmottor tenure and that the rent of the tenure is not liable to enhancement at any time.

The settlement officer held that the defendants-appellants established that they had been paying rent at a uniform rate of Rs. 3-3-0 from more than 20 years before these proceedings were started, and that they were entitled to the benefit of the presumption under S. 50 of the Bengal Tenancy Act, and that they must be recorded as persons who had been holding the tenure on the date of the permanent settlement at the same fixed rent. The settlement officer referred to the evidence, as furnished by the plaintiff, for the purpose of rebutting the presumption, and he held that that evidence was insufficient and that the existing rent of the tenure in question is the fair and equitable rent, and that the defendants should be declared to be permanent tenure-holders holding the lands in suit at a rent fixed in perpetuity. Against this decision of the revenue officer an appeal was preferred to the Special Judge, and the Special Judge came to the conclusion that the holding in suit was a non-mokarari tenure and liable to enhancement of rent; and, after so holding, he remanded the case to the lower Court for assessment of fair and equitable rent as applied for by the plaintiff. Against this decision of the Special Judge this second appeal has been preferred.

A preliminary objection has been taken to the hearing of this appeal by the learned vakil for the respondent, and it has been argued that as the order of the Special Judge was an order remanding the case to the Court of first instance no second appeal lay to this Court having regard to the provisions of S. 109A, of the Bengal Tenancy Act, which only allows appeals from decisions which have the effect of decrees. In support of this contention reliance has been placed by the learned vakil for the respondent on the case of *Mothur Chandra Majumdar* v. *Tara Sankar Ghose* (1), and another case in *Debi Prosad Bhakat* v. *Official Trustee of Bengal* (2). It has also been argued that a second appeal is also barred as the settlement officer settled fair and equitable rent after the remand and before the appeal was filed by the defendants-appellants to this Court. It is said that the defendants have no right of second appeal to this Court, because it is contended that the right of appeal from the interlocutory order ceased with the disposal of the suit.

With regard to the first branch of the preliminary objection the present case is distinguishable from the case of *Mothur Chandra* v. *Tara Sankar* (1), to which I have already referred. It does not appear from that decision what the nature of the remand order was. In the present case what the settlement officer did was to decide the cardinal point in the suit or proceeding, namely, as to what was the status of the defendants, that is, whether they were non-mokarari tenure-holders or they were permanent tenure-holders paying rent which is fixed in perpetuity. That was the cardinal issue in the proceeding and that was determined by the Special Judge. The liability of the tenure to enhancement of rent was the matter which was the principal issue in the proceedings. What the Special Judge directed the settlement officer to do was merely to fix fair and equitable rent. That was really a question which depended on the determination of the cardinal point in the proceedings, namely as to whether the tenure was liable to enhancement or not. The order of the Special Judge was, therefore, a decision within the meaning of S. 109A. I may also state here that a view, which is somewhat different from the view taken in the case in *Mothur Chandra Majumdar* v. *Tara Sankar Ghose* (1), has been taken in two decisions of this Court to one of which my learned brother was a party. This last decision is the case of *Krishnadas Acharji Choudhury* v. *Samsan Ali Sheikh* (3). The earlier decision is the case of *Monmatha Nath Dey* v. *Gadadhar Mana* (4). I do not think that the first branch of the preliminary objection can prevail, and which consequently fails.

With regard to the second branch of the preliminary objection the decisions which

(1) [1903] 7 C. W. N. 440.

(2) A. I. R. 1923 Cal. 333.
(3) A. I. R. 1923 Cal. 431.
(4) [1917] 45 Cal. 638=41 I. C. 751=28 C. L. J. 155.

have been placed before us show that where an interlocutory order has been passed resulting in a remand to the lower Court for trial of the suit on the merits, the right of appeal from the interlocutory order ceases with the disposal of the suit. But we cannot regard the order of the Special Judge in this case as an interlocutory order and we think that it is conceded by the learned vakil for the respondent that it was not an interlocutory order, but it is stated that it was an intermediate order. An order is either interlocutory or final. With regard to the question as to whether the tenure was liable to enhancement of rent or not, the decision of the Special Judge was a final decision and the order was final and not interlocutory: see *Rahimbhoy* v. *Turner* (5). This case is, therefore, distinguishable from the class of cases to which reference has been made at the Bar. The second branch of the preliminary objection therefore fails. I now proceed to deal with the case on its merits. The reasons given by the Special Judge for holding that the presumption under S. 50, Bengal Tenancy Act, available to the defendants-appellants by reason of the fact that it has been shown in this case that they have been paying rent at a uniform rate of Rs. 3-3-0 for 20 years before the institution of the suit has been rebutted, are insufficient in law. The Special Judge relied on three documents produced by the plaintiff-respondent. The first document which is earliest in point of time is thoka of the year 1218 B. S. (1811). The second document on which the learned Judge has relied is hastbud of the year 1249 B. S. (1842). The third document on which he has relied is a rent decree of the year 1892.

With regard to the thoka of 1218 B. S., it appears that the rent with regard to mauza Bishigha is shown there to be Rs. 2. The tenant's name in that thoka is Subaram Purohit. But no evidence has been adduced in this case to show that this tenure of Subaram is a tenure which was held by the defendant company and which was the subject-matter of the proceedings under S. 105. The burden of rebutting the presumption was on the plaintiff, and by the production of this thoka alone he cannot be held to have rebutted the presumption seeing that he has not been able to establish that the lands mentioned in the thoka are lands which are identical with the lands in the tenancy now in question.

The second document, the hastbud, shows only a small variation of four pies. This is a very insignificant variation and cannot be held to be sufficient to rebut the presumption under S. 50.

The third document is a rent decree of 1892 on the construction of which the Courts below have held that there is a variation of one anna from the rent of Rs. 3-3-0. We have had the decree placed before us, and we do not find anything in that decree to indicate that the Court determined in that proceeding that the rent payable was Rs. 3-4-4. All that the decree states is that the claim was made at the rate of Rs. 3-4-4. The entire amount was not decreed, and it has been contended on behalf of the defendants-appellants that that decree is inconclusive seeing that it is proved in this case that both before and after the decree the rent paid was not at the rate of Rs. 3-4-4 pies, but at the rate of Rs. 3-3-0. It has further been argued on behalf of the defendants-appellants that one single variation, assuming that the decree was at the rate of Rs. 3-4-4, is not sufficient to rebut the presumption. We think that these contentions are sound and must prevail. It was for the plaintiff to establish that the decree showed beyond doubt that the rental was at a higher rate than Rs. 3-3-0 in order to rebut the presumption under S. 50. This they have failed to do.

The materials upon which the learned Special Judge proceeded are, in my opinion, wholly insufficient in law to rebut the presumption under S. 50. We therefore set aside the judgment and decree of the Special Judge and restore the decision of the revenue officer, dated 23rd September 1922, and the defendants will be declared to be permanent tenure-holders holding the lands in suit at a rent fixed in perpetuity.

Each party will bear its own costs in all Courts.

**Panton, J.**—I agree.

*Appeal allowed.*

(5) [1890] 15 Bom. 155=18 I.A. 6=5 Sar. 639 (P.C.).

## A. I. R. 1927 Calcutta 689

RANKIN, C. J. AND MUKERJI, J.

*Levy Brothers and Knowles Ltd.*—Appellants.

v.

*Subodh Kumar Day* and *another*—Respondents.

Appeal No. 36 of 1927, Decided on 9th May 1927, from the original order of Gregory, J., D/- 22nd February 1927.

*Letters Patent (Calcutta), Cl. 15—Order under S. 215, Companies Act, depriving creditor of all rights to take advantage of winding up proceedings is appealable—Companies Act, Ss. 215 and 202.*

An order depriving a creditor, who has a claim which he has long ago put in the form of a proof of debt against a company, and which the liquidators are willing to admit, of the benefit of the company's winding-up proceedings, is an order which deprives him, of a substantial and important right, and it cannot be held that such an order is not appealable by reason that it is not a judgment under Cl. 15 of the Letters Patent. [P 690 C 2 & P 691 C 1]

*Langford James* and *Clough*—for Appellants.

*N. Sarker*, *A. K. Ray* and *W. W. K. Page*—for Respondents.

**Rankin, C. J.**—This is an appeal in connexion with the voluntary winding-up of a company called Bhagat Brothers, Limited, and the appellants are Liverpool merchants called Levy Brothers and Knowles, Limited, and the main controversy is between the appellants and Mr. Ram Kumar Bhagat who was the managing director of the company in liquidation.

It appears that the appellant company acted in connexion with certain consignments of jute shipped from Calcutta to England. It would appear that certain consignees had refused to accept the goods or meet the drafts, and that the appellants endeavoured to sell some of the jute which was thus rejected, and made certain advances to the company which is now in liquidation in that connexion. At all events, by April 1921, the appellants were claiming that in the end Bhagat Brothers, Limited, owed them some nine or ten thousand pounds upon that transaction.

On the 6th of June 1921, a resolution for voluntary liquidation was duly passed. A Mr. S. K. Day was nominated liquidator at that meeting. It appears that at a meeting of the creditors a Mr. Platt Allen was suggested as a joint liquidator with Mr. Day, but as no proper steps had been taken to appoint him joint liquidator he in fact never became a liquidator and the only liquidator of the company was Mr. S. K. Day.

A proper form of verified proof was tendered by the appellants to the liquidator. They sent certain vouchers and in the end it would appear that the liquidator was satisfied that their claim to be creditors was sufficiently proved. But Mr. Ram Kumar Bhagat was apparently not satisfied. Mr. Ram Kumar Bhagat is a gentleman who had entered into a contract with the approval of the Court whereby he undertook to purchase the whole of the property of the company for a sum equal to ten per cent.

on all claims admitted by you to rank for dividend. In addition to this I will pay the whole costs of the liquidation including such sum as may be agreed between us as your remuneration.

Mr. Bhagat under that contract had to pay for the assets a sum which varied according as the claim of the creditors should turn out to be proved or not.

The correspondence between the parties need not be set out in this judgment at any length; but what happened in the end was that the liquidators could neither give to the appellant company any intelligible account of the reason why their claim was being refused or the criticisms that were being made upon it nor could they induce Mr. Bhagat to give up his opposition to the claim being admitted.

The only intimation that was given for a very long time was one that the company was supposed to have some counter claim against the appellants. It turns out now that it is said that the company in the matter of selling and disposing of the jute acted negligently or contrary to their duty in not effecting sales in time and that in certain other particulars they had not done what they should have done.

Now, these particulars have only come into existence at a very late stage indeed of the litigation and for several years it does not appear that either the liquidators or the appellants were able to get any intelligible account of Mr. Bhagat's objections.

From an application which the liquidators (in all good faith no doubt) made to the learned Judge in the company's

winding-up on the 26th of January 1925 it is quite clear that the liquidators had got somewhat tired of going on, and were neither able to decide the matter nor able to give any intelligent reason why it should not be decided. So on the 26th of January they applied to the Court under S. 215 of the Indian Companies Act asking that they might be at liberty to admit the claim of the appellants. The appellants were no parties to that application, but it is quite true that the liquidators were doing their best for them.

Mr. Bhagat was made a respondent to the application and the result of the application is an order which has given rise to all this trouble, because the learned Judge not only did not make an order directing the liquidators to admit the claim, he also did not make an order giving liberty to the liquidators to admit the claim, he did not dismiss the application; instead of that he made an order to the effect that the liquidators were not to admit the claim unless the appellants brought a regular suit, in other words, he decided that these appellants were deprived of all rights to have their claim ascertained in the winding-up proceedings and the liquidator's hands were tied so that they could not, whatever they thought, admit the claim until the matter came before the Court in the form of a suit. It has been pointed out that that might be a very disadvantageous order from the point of view of the absent appellants. They were in this position that while at the time of the winding-up their claim was in no way statute-barred, it had in the intervening years become statute-barred for the purposes of a suit under S. 3 of the Limitation Act of 1908. At all events, whether or not they had acknowledgments which would save them from the bar imposed by the Limitation Act, the order that they were to be relegated to a suit and not allowed to follow the ordinary course of a creditor's proof of debt against the company in the winding-up was one which put them to considerable trouble and risk. That order having been made the solicitors for the appellants endeavoured first of all to settle the matter. A good deal of comment has been made, that a very long time was occupied in an unsuccessful endeavour to get a move forward in this matter. Finally what happened was that the appellant company made up their mind to move the learned Judge in the company's winding-up for relief.

The summons asked for a great many forms of relief; it asked that certain matters be disclosed, that funds be held to pay the dividend due on applicant's claim, that a sufficient sum be retained to meet the dividend, that the appellant's claim might be admitted and so on and so forth. It appears that at the hearing of the motion, learned counsel also asked to add a claim, if neceasary, to discharge the ex-parte order of Mr. Justice C. C. Ghose.

Mr. Justice Gregory after reviewing the whole matter came to the conclusion that he would not interfere with the order of Mr. Justice C. C. Ghose, in other words, though he was asked to give this matter a decision in the company's winding-up, he took the view in deference to Mr. Justice Ghose's order that he would do nothing one way or another to have it determined in the winding-up but would leave it under Mr. Justice C. C. Ghose's order to be tried by a suit and only by a suit.

Upon this appeal I have come to the conclusion that the order made by Mr. Justice Ghose was wrong. I can see no reason why a person, who has a claim which he has long ago put in the form of a proof of debt against a Company, and which the liquidators were willing to admit, should not be allowed the benefit of the Company's winding-up proceedings. If the liquidators admit a proof of debt and any person having an interest disputes the debt, it is always open to him in the Company's winding-up under S. 215 of the Indian Companies Act, just as it would be open to him in insolvency proceedings, to take the matter to a Judge and get the liquidators' decision overruled. I can in no way understand why because Mr. Bhagat obejcts, the appellant Company should be obliged to sue the insolvent Company. It seems to me that some arrangement would be more reasonable according to which Mr. Bhagat should oppose this proof at his own risk as to costs.

But the main difficulty which I find in dealing with the present appeal is the question whether the order made by Mr. Justice Gregory is a judgment

under Cl. 15 of the Letters Patent. It would appear that by S. 202 of the Indian Companies Act it is necessary that it should be shown that the order made by Mr. Justice Gregory is a judgment in that sense. But, having regard to the fact that the learned Judge refused all forms of relief except the form of relief which required the liquidators to reserve a sum sufficient to pay the dividend, I am of opinion that Mr. Justice Gregory's order is a judgment within Cl. 15 of the Letters Patent. He was asked to admit the applicants' claim, if not already admitted. He was asked to take some steps, in other words, to have this matter determined in the winding-up. What he has done is to declare that within the Companys' winding-up jurisdiction no steps whatever shall be taken for the determination of this question. He has refused rightly enough to make an order then and there, admitting the applicant's claim, but he has also refused to make an order requiring the liquidators to decide it one way or the other or to make an order bringing the matter up for decision before himself under S. 215 of the Indian Companies Act. The effect of this upon the appellants' chance of success may for aught I can tell, be fatal.

In my jndgment the order in the form of a direction to the liquidators made in a proceeding to which the appellants were not parties should not be binding on the appellants. It was quite open to them to give notice in the winding-up and to go to the learned Judge and get another order according to their true rights.

In my judgment the correct position is this that these are creditors desirous of taking proper proceedings in the winding-up to establish their right and they were told that they would not be heard. In my judgment this order is an order which deprives the appellants of a substantial and important right and I am not prepared to hold that this order is not appealable by reason that it is not a judgment under Cl. 15 of the Letters Patent.

In my opinion it only remains for us to make the ordinary order as regards the proof of debt in dispute reversing the judgment of Mr. Justice Gregory. We direct the liquidator within a month from the drawing up of this order to admit or reject the formal proof of debt which has already been tendered on behalf of the appellant Company. If he admits it, and if Mr. Bhagat thinks that he has any grievance over the admission of the proof of debt, then, at his own risk as to costs in the ordinary way, he should go to the Judge under S. 215 to have the proof rejected or varied or for such other order as he thinks necessary. If he succeeds, no doubt he will recover his costs from the appellants. If he fails, then the costs of that will come out of his own pocket. On the other hand, if the liquidator objects to the claim, it will be open to the appellants to take proceedings under S. 215 in the ordinary way and ask the Judge to reverse the decision of the liquidator and to admit the claim. There again, if the learned Judge thinks it necessary, he may allow Mr. Bhagat also to take part in that proceeding. What is necessary is that the ordinary procedure to determine the debt in the voluntary winding-up shall be applied.

This appeal is allowed with costs both here and before Mr. Justice Gregory as against the respondent Bhagat. Mr. Page's costs will, in this Court and in the Court below, come out of the assets.

**Mukerji, J.**—I agree.

G.B. *Appeal allowed.*

---

## * A. I. R. 1927 Calcutta 691

PANTON AND MULLICK, JJ.

*National Insurance Co. Ltd.*—Defendant—Appellant.

v.

*Haridas Basu*—Plaintiff—Respondent.

Appeal No. 240 of 1926, Decided on 15th February 1927.

* *Transfer of Property Act, S. 2 (d) and S. 136—Claim under life insurance policy purchased in execution by a pleader—Purchase is not prohibited.*

Section 136 is controlled by S. 2 Sub-Cl. (d) of the Transfer of Property Act, and, therefore, a purchase in execution of a claim under a life insurance policy by a legal practitioner entitles him to claim the amount from the Insurance Company : 28 *Cal.* 744, *Expl.* [P 692, C 2]

*B. K. Ghose* and *Narain Chandra Kar*—for Appellant.

*Tarakeswar Nath Mitra*—for Respondent.

winding-up on the 26th of January 1925 it is quite clear that the liquidators had got somewhat tired of going on, and were neither able to decide the matter nor able to give any intelligent reason why it should not be decided. So on the 26th of January they applied to the Court under S. 215 of the Indian Companies Act asking that they might be at liberty to admit the claim of the appellants. The appellants were no parties to that application, but it is quite true that the liquidators were doing their best for them.

Mr. Bhagat was made a respondent to the application and the result of the application is an order which has given rise to all this trouble, because the learned Judge not only did not make an order directing the liquidators to admit the claim, he also did not make an order giving liberty to the liquidators to admit the claim, he did not dismiss the application; instead of that he made an order to the effect that the liquidators were not to admit the claim unless the appellants brought a regular suit, in other words, he decided that these appellants were deprived of all rights to have their claim ascertained in the winding-up proceedings and the liquidator's hands were tied so that they could not, whatever they thought, admit the claim until the matter came before the Court in the form of a suit. It has been pointed out that that might be a very disadvantageous order from the point of view of the absent appellants. They were in this position that while at the time of the winding-up their claim was in no way statute-barred, it had in the intervening years become statute-barred for the purposes of a suit under S. 3 of the Limitation Act of 1908. At all events, whether or not they had acknowledgments which would save them from the bar imposed by the Limitation Act, the order that they were to be relegated to a suit and not allowed to follow the ordinary course of a creditor's proof of debt against the company in the winding-up was one which put them to considerable trouble and risk. That order having been made the solicitors for the appellants endeavoured first of all to settle the matter. A good deal of comment has been made, that a very long time was occupied in an unsuccessful endeavour to get a move forward in this matter. Finally what happened was that the appellant company made up their mind to move the learned Judge in the company's winding-up for relief.

The summons asked for a great many forms of relief; it asked that certain matters be disclosed, that funds be held to pay the dividend due on applicant's claim, that a sufficient sum be retained to meet the dividend, that the appellant's claim might be admitted and so on and so forth. It appears that at the hearing of the motion, learned counsel also asked to add a claim, if neceasary, to discharge the ex-parte order of Mr. Justice C. C. Ghose.

Mr. Justice Gregory after reviewing the whole matter came to the conclusion that he would not interfere with the order of Mr. Justice C. C. Ghose, in other words, though he was asked to give this matter a decision in the company's winding-up, he took the view in deference to Mr. Justice Ghose's order that he would do nothing one way or another to have it determined in the winding-up but would leave it under Mr. Justice C. C. Ghose's order to be tried by a suit and only by a suit.

Upon this appeal I have come to the conclusion that the order made by Mr. Justice Ghose was wrong. I can see no reason why a person, who has a claim which he has long ago put in the form of a proof of debt against a Company, and which the liquidators were willing to admit, should not be allowed the benefit of the Company's winding-up proceedings. If the liquidators admit a proof of debt and any person having an interest disputes the debt, it is always open to him in the Company's winding-up under S. 215 of the Indian Companies Act, just as it would be open to him in insolvency proceedings, to take the matter to a Judge and get the liquidators' decision overruled. I can in no way understand why because Mr. Bhagat obejcts, the appellant Company should be obliged to sue the insolvent Company. It seems to me that some arrangement would be more reasonable according to which Mr. Bhagat should oppose this proof at his own risk as to costs.

But the main difficulty which I find in dealing with the present appeal is the question whether the order made by Mr. Justice Gregory is a judgment

under Cl. 15 of the Letters Patent. It would appear that by S. 202 of the Indian Companies Act it is necessary that it should be shown that the order made by Mr. Justice Gregory is a judgment in that sense. But, having regard to the fact that the learned Judge refused all forms of relief except the form of relief which required the liquidators to reserve a sum sufficient to pay the dividend, I am of opinion that Mr. Justice Gregory's order is a judgment within Cl. 15 of the Letters Patent. He was asked to admit the applicants' claim, if not already admitted. He was asked to take some steps, in other words, to have this matter determined in the winding-up. What he has done is to declare that within the Companys' winding-up jurisdiction no steps whatever shall be taken for the determination of this question. He has refused rightly enough to make an order then and there, admitting the applicant's claim, but he has also refused to make an order requiring the liquidators to decide it one way or the other or to make an order bringing the matter up for decision before himself under S. 215 of the Indian Companies Act. The effect of this upon the appellants' chance of success may for aught I can tell, be fatal.

In my jndgment the order in the form of a direction to the liquidators made in a proceeding to which the appellants were not parties should not be binding on the appellants. It was quite open to them to give notice in the winding-up and to go to the learned Judge and get another order according to their true rights.

In my judgment the correct position is this that these are creditors desirous of taking proper proceedings in the winding-up to establish their right and they were told that they would not be heard. In my judgment this order is an order which deprives the appellants of a substantial and important right and I am not prepared to hold that this order is not appealable by reason that it is not a judgment under Cl. 15 of the Letters Patent.

In my opinion it only remains for us to make the ordinary order as regards the proof of debt in dispute reversing the judgment of Mr. Justice Gregory. We direct the liquidator within a month from the drawing up of this order to admit or reject the formal proof of debt which has already been tendered on behalf of the appellant Company. If he admits it, and if Mr. Bhagat thinks that he has any grievance over the admission of the proof of debt, then, at his own risk as to costs in the ordinary way, he should go to the Judge under S. 215 to have the proof rejected or varied or for such other order as he thinks necessary. If he succeeds, no doubt he will recover his costs from the appellants. If he fails, then the costs of that will come out of his own pocket. On the other hand, if the liquidator objects to the claim, it will be open to the appellants to take proceedings under S. 215 in the ordinary way and ask the Judge to reverse the decision of the liquidator and to admit the claim. There again, if the learned Judge thinks it necessary, he may allow Mr. Bhagat also to take part in that proceeding. What is necessary is that the ordinary procedure to determine the debt in the voluntary winding-up shall be applied.

This appeal is allowed with costs both here and before Mr. Justice Gregory as against the respondent Bhagat. Mr. Page's costs will, in this Court and in the Court below, come out of the assets.

**Mukerji, J.**—I agree.

G.B. *Appeal allowed.*

---

## ✻ A. I. R. 1927 Calcutta 691

PANTON AND MULLICK, JJ.

*National Insurance Co. Ltd.*—Defendant—Appellant.

v.

*Haridas Basu*—Plaintiff—Respondent.

Appeal No. 240 of 1926, Decided on 15th February 1927.

✻ *Transfer of Property Act, S. 2 (d) and S. 136—Claim under life insurance policy purchased in execution by a pleader—Purchase is not prohibited.*

Section 136 is controlled by S. 2 Sub-Cl. (d) of the Transfer of Property Act, and, therefore, a purchase in execution of a claim under a life insurance policy by a legal practitioner entitles him to claim the amount from the Insurance Company : 28 *Cal.* 744, *Expl.* [P 692, C 2]

*B. K. Ghose* and *Narain Chandra Kar*—for Appellant.

*Tarakeswar Nath Mitra*—for Respondent.

winding-up on the 26th of January 1925 it is quite clear that the liquidators had got somewhat tired of going on, and were neither able to decide the matter nor able to give any intelligent reason why it should not be decided. So on the 26th of January they applied to the Court under S. 215 of the Indian Companies Act asking that they might be at liberty to admit the claim of the appellants. The appellants were no parties to that application, but it is quite true that the liquidators were doing their best for them.

Mr. Bhagat was made a respondent to the application and the result of the application is an order which has given rise to all this trouble, because the learned Judge not only did not make an order directing the liquidators to admit the claim, he also did not make an order giving liberty to the liquidators to admit the claim, he did not dismiss the application; instead of that he made an order to the effect that the liquidators were not to admit the claim unless the appellants brought a regular suit, in other words, he decided that these appellants were deprived of all rights to have their claim ascertained in the winding-up proceedings and the liquidator's hands were tied so that they could not, whatever they thought, admit the claim until the matter came before the Court in the form of a suit. It has been pointed out that that might be a very disadvantageous order from the point of view of the absent appellants. They were in this position that while at the time of the winding-up their claim was in no way statute-barred, it had in the intervening years become statute-barred for the purposes of a suit under S. 3 of the Limitation Act of 1908. At all events, whether or not they had acknowledgments which would save them from the bar imposed by the Limitation Act, the order that they were to be relegated to a suit and not allowed to follow the ordinary course of a creditor's proof of debt against the company in the winding-up was one which put them to considerable trouble and risk. That order having been made the solicitors for the appellants endeavoured first of all to settle the matter. A good deal of comment has been made, that a very long time was occupied in an unsuccessful endeavour to get a move forward in this matter. Finally what happened was that the appellant company made up their mind to move the learned Judge in the company's winding-up for relief.

The summons asked for a great many forms of relief; it asked that certain matters be disclosed, that funds be held to pay the dividend due on applicant's claim, that a sufficient sum be retained to meet the dividend, that the appellant's claim might be admitted and so on and so forth. It appears that at the hearing of the motion, learned counsel also asked to add a claim, if neceasary, to discharge the ex-parte order of Mr. Justice C. C. Ghose.

Mr. Justice Gregory after reviewing the whole matter came to the conclusion that he would not interfere with the order of Mr. Justice C. C. Ghose, in other words, though he was asked to give this matter a decision in the company's winding-up, he took the view in deference to Mr. Justice Ghose's order that he would do nothing one way or another to have it determined in the winding-up but would leave it under Mr. Justice C. C. Ghose's order to be tried by a suit and only by a suit.

Upon this appeal I have come to the conclusion that the order made by Mr. Justice Ghose was wrong. I can see no reason why a person, who has a claim which he has long ago put in the form of a proof of debt against a Company, and which the liquidators were willing to admit, should not be allowed the benefit of the Company's winding-up proceedings. If the liquidators admit a proof of debt and any person having an interest disputes the debt, it is always open to him in the Company's winding-up under S. 215 of the Indian Companies Act, just as it would be open to him in insolvency proceedings, to take the matter to a Judge and get the liquidators' decision overruled. I can in no way understand why because Mr. Bhagat obejcts, the appellant Company should be obliged to sue the insolvent Company. It seems to me that some arrangement would be more reasonable according to which Mr. Bhagat should oppose this proof at his own risk as to costs.

But the main difficulty which I find in dealing with the present appeal is the question whether the order made by Mr. Justice Gregory is a judgment

under Cl. 15 of the Letters Patent. It would appear that by S. 202 of the Indian Companies Act it is necessary that it should be shown that the order made by Mr. Justice Gregory is a judgment in that sense. But, having regard to the fact that the learned Judge refused all forms of relief except the form of relief which required the liquidators to reserve a sum sufficient to pay the dividend, I am of opinion that Mr. Justice Gregory's order is a judgment within Cl. 15 of the Letters Patent. He was asked to admit the applicants' claim, if not already admitted. He was asked to take some steps, in other words, to have this matter determined in the winding-up. What he has done is to declare that within the Companys' winding-up jurisdiction no steps whatever shall be taken for the determination of this question. He has refused rightly enough to make an order then and there, admitting the applicant's claim, but he has also refused to make an order requiring the liquidators to decide it one way or the other or to make an order bringing the matter up for decision before himself under S. 215 of the Indian Companies Act. The effect of this upon the appellants' chance of success may for aught I can tell, be fatal.

In my jndgment the order in the form of a direction to the liquidators made in a proceeding to which the appellants were not parties should not be binding on the appellants. It was quite open to them to give notice in the winding-up and to go to the learned Judge and get another order according to their true rights.

In my judgment the correct position is this that these are creditors desirous of taking proper proceedings in the winding-up to establish their right and they were told that they would not be heard. In my judgment this order is an order which deprives the appellants of a substantial and important right and I am not prepared to hold that this order is not appealable by reason that it is not a judgment under Cl. 15 of the Letters Patent.

In my opinion it only remains for us to make the ordinary order as regards the proof of debt in dispute reversing the judgment of Mr. Justice Gregory. We direct the liquidator within a month from the drawing up of this order to admit or reject the formal proof of debt which has already been tendered on behalf of the appellant Company. If he admits it, and if Mr. Bhagat thinks that he has any grievance over the admission of the proof of debt, then, at his own risk as to costs in the ordinary way, he should go to the Judge under S. 215 to have the proof rejected or varied or for such other order as he thinks necessary. If he succeeds, no doubt he will recover his costs from the appellants. If he fails, then the costs of that will come out of his own pocket. On the other hand, if the liquidator objects to the claim, it will be open to the appellants to take proceedings under S. 215 in the ordinary way and ask the Judge to reverse the decision of the liquidator and to admit the claim. There again, if the learned Judge thinks it necessary, he may allow Mr. Bhagat also to take part in that proceeding. What is necessary is that the ordinary procedure to determine the debt in the voluntary winding-up shall be applied.

This appeal is allowed with costs both here and before Mr. Justice Gregory as against the respondent Bhagat. Mr. Page's costs will, in this Court and in the Court below, come out of the assets.

**Mukerji, J.**—I agree.

G.B. *Appeal allowed.*

---

## * A. I. R. 1927 Calcutta 691

PANTON AND MULLICK, JJ.

*National Insurance Co. Ltd.*—Defendant—Appellant.

v.

*Haridas Basu*—Plaintiff—Respondent.

Appeal No. 240 of 1926, Decided on 15th February 1927.

* *Transfer of Property Act, S. 2 (d) and S. 136—Claim under life insurance policy purchased in execution by a pleader—Purchase is not prohibited.*

Section 136 is controlled by S. 2 Sub-Cl. (d) of the Transfer of Property Act, and, therefore, a purchase in execution of a claim under a life insurance policy by a legal practitioner entitles him to claim the amount from the Insurance Company : 28 *Cal.* 744, *Expl.* [P 692, C 2]

*B. K. Ghose* and *Narain Chandra Kar*—for Appellant.

*Tarakeswar Nath Mitra*—for Respondent.

**Mullick, J.**—This appeal arises out of a suit for recovery of money due on a policy of life insurance effected on the life of one Sashi Bhusan Bhattacharji with the appellant company. The said policy had been purchased by the plaintiff-respondent at a sale in execution of a decree in the Bolepur Munsiff's Court against the heirs of Sashi Bhusan. The defence inter alia was that the plaintiff being a pleader practising in the Bolepur Court was precluded by S. 136 of the Transfer of Property Act, from buying the Policy of Insurance or enforcing his claim upon it. This defence found favour with the trial Judge, and the trial Judge on that ground dismissed the suit without determining any of the other issues raised in the case. On appeal the learned District Judge held that S. 136 of the Transfer of Property Act did not apply to the case, and on that finding allowed the appeal and remanded the case to the Court of first instance for decision on the merits. It is against this order of decision on remand that the present appeal is directed.

The main ground on which the learned District Judge held that S. 136 did not apply to the case was that the provisions of S. 2, Sub-Cl. (d) of the Transfer of Property Act acted as a bar against such an application. It is urged that herein the learned District Judge committed an error of law, and it was contended by the learned counsel for the appellant that S. 2 (d) has a limited applicability only, and does not apply to the provisions of S. 136; and, in support of this contention, we were referred to a decision of this Court in *Promotho Nath Mitter* v. *Kali Prosanna Chowdhury* (1). The case in *I. L. R*, 28 *Cal.* is no authority for the proposition that S. 2, Sub-Cl. (d), has no application to the provisions of S. 136. It is true that the learned Judges who decided that case made in their judgment, certain observations on the question of the applicability of S. 2 (d). But these observations as we read them, do not go beyond meaning that those provisions only in the Transfer of Property Act, that affect a transfer would come within the purview of S. 2 (d). S. 136, not only does affect a transfer, but affects it most vitally. It even goes so far as to invalidate it. That being so, we are of opinion that S. 136 is controlled by S. 2, Sub- Cl. (d) of the Transfer of Property Act, and the provisions of S. 2 (d) would save the suit from the operation of S. 136.

In this view of the matter the appeal fails and is accordingly dismissed with costs hearing-fee, three gold mohurs.

**Panton J.**—I agree.

D.D. *Appeal dismissed.*

(1) [1901] 28 Cal. 744.

---

## A. I. R. 1927 Calcutta 692

PANTON AND MITTER, JJ.

*Sushil Kumar Chowdhury* and *others*—Petitioners.

v.

*Annada Prasanna Lahiri* and *others*—Opposite Party.

Civil Revision No. 1005 of 1926, Decided on 3rd May 1927, against an order of Dist. J., Pabna and Bogra, D/- 4th August 1926.

*Civil P. C., O. 9, R. 14*—"*Opposite Party*"—*Meaning.*

Plaintiffs brought a suit for partition. A preliminary decree was passed against some of the defendants on the basis of a compromise arrived at between them and plaintiffs, while against the remaining defendants the decree was ex-parte. The defendants, against whom decree was ex-parte, applied for setting aside of the decree on the ground that they were not served with summons. The application was dismissed and they filed an appeal making the plaintiffs and all the defendants parties. Some of the defendants died and their representatives not having been brought on the record the appeal was dismissed on the ground of abatement.

*Held*: the words "opposite party" in O. 9, R. 14 would mean the plaintiffs who obtained the ex-parte decree against the appealing defendants, and as notice was given to the plaintiffs the lower appellate Court was wrong in dismissing the appeal: *A. I. R.* 1924 *Cal.* 814, *Rel on*; *A, I. R.* 1914 *P. C.* 31, *Ref.*

[P 693 C 2, P 694 C 1]

*Atul Chandra Gupta, Surjya Kumar Guha* and *Surajit Chanāra Lahiri*—for Petitioners.

*Gunada Charan Sen, Bireswar Bagchi* and *Biraj Mohun Majumdar*—for Opposite party.

**Mitter, J.**—This Rule was issued on the opposite parties to show cause why the order of the District Judge of Pabna and Bogra, dated the 4th of August 1926, dismissing an appeal against an order made under O. 9, R. 13, Civil P. C. on the ground of non-joinder of necessary parties, should not be set aside. The facts which are necessary to

be considered for the purposes of the Rule are these : The opposite parties 1, 2 and 3 brought a suit in the Court of the Subordinate Judge of Pabna against the petitioner 1, and the mother of petitioners 3 to 8 and of the late Sir Asutosh Chaudhuri (whose estate is now represented by the petitioner 2) and 47 other persons for partition of certain lands within certain touzis of Pabna and Rajshahi Collectorates and for specifications of their shares therein with respect to their zemindari and patni rights ; 23 other persons, who were holders of a superior interest in the touzi concerned, were subsequently added as defendants to the suit.

On the 21st February 1923 a preliminary decree was passed in the said suit ; some of the defendants filed a petition of compromise and the preliminary decree was based on a compromise as against the said defendants and was exparte against the other defendants including the petitioners ; the petitioners alleged that they were not served with summons and they came to know of the preliminary decree on the 10th April 1923 ; on the 27th April 1923 petitioners applied to the Court under O. 9, R. 13 of the Civil P. C. for setting aside the ex parte decree ; the Subordinate Judge dismissed the application on the 19th March 1924 ; against the said order of dismissal the petitioners preferred an appeal to the District Judge of Pabna making the plaintiffs and all other defendants parties to the partition suit. Respondent 30, Jatindra Nath Chakravarti, having died, his heirs were not brought on the record of the appeal within the time limited by law ; respondent 50, viz., the Maharaja of Natore having died, his heirs were not brought on the record of the said appeal. It may be mentioned here that the Maharaja is a holder of the superior interest and is not a necessary party to the suit of partition amongst the holders of the inferior interest. The District Judge dismissed the appeal as the appeal had abated against respondents 30 and 50.

On these facts the present Rule was obtained and it is contended before us by the learned advocate for the petitioners that the lower appellate Court had declined jurisdiction in not hearing the appeal on the merits as the appeal before him was competently brought and notice was given to the plaintiffs (who, it is contended, are "opposite parties" to the said application within the meaning of O. 9, R. 14, Civil P. C.,) A preliminary objection has been taken to the hearing of this Rule on the ground that the Rule cannot be heard in the absence of the heirs of respondent 30. It may be stated here that an application by the heirs of the respondent 30 for being added as an opposite party to the Rule was made to us, and we refused this application. The question raised by the preliminary objection as to the competency of the Rule depends on the view which we take as to the competency of the appeal before the lower appellate Court. On the determination of the question involved in the Rule the question raised by the preliminary objection will depend. We, therefore, proceed to consider the soundness of the point raised by the learned advocate for the petitioners. The question depends on the construction which is to be put on O. 9, R. 14 Civil P. C. The Rule runs as follows :

> No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party.

It is contended on behalf of the petitioners that the word "opposite party" mean the plaintiffs in the present partition suit on whom notice of the application was admittedly served. On the other hand, it is contended on behalf of the opposite party that it is a suit for partition and as the position of the defendants inter se is the position of counter-claimants, the words "opposite party" would include the defendants besides the petitioners, and reliance has been placed on the following observations of their Lordships of the Judicial Committee in the case of *Nalini Kanta Lahiri* v. *Sarnomoyi Debya* (1) :

> If any co-sharer applies for a partition of a property he must make the other co-sharers defendants, because the partition which is made in his favour is a partition against the co-sharers. That which gives him a portion of the property takes away all right which they would otherwise have to that portion, and therefore it is a decree against them, and in favour of himself.

We have considered the two conflicting contentions and it seems to us that the words "opposite party" would mean the plaintiffs who obtained the ex-parte decree against the defendant and as notice

(1) A. I. R. 1914 P. C. 31=41 I. A. 247 (P. C.).

was given to the plaintiffs the learned District Judge was wrong in dismissing the appeal on the preliminary ground. The learned District Judge will therefore rehear the appeal on the merits and if he finds that no summons was served on the petitioners, he will set aside the ex-parte decree against them and proceed to rehear the partition suit but he will not set aside the decree against the other defendants as the proviso to O. 9, R. 13, cannot be given effect to in the absence of some of the defendants. It will be open to the plaintiffs and the other defendants who have not applied to set aside the preliminary decree to take any objection that may be open to them arising out of the new state of things if the ex-parte decree is set aside and the suit against the petitioners be proceeded with. The view we take receives indirect support from a decision of the learned Chief Justice and Mr. Justice Mookerjee in the case of *Kailash Chandra Ray* v. *Hriday Chandra Das* (2), relating to an order made under the analogous provisions of O. 9, R. 9 Civil P. C. in a suit which was brought to set aside a preliminary and final decree for partition which was dismissed for default.

The view we take is not also inconsistent with the decision of the Judicial Committee to which reference has been made as there the question arose as to what is the effect of a decree between the defendants in a partition suit inter se and their Lordships laid down that such a decree will have the effect of res judicata and will bar a subsequent suit for partition instituted by one of the defendants against another as the position of defendants in a partition suit is that of counter-claimants. The Rule is made absolute but under the circumstances the petitioners will pay the opposite party's costs which we assess at 2 gold mohurs.

**Panton, J.**—I agree.

G.B. *Rule made absolute.*

(2) A. I. R. 1924 Cal. 814.

## ✻ A. I. R. 1927 Calcutta 694

MUKERJI AND GRAHAM, JJ.

*Brajabashi Modak* and *others*—Judgment-debtors—Appellants.

v.

*Manik Chandra Modak*—Decree-holder—Respondent.

Appeal No. 205 of 1926, Decided on 14th February 1927, from the Appellate Order of the Dist. J., Mymensingh, D/- 4th February 1926.

(a) *Civil P. C., O. 21, R. 16—Rule applies to first occasion only.*

Rule 16 contemplates the occasion when, for the first time, the assignee comes before the Court to apply for execution. The object of issuing notices under that rule to the transferrer and the judgment-debtor is to determine once for all and in the presence of all parties concerned the validity of the assignment. It cannot be said that each time the assignee comes to get the decree executed he should oome in under this rule: 25 *All.* 443 and *A. I. R.* 1923 *Bom.* 404, *Dist.* [P 696, C 1]

✻(b) *Civil P. C., O. 21, R. 2—Agreement between judgment-debtor and proprosed assignee of decree before assignment can be pleaded in bar of execution without certification.*

The argument that O. 21. R. 2, is restricted by its terms to original decree-holders and does not extend to an assignee of a decree, who steps into their shoes, as it were, under the assignment, cannot be supported. Once the assignee comes in under O. 21, R. 16, the decree may be executed in the same manner and subject to the same conditions as if the application were made by the decree-holder. When there has been an adjustment or satisfaction as between the judgment-debtor and an assignee who has attained the status of a decree-holder by an order made under O. 21, R, 16, Civil P. C., O. 21, R. 2, would be clearly applicable. But where the agreement pleaded as a bar to the execution is reached at a time when the decree had not yet been assigned to the assignee, and long before he applied under O. 21, R. 16, and under it the assignee was to get only a certain portion of the property in consideration of his paying a certain amount to the decree-holder, and also some other amounts due to the other creditors, such an agreement, though not certified under R. 2, can be pleaded by the judgment-debtor in bar of execution: 19 *Mad.* 230 and 35 *Mad.* 659, *Appl.* [P 696, C 1, 2]

*Radhika Binode Pal* and *Bhupendra Kishore Bose*—for Appellants.

*Birendra Kumar De*—for Respondent.

**Facts.**—There was a decree obtained by one Khali Mahmud against the father of the appellants and two other persons for a sum of Rs. 1,303-10-9 on the 2nd May 1922. The decretal amount, together with interest, less certain amounts paid by the judgment-debtors, came up to Rs. 843-5-9. The decree was put

into execution in execution case No. 158 of 1922 and the lands and homestead of the judgment-debtors were all attached. On the 12th April 1923 the respondent obtained an assignment of the decree in his favour. On the 16th April 1923 execution case No. 158 of 1922 was struck off. On the 12th June 1923 the respondent applied for execution of the decree. Execution Case No. 97 of 1923 was started and 8 pakhis of land belonging to the appellants were put up to sale and purchased by the respondent for Rs. 500. On the 15th September 1924 the respondent again applied for execution for the balance of the amount due, i. e. Rs. 343-5-9. On this execution case No. 145 of 1924 was started. The appellants put in an objection which was given effect to by the Court of first instance but was overruled by the District Judge. Hence this appeal.

**Mukerji, J.**—(After stating facts, the judgment proceeded.) The objection that was taken to the execution of the decree was as follows: When the lands and homestead of the judgment-debtors had been under attachment in execution case No. 158 of 1922, at the instance of the decree-holder Khali Mahmud, as stated above, there was a settlement in which three parties took part, viz. the judgment-debtor, the decree-holder Khali Mahmud and the respondent. The position at that time was that there were several creditors who had to be paid off. Some of them, rather all with the exception of only five—one of those five being Khali Mahmud—were paid off by sale of some of the properties belonging to the appellant, the sale being made by the appellants' mother acting as guardian on their behalf and on the strength of a permission obtained from the Judge. Khali Mahmud, in execution of his decree, had now attached some lands as well as the homestead of the appellants. Finding the helpless plight of the appellants he took pity on them and agreed to receive Rs. 325 in full satisfaction of his decree. For this amount he was prepared to assign his decree over to the respondent, who agreed to pay off also four other creditors of the appellants; and for all this the respondent agreed to have from the appellants only 8 pakhis of land. By adopting this course it was expected that the homestead of the appellants would be saved to them. The appellants' case is that the respondent paid Rs. 325 to Khali Mahmud and obtained an assignment of the decree, but since then paid none of the other creditors. As an apprehension was entertained as to whether the District Judge would grant permission for the sale of the minors' properties a second time, it was arranged that the respondent would execute the decree against the 8 pakhis of land. This was done and the respondent purchased the same himself. Thereafter, in breach of the agreement, the respondent again put the decree to execution, and this time for the balance, that is to say, for Rs. 344-5-9; which represents the difference between the decretal dues with interest less the sale-price, Rs. 500, for which he had purchased the 8 pakhis of land, and against the homestead of the appellants. This substantially is the appellants' case and both the Courts below have found that it has been established upon the evidence. The only point on which there may be a doubt is as regards the stipulation to pay off the other four creditors.

The District Judge has held that the objection cannot be given effect to as the arrangement amounted to an adjustment which was not certified in accordance with O. 21, R. 2 and consequently cannot be recognized by an executing Court.

Two grounds have been urged on behalf of the appellants in this appeal: the first is to the effect that the Court was not the Court which was executing the decree and therefore the objection was capable of being recognized by it; and the second, that the arrangment required no certification under O. 21, R. 2, Civil P. C.

To take the first contention first. The decree was passed by the same Court in which it was being executed. The appellants' argument is that, as the application for execution was made not by the orginal decree-holder but by the assignee, his application must be regarded as one made under O. 21, R. 16, Civil P. C., and as such as application lies only in the Court which passed the decree. It should be held that the Court was dealing with it in the latter capacity, and consequently, under the first proviso to that rule, the decree cannot be executed until the judgment-debtor's objection, if any, to its execution has been heard. It is an ingenious argument, but I am afraid it is with-

out any substance. The rule evidently contemplates the occasion when, for the first time, the assignee comes before the Court to apply for execution. The respondent did this when he applied on the 12th June 1923 and execution case No. 97 of 1923 was started. The object of issuing notices under that rule to the transferrer and the judgment-debtor is to determine once for all, and in the presence of all parties concerned, the validity of the assignment. It cannot be said that each time the assignee comes to get the decree executed he should come in under this rule. The application filed on the 15th September 1924 is a simple tabular statement for the execution of the decree. It neither is, nor can be regarded as an, application under O. 21, R. 16, Civil P. C. The case of *Tameshar Prasad* v. *Thakur Prasad* (1) and *Raghunath Gobind* v. *Gangaram Tesu* (2), upon which reliance has been plácad on behalf of the appellants, do not assist them. This contention, therefore, has no substance.

As regards the second contention it rests upon two grounds. The first ground is that O. 21, R. 2 is restricted by its terms to original decree-holders and does not extend to an assignee of a decree, who steps into their shoes, as it were, under the assignment. For this contention reference has been made to the amendment that was made by the Code of 1908 to the definition of "decree-holder" as given in the Code of 1882. The alteration is noteworthy, but it is not necessary to enquire into the object of the change, for the proposition, in the broad form in which it has been put before us, cannot be supported. Once the assignee comes in under O. 21, R. 16,

> the decree may be executed in the same manner, and subject to the same conditions, as if the application were made by the decree-holder.

This provision means that the rules relating to execution would apply in all their integrity to the case of an assignee. In a simple case, where there has been an adjustment or satisfaction, as between the judgment-debtor and an assignee who has attained the status of a decree-holder by an order made under O. 21, R. 16, Civil P. C., O. 21, R. 2 would be clearly applicable. The other ground on which the contention rests is not quite so plain and must be carefully considered. It is obvious that the agreement that is pleaded as a bar to the execution was reached at a time when the decree had not yet been assigned to the respondent and long before he applied under O. 21, R. 16. The question is whether this agreement requires certification under O. 21, R. 2. On behalf of the respondent has been urged that it was a tripartite agreement, to which admittedly the original decree-holder was a party, and, therefore, it does come under that rule. The real nature of the arrangement, to my mind, was this : the original decree-holder was satisfied with Rs. 325 and for that consideration he assigned the entire decree together with all his rights thereunder to the respondent. The agreement between the judgment-debtors and the respondent was that the latter would pay Rs. 325, and perhaps also some other amounts due to the other creditors, and for all this he would get 8 pakhis of land and nothing more, and that, although he was getting an assignment of the decree, he would not be able to execute it except for the purpose of obtaining the 8 pakhis of land. This agreement took place at a time when the respondent was not before the Court at all, and so no application by him nor any by the judgment-debtors for its certification would have been entertained by the Court until the respondent had taken the steps necessary under O. 21, R. 16, Civil P. C. This view, to my mind, seems reasonable and has some authority in its support.

In the case of *Rama Ayyan* v. *Sreenivasa Pattar* (3), the facts were these : A judgment-debtor alleged that he had transferred certain immovable property to another person in consideration of his paying the judgment-debt to the original decree-holder. That person accordingly discharged the debt and subsequently got the decree transferred to himself and thus becoming the assignee, instead of entering satisfaction thereof fraudulently applied for its execution. It was held by Subramaniya Ayyar, J., that this adjustment could be pleaded notwithstanding S. 258, Civil P. C. It is true that there are several points of distinction between that case and the one we are dealing with; e. g., there it was a question whether the decree having been satisfied

(1) [1903]] 25 All. 443=(1903) A. W. N. 99.
(2) A. I. R. 1923 Bom, 404=47 Bom. 643.
(3) [1896] 19 Mad. 230.

the assignee acquired any interest by the assignment; and also, the objection was taken before the Court which had passed the decree and at a stage when the transferee had applied to that Court for execution, and therefore the objection was such as would have come within O. 21, R. 16 of the present Code and would have been entertainable thereunder, and so on. But these points of difference do not really matter, for it is the view of S. 258 of the Code of 1882 that was taken by the learned Judge that is really material for our present purposes. That section was much in the same words as O. 21, R. 2 of the Code of 1908, and the slight variation in Cl. 5, if at all, only makes the rule more stringent. Referring the three paragraphs of the section the learned Judge observed thus :

> Manifestly therefore the enquiry under the said second paragraph can take place only between parties standing in the relation of judgment-debtor and judgment-creditor. If the former has entered into a contract, not with the latter, but with a third party with reference to the satisfaction or adjustment of a decree, the judgment-creditor cannot make any application against such third party under S. 258, and consequently the latter cannot on principle be permitted to take advantage of the prohibition imposed by the concluding paragraph of that section as a penalty for the judgement-debtor's omission to apply to the Court under the previous paragraph or for his failure to prove his case if he did apply. The circumstances that the third party, subsequently to the contract, becomes the transferee of the decree which he contracted to satisfy, can have no retrospective effect, so as to deprive the judgment-debtor of his right to establish that the transferee is, by the anterior contract, precluded from realizing the judgment-debt.

These observations, in my opinion, apply equally well to the present case. It has been urged that in this case the adjustment of the decree with the original decree-holder and the agreement with the respondent and the assignment were all at one and the same time, and all the three parties were parties to the whole arrangement and that the whole arrangement was effected at one and the same time. I am, however, of opinion that the agreement between the judgment-debtors and the respondent must have been reached before the assignment; however short the interval may have been is not material; and in the agreement that the defendant would get nothing more than 8 pakhis of land, the original decree-holder was not interested though it was to his knowledge.

Subramaniya Ayyar, J., himself had occasion to refer to this case in *Periatambi Udayan* v. *Vellava Goundan* (4), and there he and Benson, J., said :

> In the case of *Rama Ayyan* v. *Sreenivasa Pattar* (3) the person relying on the adjustment was not entitled to make any application . . . . as against the person who denied the payment inasmuch as the latter was not then an assignee.

In the case of *Ponnusami Nadar* v. *Letchmanan Chettiar* (5), Abdur Rahim, J., was unable to accept the dictum as a correct exposition of S. 258 of the Code, and sought to support the decision of the case on the ground of fraud committed by the assignee and also on the ground that when a question arises as to whether the assignee is a benamidar of the original decree-holder, the question of adjustment or satisfaction of the decree does not really arise. In the same case Sundara Ayyar, J., referred to the dictum with approval and observed :

> It may perhaps be contended that the anterior contract is no reason for depriving the assignee of rights under the transfer that he is entitled to all the rights of his transferrer and therefore has the right to execute the decree which has not not been satisfied on the record of the Court. But to such an argument it may well be replied that, after entering into the contract he should not be allowed to set up any right in opposition to that contract by virtue of an assignment,

In a later decision of the same Court, *Arumugam Pillai* v. *Krishnasami Naidu* (6), in which, however, the dictum was hardly of any relevancy, Oldfield, J., passed it over as being the decision of a single Judge.

I am of opinion that the dictum does apply to this case and the observations of Sundara Ayyar, J., in *Ponnusami Nadar* v. *Letchmanan Chettiar* (5) do also apply to it.

In my opinion the agreement upon which the judgment-debtors relied as a bar to the execution of the decree was fit to be entertained by the executing Court O. 21, R. 2, notwithstanding.

The appeal accordingly should be allowed, the order by the District Judge set aside and that of the Subordinate Judge restored with costs in this Court and the lower appellate Court. Hearing fee of this appeal is assessed at two good mohurs.

**Graham, J.**—I agree.

D.D. *Appeal allowed.*

(4) [1897] 21 Mad. 409=8 M. L. J. 51.
(5) [1911] 35 Mad. 659=22 M. L. J. 170=12 I. C. 657=(1911) 2 M. W. N. 568.
(6) [1920] 43 Mad. 725=39 M. L. J. 223=56 I. C. 976=12 M. L. W. 41.

## ✻ A. I. R. 1927 Calcutta 698

C. C. GHOSE AND GREGORY, JJ.

*Satyaranjan Bakshi* and *another*—Accused—Appellants,

v.

*King-Emperor*—Opposite Party.

Criminal Admitted Appeal No. 97 of 1927, Decided on 5th July 1927, from the judgment of the Ch. Presy. Mag., Calcutta, D/- 9th February 1927.

✻ (*a*) *Penal Code, S. 124A—Indian Law is more compressed—Intentional attempt to rouse, against Government, feeling of disaffection must exist—Meaning of language used, as understood by the readers, is the meaning of the writer—Words used should be construed liberally.*

The law as codified in India in S. 124A represents in substance the English Law of sedition, although it is much more compressed and more distinctly expressed. [P 699 C 2]

In a charge under S. 124A, the prosecution must prove to the hilt that the intention of the writer or the speaker, whoever he may be, is to bring or attempt to bring into hatred or contempt or excite or attempt to excite disaffection towards the Government established by law in British India. The essence of the crime of sedition, therefore, consists in the intention with which the language is used. What is rendered punishable by S. 124A is the intentional attempt, successful or otherwise, to rouse as against Government the feelings enumerated in the section, and a mere tendency in an article to promote such feelings is not sufficient to justify a conviction. [P 699 C 2, P 700 C 1]

The intention of a writer or a speaker, however, has to be gathered from the language used in the particular article or speech which is the subject-matter of the charge. When a man is charged in respect of anything that he has written, the meaning of what he wrote must be taken to be his meaning and that meaning is what his language would be understood to mean by the people to whom it is addressed. [P 700 C 1]

The expression in the section "calculated to bring into hatred or contempt or excite or attempt to excite disaffection" must, as a rule of construction, be very narrowly construed so as to interfere as little as possible with the liberty of the subject and the freedom of speech. If a party publishes any matter in a newspaper and it contains no more than a calm, dispassionate and quiet discussion showing possibly a little feeling in the man's mind, that will not be sedition ; but if the article goes beyond and attributes improper and dishonest or corrupt motive and thereby is calculated to excite tumult then it is sedition. [P 700 C 1,2]

While a very large amonnt of latitude is and must be allowed to writers in the public press, the interests of the State must at the same time, be not lost sight of and writers cannot under the guise of criticism of public affairs, be allowed to indulge in attributing base, improper or dishonest motives to those who carry on the work of the Government of the country. [P 701 C 1]

✻ (*b*) *Penal Code, S. 124A—Sentence—Object is not to take vindictive action.*

The object of the Crown, in instituting proceedings of this nature, is not to take vindictive action. [P 701 C 2]

*N. K. Basu, Suresh Chandra Taluqdar, Ramendra Chandra Roy* and *Radhika Ranjan Guha*—for Appellants.

*B. L. Mitter*—for the Crown.

**C. C. Ghose, J.**—This is an appeal by two persons named Satyaranjan Bakshi and Pulin Behary Dhar, who have been convicted by the learned Chief Presidency Magistrate of Calcutta under S. 124A, I.P.C., and sentenced as follows; namely, the appellant 1 to suffer rigorous imprisonment for a period of three months and to pay a fine of Rs. 300 and, in default, to undergo one month's rigorous imprisonment and appellant 2 to pay a fine of Rs. 250 and, in default, to suffer rigorous imprisonment for two months. Appellant 1 is the editor and appellant 2 is the printer of a newspaper published in Calcutta called the "Forward." They were charged under S. 124A, I. P. C., for having brought or having attempted to bring into hatred or contempt and for having excited or having attempted to excite disaffection towards the Government established by law in British India by editing, printing and publishing respectively an article entitled "Anarchy" in Pabna" in the issue of the Forward newspaper dated the 7th July 1926.

The article in question will have to be dealt with in detail later on. But it may be observed at this stage that, according to the learned Chief Presidency Magistrate, the first paragraph of the article contains a sneer at Government and at the services through which it works. The second paragraph is described by the learned Magistrate as an attack on the policy of the then Acting Governor of Bengal and, in his opinion, it contains a sneer at the impartiality of the bureaucracy ; and the third paragraph, which is the final paragraph, is to the effect, according to the learned Magistrate, that the Governor or the Acting Governor takes his cue from the Government in Whitehall, where the Hindu-Moslem strife is a trump card in the hands of the British Imperialists and that the bureaucracy here know what policy they are expected by the Parliament to follow. The offending article,

as stated above, was published on the 7th July 1926, at a time when a serious outbreak of lawlessness had taken place in the district of Pabna.

It is argued, on behalf of the appellants, first, that the article read as a whole and given a fair meaning, is not seditious within the mischief of S. 124A, I. P. C.; secondly, that if it is alleged that there is in the article an imputation of motive, the motive, such as is to be discerned in it is a motive attributed to Parliament and the British Foreign Office and that, if that is so, it is not an offence under S. 124A, I. P. C., read with S. 17 thereof; thirdly, that the learned Magistrate was clearly in error in admitting in evidence articles published in the "Forward" newspaper on dates subsequent to the 7th July 1926, and, lastly, that the sentences imposed on the appellants are out of all proportion, if they should be found guilty of having committed an offence punishable under S. 124A, I. P. C.

We have had the advantage of hearing Mr. Basu at great length on behalf of the appellants and Mr. Advocate-General on behalf of the Crown. Mr. Advocate-General has contended that the article in question is nothing more nor less than as follows: in the opening paragraph attention is called to the situation in Pabna, where, as is stated above, there had been a very serious outbreak of lawlessness, and it is sarcastically remarked that although the Government has an efficient police and an efficient Civil Service, nothing had been done to check the lawlessness which was prevalent at the time in Pabna, and that the Government had been singularly inactive in its primary duty of maintaining law and order. In the second paragraph, according to Mr. Advocate-General, the writer argues that the situation in Pabna is inexplicable having regard to the fact that a tried and accomplished administrator in the person of Sir Hugh Stephenson—the Acting Governor of Bengal,—is at the head of affairs, unless it be that Sir Hugh Stephenson is following what is described as the "Favourite wife policy," and that he has an object behind the inaction of his government, namely, to encourage communal tension so that a scheme described as Sir Abdur Rahim's scheme of forming a Moslem-block in the Bengal Legislative Council may be effectuated. In the third paragraph, according to Mr. Advocate-General, the argument of the writer is that there is nothing strange whatsoever in the action or inaction of the local Government seeing that the policy of Parliament and the British Foreign Office is to set the two communities, Hindu and Moslem, by the ears, and thereby indefinitely postpone the realization of self-Government or Swaraj which, if it once come to existence, would make the Civil Service and the Executive completely responsible to an elected legislature.

Mr. Advocate-General contends that the meaning of the article is to be collected from the whole article itself and that, if one reads the article as a whole, one cannot but come to the irresistible conclusion that the writer was leading up to this, namely, that there was behind the action or inaction of the Government a deeply laid motive which was a dishonourable one and inconsistent with the elementary duties of a Government and he argues that if, as a matter of fact, an improper motive has been attributed to Government for its action or inaction in the matter of the disturbances in Pabna, the article does come within the mischief of S. 124A, I. P. C., and, therefore, is not protected by any of the exceptions and, in particular, by Excep. (2) to the said section.

Now, so far as S. 124A, I. P. C. is concerned, its interpretation is now settled and has been so settled for some time past according to a long series of judicial decisions in India. As is well known, the section itself, although drafted by the first Indian Law Commissioners, did not find place in Lord Macaulay's original draft of the Indian Penal Code, but was added to the Code itself in 1870 at the instance of the late Sir James Fitzjames Stephens. The law, as codified in India, represents in substance the English law of sedition, although, as has been stated in one of the judgments to which our attention was called, "much more compressed and more distinctly expressed."

Now, in a charge under S. 124A, I. P. C., the prosecution must prove to the hilt that the intention of the writer or the speaker, whoever he may be, is to bring or attempt to bring into hatred or contempt or attempt to excite disaffection towards the Government established by

law in British India. The essence of the crime of sedition, therefore, consists in the intention with which the language is used and the Magistrate has correctly stated that what is rendered punishable by S. 124A, I. P. C., is the intentional attempt, successful or otherwise, to rouse as against Government the feelings enumerated in the section, and that a mere tendency in an article to promote such feelings is not sufficient to justify a conviction ; in other words, as indicated above, the prosecution must bring home to the accused that his intention was as is described in the section itself. The intention of a writer or a speaker, however, has to be gathered from the language used in the particular article or speech which is the subject-matter of the charge. When a man is charged in respect of anything that he has written, the meaning of what he wrote must be taken, as Sir Lawrence Jenkins said in a case decided in Bombay, to be his meaning, and that meaning is what his language would be understood to mean by the people to whom it is addressed. The article in the present case is in the English language, and obviously it is addressed to people who have a fair and working acquaintance with the English language.

But, while the intention is to be judged from the language itself, the offending article must be read as a whole in a fair, free and liberal spirit. It has been said that one should not pause upon an objectionable sentence here, or a strong word there, but that the article as a whole should be dealt with in a spirit of freedom and should not be viewed with an eye of narrow and fastidious criticizm but, as has been said in another case, should be viewed in a free, bold, manly and generous spirit towards the accused. As we read the cases to which our attention was drawn during the course of the argument, the expression in the section " calculated to bring into hatred or contempt or excite or attempt to excite disaffection " must, as a rule of construction, be very narrowly construed so as to interfere as little as possible with the liberty of the subject and the freedom of speech. In one of the cases to which Mr. Basu drew our attention, it is said that every man has a right to give every public matter a candid, full and free discussion ; but, although people have a right to discuss grievances, they must not do so in a way calculated to excite tumult ; in other words, if a party publishes any matter in a newspaper, and it contains no more than a calm, dispassionate and quiet discussion showing possibly a little feeling in the man's mind, that will not be sedition ; but if the article goes beyond and attributes improper and dishonest or corrupt motive, and thereby is calculated to excite tumult, then it is sedition.

Bearing these principles in mind, we have anxiously, and with such care as we are capable of, considered the article in question. The first paragraph taken by itself does not, in our opinion, offend against S. 124A, I. P. C. The writer was obviously entitled to draw attention to the state of things in Pabna and to comment, if the facts were true, on the inaction of the Government severely and even sarcastically. But the paragraph in question cannot be isolated from the rest of the article nor can the two other succeeding paragraphs be isolated and dissected for discussion apart from what is contained in para. 1 of the article. Mr. Basu argues that what the writer has said, stripped of verbiage, is this : namely that the administrators in India are fond of following the policy of " Divide and Rule " compendiously described as the " Favourite Wife Policy," and that, for the purpose of securing a majority in favour of Government in the Legislative Council of the province, the Government has chosen to be inactive, notwithstanding the fact that the disturbances in Pabna, to which reference had been made in an earlier part of the article, had taken place and that there was nothing to wonder at the attitude of the Acting Governor because the established policy of the Parliament and the British Foreign Office was to promote discord between the Hindu and Moslem communities.

Mr. Basu's point is that, if a motive has at all been ascribed to the Local Government, it is a motive which is commonly attributed by one political party to its opponent and that the attribution of a motive of this description does not bring the writer within the mischief of S. 124A, I. P. C. As we have said we have very fully considered this matter not only because of its wide and intrinsic importance to the question of freedom of discussion but also on account

of its importance so far as the appellants are concerned and we have come to the conclusion that the Article in question, taken as a whole, does offend against the provisions of S. 124A I. P. C. The very cases to which Mr. Basu drew our attention show unmistakeably that while a very large amount of latitude is and must be allowed to writers in the public press, the interests of the State must at the same time be not lost sight of and that writers cannot under the guise of criticizm of public affairs be allowed to indulge in attributing base, improper or dishonest motives to those who carry on the work of the government of the country. If the writer had merely said that administrators follow the policy of "Divide and Rule" in India that perhaps by itself, could not come within S. 124A, but in this case, there can be no doubt whatsoever—and we say this after repeated perusals of the article—that a distinctly improper motive has been astributed to Government when the writer said that the whole business namely the inaction of the Government was one of political manouværing caclulated to secure an advantage to Government in the Bengal Legislative Council.

We shall not fail to take note of the act, as the concluding portion of our judgment will show, that the article was written at a time of great public excitement and that the writer was penning his article in an exasperated mood. But these considerations will go towards the mitigation of sentence and they do not and cannot be held to constitute an excuse for the article in question. Therefore, on Mr. Basu's first point, we are of opinion that the article does come within the mischief of S. 124A, I. P. C.

As regards Mr. Basu's second point, namely that, if a motive has been attributed at all, it has been so attributed against the British Parliament and the British Foreign Office and not against the Government in this country, the third paragraph of the article taken with the two previous paragraphs constitutes a sufficient refutation of it. It is an argument which has no foundation of any substance whatsover to sustain it. The answer to the second point really disposes of Mr. Basu's third point.

As regards the fourth point : Mr. Advocate-General at the very outset intimated to us that he did not propose to rely on any other article which was subsequently published in the "Forward" newspaper. We need not, therefore, take any notice of the fact that articles subsequent to the 7th July 1926 published in the "Forward" newspaper have been allowed to be admitted in evidence. They should not have been admitted in evidence.

Lastly, there is the question of sentence. The object of the Crown in instituting proceedings of this nature is not to take vindictive action. The cases in England show that sedition is and has always been considered as a very serious offence. But while it is a serious offence many factors have got to be taken into consideration in awarding punishment and, on a full consideration of everything that has been argued before us and having perused the entire record, we are of opinion that the ends of justice will be sufficiently met if we reduce the sentence of imprisonment imposed on appellant 1, Satyaranjan Bakshi from the period of three month's rigorous imprisonment to a period of a fortnight's simple imprisonment and alter the fine to one of five hundred rupees and, in default, to suffer simple imprisonment for a period of two months. As regards appellant 2, Pulin Behary Dhar the fine will be reduced from two hundred and fifty rupees to a sum of one hundred rupees and, in default one month's simple imprisonment. With this modification, the appeal will be dismissed.

Appellant, Satyaranjan Bakshi, must surrender to his bail and serve out the sentence now imposed on him.

D.D. *Sentence reduced.*

---

## * A. I. R. 1927 Calcutta 701

CUMING AND GRAHAM, JJ.

*Rakhal Dolui* and *another*—Accused—Petitioners.

v.

*Makham Lal Ghose*—Complainant—Opposite Party.

Criminal Revision No. 1260 of 1926, Decided on 8th April 1927, from an order of the Dy. Mag., Alipore, D/- 6th August 1926.

* *Criminal P. C., S. 145—Order under, passed in favour of one party—Other party can show in a subsequent proceeding that he was actually in possession after the order (Graham, J., doubting ).*

The order under S. 145 is only a piece of evidence to be taken into consideration in determining who is in possession. It would go no doubt to show that the party in whose favour the order is made was in possession on the date when it was made. But it is open to the other party to show in a subsequent proceeding that in spite of the order, they were actually in possession or regained possession after the order.

[P 702 C 2]

*Binode Ch. Mitter, Bir Bhusan Dutt* and *Durga Das Ray*—for Petitioners.

*Satindra Nath Mukerji* — for the Crown.

*Basanta Kumar Mukherji* and *Prem Ranjan Ray Choudhury*—for Opposite Party.

**Cuming, J.**—The facts of the case on which this rule has been granted are these : the petitioners were convicted under Ss. 143 and 379, I. P. C., and sentenced to a fine of Rs. 100 in default to three months' rigorous imprisonment under S. 379. No separate sentence was passed under S. 143, I. P. C.

The case against them was that, on 1st November 1925, they cut and took away the complainant's paddy. The defence was that the petitioners grew the paddy and so cut it.

The Magistrate found that the complainant was in possession and grew the paddy. Hence he convicted the petitioner as stated above. On appeal the learned Additional Sessions Judge held that there had been certain proceedings under S. 145, Criminal P. C., and the result of those proceedings was that, on the 28th of January 1925, the complainant was declared to be in possession, and further, that he would remain in possession till evicted in due course of law. Hence the learned Judge argued that it was idle for the appellants to produce evidence that they were in actual possession ; for, even if it be so, they cannot be anything but trespassers. Hence he held that the conviction was right.

If I understand the learned Judge rightly, what he held is that it is useless to go into the question whether the accused were or were not in possession on the day of the occurrence, because, as trespassers, they had no right to be there and therefore they could be found guilty of stealing their own paddy even if they had grown it. The learned Judge has approached the case from an entirely wrong standpoint. We are not in the present case concerned with the title of either party to the land. What we are concerned with is who were in possession on the day of the occurrence with or without title and who grew the crops in question. The order under S. 145 is only a piece of evidence to be taken into consideration in determining who is in possession. It would go no doubt to show that the complainant was in possession on the 28th January 1925, the date when it was made. But it is open to the accused to show that, in spite of the orders they were actually in possession or regained possession after the order and that they grew the crops and were in possession on the day of the occurrence.

The order of the learned Additional Sessions Judge must be set aside and the appeal re-heard in the light of these observations.

**Graham, J.**—I have further considered this case, and, speaking for myself, I must confess that I feel considerable doubt as to the effect of the order under S. 145, Criminal P. C., and as to whether, in all the circumstances the possession claimed by the accused in this case can be said to have been lawful possession or possession which the Court could in any way recognize as a defence to the charges. As the order which my learned brother proposes to make, however, is to send the case back for re-hearing the appeal, and as it appears from the judgment of the trial Court that there is evidence as to possession apart from the order under S. 145, Criminal P. C., I do not feel disposed to deliver a dissenting judgment and I concur in the order which has been made.

D.D. *Case sent back.*

---

## A. I. R. 1927 Calcutta 702

C. C. GHOSE AND CAMMIADE, JJ.

*Ramesh Pada Mandal*—Accused—Petitioner.

v.

*Kadambini Dasi*—Complainant—Opposite Party.

Criminal Revision No. 520 of 1927, Decided on 7th June 1927.

*Criminal P. C., S. 439—Case heard without notice to accused—Order passed thereon was vacated and case was retried after issue of notice.*

An order under S. 439, setting aside an order of the lower Court under S. 562 (1A) Criminal P. C., and convicting the accused under Penal Code, S. 324 was passed under the impression that accused was served with a notice of hearing. It subsequently turned out that no such notice was issued. The High Court thereupon issued a notice and reheard the case. [P 704, C1]

*S. C. Bose* and *Santosh Kumar Pal*—for Petitioner.

*Narendra Kumar Basu* and *Promotho Nath Mitter*—for Opposite Party.

**Judgment.**—In this case the learned Additional District Magistrate of Midnapore made a reference to this Court, on the 11th March 1927, recommending that a certain order passed by Babu Sukesh Chandra Deb Roy, Deputy Magistrate of Midnapore, convicting the accused under S. 323, I. P. C., and letting him off with a warning under S. 562 (1A), Criminal P. C., might be set aside and the accused convicted either under Ss. 323 or S. 324, I. P. C., and given a suitable sentence. The order of the Magistrate is dated the 28th July 1926.

This Reference came on before us for hearing on the 5th May 1927. The case appeared on the daily printed defended list and the record in this Court was marked with the word "defended." Mr. Narendra Kumar Basu, Advocate, appeared for the complainant, but, at the time of the hearing of the Reference, there was no appearance by any learned counsel, or advocate or vakil on behalf of the accused. Having regard to the fact that the record of the Reference before us showed, on the face of it, that it was "defended," we assumed that notice of the reference had been served on the accused, and after hearing Mr. Basu for the complainant we accepted the Reference and altered the conviction from one under S. 323, I. P. C., to one under S. 324, I. P. C., and sentenced the accused to suffer rigorous imprisonment for a period of one year. This order, as stated above, was made by us on the 5th May 1927. Subsequently, i e., on the 23rd May 1927, Mr. S. C. Bose, Advocate, appeared before us on behalf of the accused and drew our attention to the fact that our order of the 5th May 1927 had been made without hearing the accused and without the accused having been given any notice of the hearing of the Reference before this Court.

We thereupon made enquiries, and we discovered, on examination of the record, that, although the accused appeared before the Additional District Magistrate on the 21st September 1926, when orders were reserved by the Additional District Magistrate, it did not appear that the accused appeared before the Additional District Magistrate on any subsequent date, or on the 23rd December 1926, when the Additional District Magistrate of Midnapore finally made up his mind to refer the matter to this Court; or that the accused had any knowledge of the fact of the Reference to this Court having been made by the said Additional District Magistrate.

So far as the proceedings in this Court are concerned it did not appear, as it should have appeared, on the record in this Court, that no notice of this Reference had been served upon the accused. As stated above our attention was never called to that fact. Under these circumstances we came to the conclusion that it was our obvious duty to issue a Rule at once on the application of the accused calling upon the complainant to show cause why the reference should not be re-heard in the presence of both parties, i. e., the complainant and the accused. A rule was accordingly issued. It was heard in part yesterday, and the hearing has been concluded today.

The first point taken by Mr. Narendra Kumar Basu on behalf of the complainant is that having regard to our order of the 5th May 1927 we have no jurisdiction whatsoever to re-hear the matter. He has called our attention to various cases beginning with *Queen* v. *Godai Raout* (1) and ending with the case of *Pigot* v. *Ali Mahammad Mondal* (2). We have examined the cases, and, except the case of *King-Emperor* v. *Ramesh Chandra Gupta* (3) and the case of *Achambit Mondal* v. *Mohatab Singh* (4), we do not think that the other cases have any real bearing having regard to the facts of this particular case. But be that as it may,

(1) [1866] 5 W. R. Cr. 61=B. L. R, Sup. Vol. 436.
(2) A. I. R. 1921 Cal. 30=48 Cal. 522 (S. B.).
(3) [1917] 22 C. W. N. 168=46 I. C. 157=19 Cr. L. J. 701.
(4) [1914] 42 Cal. 365=27 I. C. 212=18 C. W. N. 1180.

we are concerned really, on the question of jurisdiction, with the provisions such as are contained in the Criminal P. C., as at present amended. We think under the present Code we have ample powers in a case of this description and having regard to the facts involved to vacate our order of the 5th May 1927, and to re-hear the reference. It will serve no useful purpose to go through the long catena of cases cited by Mr. Narendra Kumar Basu as in none of the cases referred to by him were the facts similar to the facts in the present case.

Under S. 439, Criminal P. C., we could not make an order of the description which we made on the 5th May 1927, without giving the accused an opportunity of being heard before us. In the circumstances it may well be contended that the order that was made on the 5th May 1927, was an order *per in curium* and one which bordered on nullity. If our attention had been called to the fact that no notice had been given to the accused, we would have directed, in the ordinary course of things the issue of a rule on the accused. That we did not do so is because of the circumstances to which reference has already been made. There can therefore be no bar in our opinion in vacating the order of the 5th May 1927, and re-hearing the reference in the presence of both sides We have accordingly re-heard the reference, and we have had the satisfaction of hearing an elaborate and exhaustive argument on the merits on behalf of the accused from Mr, S. C. Bose. We are greatly indebted to him. But in the circumstances of this case, there can be no doubt whatsoever that the action taken by the trying Magistrate under S. 562 (1A)., Criminal P. C., was clearly irregular. In our opinion this is a fit and proper case where this Court should exercise its powers of superintendence. We do not propose having regard to the facts stated in the judgment of the trying Magistrate and to the facts referred to in the letter of reference to go into details. It is sufficient to observe that this case could not by any stretch of the language of S. 562 (1A) be brought within the four corners thereof.

In this view of the matter we vacate our order of the 5th May 1927, and after re-hearing the reference in the presence of both parties we accept the reference; we set aside the order made by the trying Magistrate under S. 562 (1A), Criminal P. C., and maintain the conviction under S. 324, I. P. C., and sentence the accused to suffer rigorous imprisonment for the period of one year.

The accused who is on bail will surrender to his bail aud undergo the sentence passed on him.

D.D. *Reference accepted.*

---

## A. I. R. 1927 Calcutta 704

MUKERJI AND GRAHAM, JJ.

*Bhuban Mohan Basak* and *others*—Plaintiffs—Appellants.

v.

*Chairman, Dacca Muncipality* and *others*—Respondents.

Appeals Nos. 636 to 639 of 1926, Decided on 28th March 1927, from the appellate decrees of the Addl. J., Dacca, D/- 7th December 1925.

(a) *Specific Relief Act, S. 42—Municipal election—A rate-payer, as such, is not entitled to challenge.*

A rate-payer as such is not entitled to challenge the validity of a Municipal election. [P 706 C 1]

(b) *Bengal General Clauses Act, S. 22—Power to fix date includes power to postpone the same.*

Under S. 22 the power to fix a date for election must be taken to include the power to postpone any date so fixed. [P 706 C 2]

(c) *Bengal Municipal Election Rules—Rr. 4 to 11—Election postponed to allow 15 days time under R. 5—Fresh compliance with Rr. 4 to 11 is not necessary.*

Where an election is postponed merely for the purpose of allowing the necessary interval of 15 days, required by R. 5, there would be no necessity for fresh compliance with Rr. 4 to 11 of the Election Rules. The register, as already prepared and amended, would be a valid register for the purpose of the postponed election. [P 703 C 2]

(d) *Bengal Municipal Act—Meeting Rules, R. 32—Election postponed and new polling officers appointed in place of old ones—R. 32 does not apply.*

Where an election is postponed and consequently fresh polling officers appointed and a new date and place are fixed for polling in supersession of the old polling officers and date and place of polling, R. 32 does not apply. [P 707 C 1]

(e) *Bengal Municipal Act* (1884), *S. 45—Rules under the Act—Chairman has power to delegate his power even under the rules.*

The Chairman has power to delegate his powers, not only under the Act, but under the rules as well, the rules forming an integral part of the Act. [P 707 C 2]

*(f) Bengal Municipal Election Rules, Rr. 6, 7 and 10—Eight days time not allowed to apply under R. 10—No application rejected wrongly and no prejudice caused—Election cannot be set aside.*

*Per Graham, J.*—A Court would not be justified in setting aside an election on the ground that time allowed by R. 10 to apply to Magistrate was not made available in consequence of publication of the revised register before the time allowed under R. 10 had elapsed after the applications were rejected, where it has not been shown that the omission to comply with the rule affected the result of the election, or that any of the applications was wrongly rejected. [P 707 C 2]

*Per Mukerji, J.*—The rights which the successful candidates acquire in the elections cannot be interfered with unless, at least, it is reasonably clear that the irregularity contributed directly or indirectly to the acquisition of those rights, or that it has really operated to the prejudice of the rate-payers who intended to take part in the elections. [P 711 C 1]

*Jotindra Nath Sanyal, Probodh Nath Sanyal* and *Upendra Lal Roy*—for Appellants.

*Langford James, J. C. Gupta, Nilkanta Ghose, Jitendra Kumar Sen Gupta, Prokas Chandra Pakrasi, Jotindra Mohan Choudhuri* and *Prafulla Chandra Chakravarti*—for Respondents.

**Graham, J.**—These four appeals are against judgments and decrees of the Additional District Judge of Dacca reversing decisions of the Munsif, 4th Court, Dacca, and arise out of a Municipal election held on the 3rd March 1925. One of these suits (Suit No. 802 of 1925) was brought by three rate-payers of the Dacca Municipality to set aside the whole election, while the remaining three suits were instituted by unsuccessful candidates for the purpose of setting aside the election in the particular wards in which they failed. All the suits were decreed by the Court of first instance. On appeal the learned Additional District Judge reversed those decisions and dismissed the suits. The plaintiffs have now appealed to this Court.

Appeal No. 636, arising out of suit No. 802, in which the entire election is sought to be set aside, may be conveniently dealt with first. The facts are briefly as follows :

The general election of the Commissioners of the Dacca Municipality was notified to be held on the 14th February 1925 by a notification published in the *Calcutta Gazette* of 5th November 1924. Thereafter the register of voters, which is kept by the Municipality, was revised and brought up to date according to the rules framed by the Government under the Municipal Act. The register was published at the local thanas on 1st December 1924, and, after scrutiny, was published on 31st January 1925. On the same date, at a meeting of the Commissioners, polling officers were appointed for conducting the election on the 14th February 1925. On the 10th February, however, at an ordinary meeting of the commissioners, it was decided to postpone the election to 3rd March 1925, on the ground that the final publication of the register had been made less than 15 days before the date fixed for the election, which was in contravention of R. 5 of the Election Rules. Incidentally it may be observed the commissioners have apparently no power to fix or postpone the date of election, but the commissioner of the division, with whom that power rests, appears to have accepted the decision of the commissioners and notified the 3rd March as the date of the election. The change of date was duly notified by beat of drum. Thereafter a notice was issued for an extraordinary meeting of the commissioners on 13th February, when fresh polling officers for the new election were appointed and the time and place of the poll were fixed. The voters' register was republished on the same date. The election duly took place on the 3rd March according to the revised notification. The plaintiffs Bhuban Mohan Basak and two others, who are rate-payers of the Dacca Municipality, thereupon instituted a representative suit on behalf of the general body of rate-payers to set aside the election on the ground that in the preparation and publication of the register there had been various illegalities which invalidated the whole election.

The Munsif framed a number of issues, one of these being whether the plaintiffs had any locus standi to bring the suit, while the others related to breaches of the Election Rules, and in particular Rr. 4 to 11 as well as R. 32 of the Meeting Rules. He found that the plaintiffs had the right to sue, and that there had been a breach of Election Rules 9, 10, 11 and 15, and also of R. 32 of the Meeting Rules. He accordingly set aside the election and issued an injunction restraining the newly elected commissioners

from sitting on the Municipal Board. On appeal the learned Additional District Judge held that the plaintiffs in their capacity as rate-payers had no right to sue and that the suit should have been dismissed. He also held that no non-compliance with the rules had been made out sufficient to invalidate the election, and accordingly allowed the appeal and dismissed the suit.

The first point which arises for determination is whether the plaintiffs had any right to bring the suit. It has been urged on behalf of the respondents that a rate-payer as, such, is not entitled to challenge the validity of a Municipal election, and reference has been made in support of this view to precedents in connexion with Parliamentary and Municipal elections in England. At an English Parliamentary election objection can be taken by any person who voted at the election, or had a right to vote for a candidate at such an election, or one who could be a candidate. A Municipal election in England can be similarly challenged by an election petition on certain grounds mentioned in the Municipal Corporation Act of 1882, as well as by persons who either voted or were voters or candidates.

With regard to S. 15 of the Municipal Act, which was relied on on behalf of the appellants, it was contended for the respondents that, while that section saves the jurisdiction of the civil Courts in the matter of elections, it cannot be held to entitle a mere rate-payer to sue. An election can only be challenged under S. 42 of the Specific Relief Act, where a right has been denied to a person who is entitled to the same. At an election a mere rate-payer, if he is not a voter, has no right at all, and consequently there can be no question of any denial of any right possessed by him.

In my judgment these contentions are well founded, and, in my opinion, the learned Additional District Judge was right in holding that the plaintiffs had no right to sue. Apart, however, from this view as to the maintainability of the suit, the appeal in my judgment fails upon the merits. I will deal briefly with the points which have been urged on behalf of the appellants. It was first contended that the election fixed for the 14th February was not postponed, that the Act does not give the Commissioner power to postpone an election, and that, as a fresh date for election had been fixed for the 3rd March, all the rules, viz. Rr. 4 to 11, should have been complied with over again.

In the course of the hearing of the appeal it appeared to be conceded that the Commissioner has power to postpone an election, and there can be no doubt that, under S. 22, Bengal General Clauses Act, the power to fix a date for election must be taken to include the power to postpone any date so fixed. It is argued, however, for the appellants that the election was not postponed, but that a date was fixed for a new election, and that therefore all the necessary formalities should have been complied with over again. I do not think this contention can be allowed to prevail. It is, I think, reasonably clear that, though the notification did not mention the word "postpone," the intention was that the election previously fixed for the 14th February should be postponed till the 3rd March. The Commissioners of the Municipality were clearly of opinion that the election was merely being postponed (vide resolution of the 10th February) If it was a postponed election, merely for the purpose of allowing the necessary interval of 15 days required by R. 5 of the Election Rules, there would be no necessity for fresh compliance with Rr. 4 to 11 of the Election Rules. The register, as already prepared and amended, would be a valid register for the purpose of the postponed election. R 4 requires revision of the register at least three months before the date fixed for any general election. R. 5 says that the general register shall be published not less than 60 days before the date fixed for a general election, and R. 9 requires publication of the register not less than 15 days before the date of election. The qualifying words in each instance have the effect of importing some elasticity to the time-limits imposed, and in my opinion these rules were complied with as the required interval had elapsed between these formalities and the date of the election. The argument that the necessary formalities should be complied with over again would lead to this result: that a postponed election could not be postponed to a nearer date than three months, which might entail very great inconvenience. Stress was laid on behalf of the appel-

lants on the fact that the result would be that voters, whose right to vote may have accrued in the interval, would be shut out from voting, but that is inevitable under any circumstances. There is necessarily an interval between the completion of the register and the date of election during which some voters will qualify, but will not be eligible to vote.

It was next contended that, even allowing that the Commissioner could postpone the date of election, the appointment of polling officers, and the fixing at the meeting of the 13th February of the time and place of the polling, was in breach of R. 32 of the Meeting Rules, and that the election held by officers so appointed was invalid.

Rule 32 reads as follows:

> Unless not less than two-thirds of the Commissioners consent, by signing a requisition, no subject once disposed of shall be re-considered within six months.

In my opinion the rule has no application in such circumstances as the present. There was no question of re-considering any subject which had already been disposed of at a previous meeting. All that was done was to appoint fresh polling officers and to fix a new date and place for polling consequent on the changes in the date for election. There was no question of rescinding any resolution. What was done at the previous meeting was in reference to the election notified for the 14th February, while what was done on the 13th February was in regard to the election fixed for the 3rd March. The subject-matters were not identical, and the subsequent meeting did not rescind anything which had been already dealt with by the previous meeting.

The next point urged on behalf of the appellants was with reference to Rr. 9 and 10 of the Election Rules. R. 9 relates to the publication of the revised register of voters, and R. 10 provides that any person, whose application under R. 6 or 7 has been refused, may, within eight days after such refusal, apply to the Magistrate to have his name inserted in, or a name omitted from, the register of voters. The trial Court found that the register had been published at the Municipal office on the 28th January, and that the last of the applications under Rr. 6 and 7 were disposed of on the 23rd January so that, if those dates be accepted, there would not be the prescribed interval of eight days in which to appeal.

In my opinion, however, we should not be justified in setting aside the election on this ground for two reasons: firstly, because it has not been shown that the omission, if any, to comply with the rule affected the result of the election; and, secondly, because, on reference to the record, there is not a tittle of evidence to show that any of the applications was wrongly rejected.

It was further argued on behalf of the appellants that the new date fixed for the election did not allow the time prescribed by R. 14 for candidates to put in their nomination papers, and that four applications filed by candidates after the 14th February ought not to have been rejected as filed out of time. This argument proceeds on the assumption that it was a new election and that the formalities had to be complied with afresh. As I have already held that it was merely a postponed election the four applications were out of time and were rightly rejected.

It was next argued that the notice of the meeting of the 13th February, not having been served upon all the Commissioners, and two clear days notice of the meeting not having been given, as required by R. 5 of the Meeting Rules, the meeting was illegal and ultra vires; that the resolution passed therein as to the appointment of polling officers, and the place and time of polling, were bad and that the election held by officers so appointed, and at such time and place, was equally bad and illegal. There is no substance in either of these contentions. The rule, it is true, says that notice shall be given to every Commissioner, and one of the Commissioners was, it appears, not so served, because he happened to be in England. It was obviously not possible to comply strictly with the rule in these circumstances, and it would be absurd to hold that the meeting could be rendered invalid by this fact. Rules must be interpreted with some degree of commonsense.

There was a technical breach of the two days rule regulating extraordinary meetings of the Commissioners, but it has not been shown that this breach materially affected the election, and I do not think that the election should be set aside upon such a ground. In my opinion

the appellants in this appeal had no right to sue, and, on the merits, no case was made out for setting aside the election. This appeal, therefore, should be dismissed with costs.

*Appeal No.* 637, *Ward No. VI.*

In this ward the successful candidate, Umesh Chandra Dutt, obtained 212 votes, while the appellant, Abdul Sobhan, obtained 209, so that there was a difference of 3 votes only. In addition to the general grounds urged in the representative suit going to the election as a whole, it has been urged on behalf of this appellant that the polling officer had no power to alter or extend the place fixed for polling, and that, in so doing, he committed a breach of Rr. 17 and 17 A of the Election Rules. The argument is based on an extremely technical interpretation of the rules in question. The facts appear to be that the place notified as the polling centre for this ward was the Nabakumar Institution, which is surrounded by a wall, and within the compound so enclosed a bamboo enclosure was erected for the purposes of the poll. This enclosure was apparently not strong enough to withstand the rush of voters at 6-30 p. m., the time for the close of the poll, with the result that the polling officer, in order to meet the emergency, had the gate of the outer wall of the institution closed, as well as the gate of the bamboo enclosure, and after 6-30 p. m. no one who was not inside the outer wall of the institution was permitted to vote. The notification stated that the poll would take place at the Nabakumar Institution, and I think the learned additional Judge has rightly held that any voter who presented himself at the place so appointed before 6-30 p. m. could demand to have his vote recorded. The notification made no mention of any enclosure at all.

Apart from this view of the matter it is obvious that, in the circumstances which arose, the polling officer adopted the only course which was practicable. The rules, as I have said before, must be interpreted with common-sense.

The election ought, certainly, not to have been set aside upon such a ground. In my judgment this appeal should be dismissed with costs.

*Appeal No.* 638. *Ward No. III.*

In this appeal two points have been urged : firstly, that Mr. Ahmad Hossein, who took the poll, had no authority to do so ; and, secondly, that the secrecy of the ballot was not maintained, as some of the voters openly declared their votes. Reference has been made to Rr. 19 and 25. Objection is taken, in the first place, that Mr. G. C. Majumdar, who had been appointed polling officer in the first instance was not unable to attend, and therefore that the contingency enabling the appointment of a substitute had not arisen ; and, secondly, that the Chairman's powers of delegation under S. 45, Bengal Municipal Act, do not extend to powers conferred upon him under the rules framed under the Act.

With regard to the first point, it seems to me that the argument proceeds upon an unduly narrow view of the rule. For reasons of convenience Mr. Ahmad Hossein was appointed in place of Mr. Majumdar, and it appears that Mr. Hossein had in fact been appointed a reserve polling officer at the meeting of the Commissioners held on the 28th January. The Chairman gave his approval to the arrangement.

As to the second point, I am clearly of opinion that the Chairman had power to delegate his powers, not only under the Act, but under the rules as well, the rules forming an integral part of the Act.

In any view of the case it seems clear that an election ought not to be set aside upon such grounds as are alleged here, there being no allegation whatever against the polling officer who conducted the election, nor is there anything to show that the result of the election was affected in any way by the change of polling officer.

The objection as to the secrecy of the poll not being maintained is to my mind frivolous. It is obviously not possible, when dealing with illiterate voters, to prevent some such breaches of secrecy. The polling officer cannot be blamed for such indiscretions, and it would be ridiculous to set aside an election upon such a ground.

In my opinion this appeal fails and should be dismissed with costs.

*Appeal No.* 639, *Ward No. V.*

In this appeal the following points were urged on behalf of the appellants :—

1. That the Court of appeal below erred in holding that Rai Bahadur Keshab Chandra Banerjee was competent under

R. 19 of the election rules to act as polling officer.

2. That Rai Bahadur Keshab Chandra Banerjee being a candidate for election the general election held on the 3rd March 1925, and the election in Ward No. 5 held on the 25th March being a part of the said general election, Rai Babadur was not competent to act as polling officer under R. 14.

3. That the Rai Bahadur as Vice-Chairman of the Municipality had no authority to appoint himself as the polling officer under the Municipal Act or the rules framed thereunder.

4. That the lower appellate Court erred in law in holding that the Chairman was entitled to delegate to the Vice-Chairman the authority to appoint a polling officer under S. 45 of the Act, the powers to do so being confined to himself under R. 19 of the election rules.

I do not think that there is any substance in these contentions. The circumstances in which the Vice-Chairman came to take the poll himself have been referred to in the judgment of the learned Additional District Judge, and in view of those circumstances it is difficult to see what other course he could have adopted. In my opinion S. 45 of the Act enables the Chairman to delegate to the Vice-Chairman his powers not only under the Act but also under the rules framed under the Act. That being so, the Vice-Chairman would have power to appoint another fit and proper person in place of the polling officer who failed to attend. It is clear from the wording of R. 26 that the Chairman might himself be polling officer, and; if that is so, there can be no reason why the Vice-Chairman should not exercise the same function. As regards the argument, that there was a bar to the Vice-Chairman acting as polling officer in the present case because he was himself a candidate for ward No. 1, the answer is that he had been defeated at the poll in ward No. I on the 3rd March, so that his interest in the election ceased from that date, and there was no bar to his acting as polling officer on the 23rd March.

In my judgment this appeal also fails and should be dismissed with costs.

**Mukerji**, J.—I agree in the conclusions which my learned brother has arrived at and in the orders which he has passed in these appeals. I desire only to add a few words with regard to two matters.

The first relates to the question of maintainability or otherwise of the representative suit. The suit was instituted by three rate-payers of the Dacca Municipality to set aside the entire elections in all the wards of that Municipality, with permissions under O. 1. R. 8, Civil P. C.. on behalf of all the rate-payers of that Municipality. for a declaration that the election held on the 3rd March 1925 was void, as it was held without conforming to the procedure, which, under the rules, must precede a general election, and for an injunction restraining the candidates declared elected at the said election from acting as commissioners. The fact that two out of these three persons are voters is immaterial, because the same interest within the meaning of O. 1, R. 8, Civil P. C., which enables them to sue on behalf of all is their interest as rate-payers. If the suit is treated as one under S. 42 of the Specific Relief Act, the requisitions of that section have not been fulfilled, because no legal character or right to property to which any rate-payer is entitled by virtue of his being a rate-payer has been denied, nor are the defendants or any of them interested to deny the same.

It, may, however, be said that S. 42 of the Specific Relief Act is not exhaustive for the declaratory suits entertainable by the civil Courts. This position is suggested by the following observations of the Judicial Committee in the case of *Robert Fischer* v. *Secretary of State for India* (1). Their Lordships said :

> Now in the first place it is at least open to doubt whether the present suit is within the purview of S. 42 of the Specific Relief Act. There can be no doubt as to the origin and purpose of that section. It was intended to introduce the provisions of S. 50 of the Chancery Procedure Act of 1852, 15 and 16 Vict., Cap. 86, as interpreted by judicial decisions. Before the Act of 1852 it was not the practice of the Court in ordinary suits to make a declaration of right except as introductory to relief which it proceeded to administer. But the present suit is one to which no objection could have been taken before the Act of 1852. It is in substance a suit to have the true construction of a statute declared and to have an act done in contravention of the statute, rightly understood, pronounced void and of no effect. This is not the sort of

(1) [1898] 22 Mad. 270=26 I. A. 16=7 Sar. 459 (P.C.).

declaratory decree which the framers of the Act had in their mind.

Now, assuming that the suit is one which is not contemplated by S. 42 of the Specific Relief Act, its maintainability would depend upon the existence of a cause of action. The rights of the plaintiffs as rate-payers have not been injured or threatened, and the suit therefore is not maintainable. The cases of *Vaman Tatyaji* v. *The Municipality of Sholapur* (2), in which individual tax-payers sued for an injunction restraining a Municipality from mis-applying funds, in the proper application of which the tax-payers are interested, and of *Lakshminarasinha* v. *Ramalingam* (3), in which the plaintiff, who had a fair chance of being appointed or elected as a member of the Taluk Board and had a substantial interest in the matter of the proper constitution of the Board, sued for a declaration that the election of a member of that Board was invalid—cases which have been referred to on behalf of the appellants—are cases in which there was a right in the plaintiffs sufficient to enable them to maintain the suits. The case of *Molla Ataul Huq* v. *Chairman, Maniktolah Municipality* (4), on which also reliance has been placed on behalf of the appellants was that of a suit by a person qualified to vote. I am therefore of opinion that the suit was not maintainable.

The second relates to what I consider to be the only substantial one out of the numerous irregularities that are complained of, viz. the publication of the revised register on the 31st January 1925. R. 9 of the election rules relates to the publication of the revised register by the Chairman after dealing with applications under Rr. 6 and 7 inclusive, and omission of names in and from the register that has to be published by him under R. 5 not less than 60 days before the date fixed for any general election. R. 10 says that

> any person whose application under Rr. 6 and 7 has been refused may, within 8 days after such refusal, apply to the Magistrate for an order to have his name inserted in, or a name omitted from, the register of voters, and such Magistrate shall, after enquiry, make such order as to the insertion or omission of the name as appears to him to be just; and the Chairman shall, upon receipt of a copy of such order, give effect to the same, and such order shall be final.

Rule 11 says that

> the register thus prepared and amended shall be deemed to be the final register of persons entitled to vote at a general election.

It is clear, therefore, that at least 8 clear days must elapse between the rejection of an application under R. 6 or 7 and the publication of a revised register under R. 9, which is the final register contemplated by R. 11. To proceed with the election on the footing of a register published within 8 days of the rejection of an application under R 6 or 7 is out of the question under the rules and interferes with the right of a person whose application has been so rejected to apply to the Magistrate under R. 10, for which the rule gives him 8 days time. It is true that there is no prohibition to file the said application, even though the revised list happens to be published in the meantime, but the publication may create an impression that the process of revision is closed and may thus discourage the filing of the application. In the present case a very large number of applications were rejected on the 23rd. That was the date mentioned in the plaints, on or before which, according to the plaintiffs, the applications were refused. During the trial the plaintiffs put in numerous applications which were fixed for hearing on the 23rd to 25th, and the plaintiffs wanted to show that they were rejected on the 29th.

This was objected to on behalf of the defendants on the ground that, as the plaintiffs had admitted in the plaints that the applications had been disposed of on or before the 23rd, these applications should not be admitted in evidence because, if there was no such admission in the plaints, the defendants could have shown that, although the applications purported to show that they were rejected after the 23rd, they had, as a matter of fact, been rejected orally before that date; and, if they were rejected after the 23rd, no application to the Magistrate would have been made by the aggrieved parties under R. 10. The appellants appear to have conceded these two matters in order to get these applications admitted in evidence. That the concession extended thus far and did not extend to the applications rejected on the 23rd, or before the 23rd, is quite clear from several passages in the Munsif's

(2) [1898] 22 Bom. 646.
(3) [1920] 39 M.L.J. 319=12 M.L.W. 202=59 I. C. 245=1920 M.W.N. 519.
(4) [1920] 24 C. W. N. 969=57 I. C. 960.

judgment. The plaints state that the publication of the revised register was on the 31st January 1925. The publication on that date, it has been found, was at the thanas. It has been found by the Munsif that the revised register was finally published on the 28th January 1925 and despatched to the thanas on the same day and published there on the 31st.

This finding has not been upset by the learned Additional Judge. The latter seems to have proceeded upon an erroneous view of the concession. The revised register having been published on the 23rd, the rights of persons under R. 10 whose applications were rejected between the 20th and 23rd, both days inclusive, in my opinion, were affected as they did not get 8 clear days before the revised list was published, and the publication of the revised list on the 28th may have dissuaded them from applying to the Magistrate as they were entitled to do under R. 10. This, in my opinion, was a serious irregularity and, in view of the very large number of applications that were dealt with in that way, it is clear to my mind that there was something egregiously wrong either in the conduct of the executive or of the applicants. It is not possible, however, to say whether the rejections were right or wrong as, in fact, there was no application under R. 10, and excepting the statement of one witness whose application was rejected on the 23rd and who said he could not "appeal" by reason of shortness of time, there is no evidence that any of the others even intended to proceed under R. 10, and, further, that there is not a tittle of evidence which would go to suggest that any single application was wrongly rejected. The rights which the successful candidates acquired in the elections cannot be interfered with unless at least it is reasonably clear that the irregularity contributed directly or indirectly to the acquisition of those rights or that it has really operated to the prejudice of the rate-payers who intended to take part in the elections. Of these there is no evidence.

G.B. *Appeals dismissed.*

---

## A. I. R. 1927 Calcutta 711

MAJUMDAR, J.

*Sarat Chandra Rakshit*—Petitioner.

v.

*Mon Mohan Panday*—Opposite Party.

Civil Rule No. 34 of 1927, Decided on 6th May 1927.

(a) *Bengal Tenancy Act, S. 109—Application by landlord for settling fair rent under S. 105 pending—Subsequent rent suit by landlord in respect of that holding not barred.*

To attract the operation of S. 109, it is essential to establish that the civil suit has for its subject, a matter which has already formed a subject of an application under S. 105.

The defendant-tenant held 13 jamas under the plaintiff. There was settlement and survey under the Bengal Tenancy Act and the record was prepared by the settlement officer, and these 13 jamas were amalgamated and the rent shown to be Rs 170 odd. After the final publication of the record an application was made by the landlord under S. 105, Bengal Tenancy Act, for assessment of fair and equitable rent. The tenant defendant filed objections in that proceeding. The main objection being that he did not hold one jama, but 13 separate jamas under the landlord, and the settlement officer was wrong in consolidating those jamas without his consent. While that proceeding was still pending, the settlement officer not having come to any decision whatever, upon the application, the landlord instituted a rent suit with reference to one of those holdings.

*Held*; that the suit was maintainable and it cannot be held on the analogy of the doctrine of constructive res judicata, that the jurisdiction of the civil Court has been constructively excluded even when a point has been neither raised nor decided under S. 105 read with S. 105A : 14 *C. W. N.* 897 ; 19 *C. W. N.* 636, *Rel. on* ; 24 *C. W. N.* 223, *not Foll.*

[P 713 C 1]

(b) *Jurisdiction—Nature of proceeding should be decided with reference to the plaint or application—Bengal Tenancy Act, S. 109—Civil P. C., O. 7, R. 10.*

A Judge may have to decide various matters and various issues which are raised by the parties in the course of the trial, but certainly what the subject-matter of the suit or application is, must be determined by looking into the application itself or the plaint of the suit itself : 41 *Cal.* 783, *Foll.* [P 712 C 2]

(c) *Bengal Tenancy Act, S. 153—Munsif holding wrongly that a suit was barred under Bengal Tenancy Act, S. 109—District Judge can interfere.*

Where the Munsif declined to exercise jurisdiction wrongly, on the ground that S. 109, Bengal Tenancy Act, barred the suit and instead of going on with the suit dismissed it:

*Held* : that the District Judge could interfere under S. 153. [P 713 C 2]

*Bijoy Kumar Bhattacharya* and *Gour Mohan Dutt*—for Petitioner.

*Sarat Chandra Roy Chowdhury* and *Ananda Charan Karkoon*—for Opposite Party.

**Majumdar, J.**—This application arises out of an application for revision by the defendant in a rent suit. The facts which give rise to the present application are as follows . The defendant-tenant held 13 jamas under the plaintiff. There was settlement and survey under the Bengal Tenancy Act, and the record was prepared by the settlement officer, and these 13 jamas were amalgamated and the rent shown to be Rs 170 odd. After the final publication of the record an application was made by the landlord under S. 105. Bengal Tenancy Act, for assessment of fair and equitable rent. The tenant-defendant filed objections in that proceeding. The objection being that he did not hold one jama, but 13 separate jamas under the landlord, and the settlement officer was wrong in consolidating those jamas without his consent. The proceeding is still pending, the settlement officer not having come to any decision, whatsoever, upon that application. In the meantime, the landlord instituted a rent suit with reference to one of those holdings. The learned Munsif held that the present suit is not maintainable, regard being had to the provisions of S. 109, Bengal Tenancy Act. There was an application for revision before the District Judge. The District Judge came to the conclusion, that the learned Munsif was wrong in the view he has taken, and he remanded the case to him for trial of the case.

Before me three points have been taken by the learned vakil for the petitioner. First that under S. 109 the rent suit is not maintainable; second, that it was not open to the plaintiff to frame the suit or to proceed with the suit in the way he did; and third, the learned District Judge was wrong in exercising a jurisdiction not vested in him under S. 153, Bengal Tenancy Act. With reference to the first question as to the maintainability of the present suit under S. 109, Bengal Tenancy Act, I do not agree with the contention put forward by the learned vakil. S. 109 says:

> Subject to the provisions of S. 109A, a civil Court shall not entertain any application or suit concerning any matter, which is or has already been the subject of an application made, suit instituted or proceedings taken under Ss. 105 to 108.

Here the application was made by the landlord. The subject-matter of the application was ascertainment of fair and equitable rent. What the subject-matter of a proceeding is must be ascertained by looking into the application itself, which initiates the proceeding.

The learned vakil contends, that in order to dispose of any application under S.106, Bengal Tenancy Act, the provisions of S. 105A should be looked into; and S. 105 gives a good deal of power to the settlement officer to decide questions, which may be raised by the parties ancillary to the main question raised by the application itself. These questions still being ancillary questions, those will not form the subject-matter of the application made by the applicant, which initiates the proceeding. A Judge may have to decide various matters and various issues which are raised by the parties in the course of the trial, but certainly what the subject-matter of the suit or application is must be determined by looking into the application itself or the plaint of the suit itself. This question seem to have been raised in a case, *Nawab Bahadur of Murshidabad* v. *Ahmad Hossein* (1). In that case the facts are given correctly in the headnote.

> Where in a proceeding instituted by the landlord for settlement of rent under S. 105, no questions as to tenants being mukurari, maurasi raiyats and not tenure-holders, and the lands held by them being not one tenure, but distinct raiyati holdings were raised, S. 109 was no bar to the tenants suing for a declaration of these rights.

This is a converse case, because the subsequent suit was instituted by the tenant. In the course of the judgment the learned Judges referring to the objections, that such a suit is not maintainable under S. 109, say:

> Whether the tenants were or were not aware of the proceedings under Chap. 10, the fact remains that the matters now in controversy did not form the subject of investigation under S. 105. Consequently, on a plain and literal reading of S. 109, the position cannot be maintained that the present suit concerns a matter, which has already been the subject of an application under S. 105. The appellant, however, urges us to put a wider construction upon S. 109. He contends that, as in a case, where S. 11, Civil P. C., is applicable, a question which might and should have been raised is deemed to have been raised and decided, we should hold under S. 109, that a matter has been the subject of an application under S. 105, whenever it might, if the defendant has so chosen, have been raised and decided under S. 105 read with S. 105A. We are of opinion that this contention

(1) [1916] 44 Cal. 783=25 C. L. J. 556=35 I. C. 695=21 C. W. N. 1004.

is unsound. If we were to accept the construction put forward by the appellant, we should have to read into S. 109 words which are not to be found there; we cannot hold on the analogy of the doctrine of constructive *res judicata*, that the jurisdiction of the civil Court has been constructively excluded even when a point has been neither raised nor decided under S. 105 read with S. 105A. In this connexion, we may observe that Ss. 105 and 109 were inserted in the Bengal Tenancy Act, by Act 3 of 1898, B. C. S. 105A was subsequently introduced into the Bengal Tenancy Act, by S. 26, Act 1 of 1907, B. C. But though the scope of S. 105 was thus widened and S. 105A was included in S. 109, the language of S. 109 was left unaltered. If the legislature had intended to adopt the view put forward by the appellant, the language of S. 109 would, no doubt, have been suitably modified. As pointed out by this Court in a long line of cases amongst them, in *Pandab Dowari* v. *Ananda Kishun* (2); *Sashi Bhusan* v. *Eshabar* (3) and *Sasi Bhusan Hazra* v. *Aswini Kumar Samanta* (4), to attract the operation of S. 109, it is essential to establish that the civil suit has for its subject a matter which has already formed a subject of an application under S. 105. These cases were decided before the introduction of S. 105A into the Bengal Tenancy Act. But as the introduction of S. 105A has not altered, for our present purpose, the scope of S. 109, S. 109 must now be construed on the same lines as before the introduction of S. 105A.

This case was followed subsequently in two other cases. I need not refer to them in detail. One is reported in *Priyambada Debi* v. *Priyanath* (5) and the other in *Mahendra Nath* v. *Probal Chandra* (6). The learned vakil tries to distinguish the last case on the ground that there the learned Judges were correct, because S. 109 was no actual bar; but referring to the arguments and pleadings of that appeal, I find that it was objected that S. 109 was a bar. But the learned Judges pointed out that the institution of a suit for rent was not a proceeding under any of the sections of the Bengal Tenancy Act, and as such S. 109 would not be a bar to the institution of such a suit. With reference to the case reported in *Apurba Krishna Roy* v. *Shyam Ch. Paramanik* (7), there are stray observations, which may go to support the learned vakil for the petitioner; but what the learned Judges had actually decided was whether S. 107 was applicable to the case and they said it would be. The learned Judges held (at page 225), with regard to the decision of the settlement officer in that case, that

> We think, therefore, that the decision of the settlement officer under S. 105A, is binding upon the plaintiff in the present case having regard to the provisions of S. 107, Bengal Tenancy Act.

Again on the same page the learned Judges observed:

> In the present case, as we have seen, the question was directly, raised and there was an express issue on the point, and even though the defendant did not adduce any evidence in Court, the decision of the Settlement Officer was open to appeal, and to second appeal to this Court.

But no such second appeal was preferred. Incidentally, they referred to the bar under S. 109. According to them, reading the judgment closely, it would appear, that their opinion was that in such a case the defence taken in the written statement may form the subject-matter of an application under S. 109. Regard being had to the decided cases referred to above, I prefer to follow them in preference to *Apurba Krishna Roy* v. *Shyam Ch. Paramanik* (7). That disposes of the first contention of the learned vakil.

As to the second point: it is contended that the present suit is inconsistent with the plaintiff's application under S. 105. I do not find that this question was raised before the District Judge. It is for the first time raised before me. With reference to this point, I observe that so far as the plaint is concerned (a part of the plaint has been read out to me), I do not find that he accepted the consolidation; if such consolidation had been accepted, the result would have been to put the plaint out of Court. But from what has been read out to me I do not understand the plaint to be in that way.

As to the third objection, that is, the District Judge has no jurisdiction to interfere under S. 153: I think the learned District Judge had such jurisdiction regard being had to the fact that the learned Munsif declined to exercise jurisdiction, wrongly on the ground that S. 109 barred the present suit, and what he did was not to go on with the suit, but dismissed it. In these circumstances, I think the learned District Judge was perfectly justified in interfering under the revisional powers under S. 153, Ben-

(2) [1910] 12 C. L. J. 195=7 I. C. 102=14 C. W. N. 897.
(3) [1915] 19 C. W. N. 636=29 I. C. 122.
(4) [1912] 19 C. W. N. 637 (foot-note) = 28 I. C. 981.
(5) A. I. R. 1926 Cal. 822.
(6) A. I. R. 1926 Cal. 980=53 Cal. 475.
(7) [1920] 24 C. W. N. 223=54 I. C. 952.

gal Tenancy Act. All the points having failed, the rule is discharged with costs. I assess the hearing fee at two gold mohurs.

D.D. *Rule discharged.*

---

## * A. I. R. 1927 Calcutta 714

RANKIN, C. J., AND MITTER, J.

*Johurmull Bhutra* —Appellant.

v.

*Kedarnath Bhutra*—Respondent.

Appeal No. 47 of 1927, Decided on 5th July 1927, from the O. C. Jr. Order of Buckland, J., D/-2nd March 1927.

* (a) *Civil P. C., O. 23, R. 3—Partition suit—Suit involving only a point as to whether a property was joint or debuttar—Counsel compromising suit appointing attorneys for parties as receivers of one property and commissioners at partition—Receiver's appointment was a collateral matter and client's consent should be obtained—Appointment of attorney as receiver interrupts the relationship of client and attorney and decree based on the compromise should be set aside—Civil P. C., O. 3, R. 1.*

The authority of counsel to compromise a suit coram judice in Court is limited to matters involved in the suit and it does not extend to collateral matters. If a bargain is to be made so as to bind a client upon collateral matters then counsel should take care to get express authority from his client. [P 716 C 2]

In a partition suit where the only point of difference between the parties was as to whether a certain property was joint or debuttar and counsel for the plaintiff and the defendant agreed to certain terms of settlement outside Court settling that the attorneys of the parties were to be appointed commissioners of partition and receivers of the joint estate and the debuttar property and a certain remuneration was fixed for them, and a decree was passed in terms of the compromise:

*Held*: that the question whether to appoint a receiver of the debuttar property was a matter merely collateral to the suit and not within the scope of the general authority of the counsel and therefore that part of the terms of compromise was, as a matter of law, outside the authority of the counsel. The fact that it may be a severable part of the agreement was immaterial.

*Held*: further, that the arrangement of appointing an attorney, who was engaged to fight the case as receiver, is one that interrupts the relationship of attorney and client and when it is brought to the Court's notice the decree based on such arrangement should be set aside.

[P 717 C 1, 2]

(b) *Legal Practitioner—General authority to compromise coram judice.*

A compromise arrived at between the counsel of either party and consented to by the Court is not vitited merely because the counsel considered the matter in the corridor of the Court or in the bar library.

*S. N. Banerjea, N. N. Bose* and *S. K. Gupta*—for Appellant.

*N. N. Sircar* and *Sudhir Roy*—for Respondent.

**Rankin, C. J.**—This is an application brought on the 22nd February 1927 to set aside a consent decree passed in a partition suit on the 24th January 1927. The suit was brought by the infant plaintiff Kedarnath Bhutra by his mother as next friend. The defendant Johurmull Bhutra is the brother of the plaintiff's deceased father Hira Lal, and the general character of this suit was that the plaintiff claimed that since the death of his father Hira Lal and indeed before, the defendant had been in occupation and enjoyment of properties which had been joint between the two brothers. It would seem to be accurate that before Hira Lal's death the brothers had separated and that there had been no actual division of the ijmali property.

It may be mentioned that in the year 1900 Hira Lal and the defendant had executed a deed of trust whereby a certain property at Lilooah had been conveyed to the trustees on behalf of a certain deity. So far as can be ascertained the trustees at the relevant time were the defendant, the plaintiff's mother and a third person.

The suit having been brought in May 1925 a written statement was put in by the defendant, and in that written statement it is necessary to notice that the defendant set up the debuttar deed. He set up that there was an agreement to take lease of certain premises, No. 7, Bysack Lane, which premises should be included in the joint property. The defendant admitted also that, as the senior male member of the family, he had been realizing rents of the joint estate. He stated that he had always been ready and willing to render proper accounts and to make over the plaintiff's share to the plaintiff on getting proper discharge. Among other matters the defendant stated that he had never objected to an amicable partition of the joint estate, that the present suit was unnecessary and that he left it to the judgment of the Court as to whether a separation was to the benefit of the infant plaintiff or not.

That written statement was filed in June 1925, and in January 1927 the case came on for hearing. Mr. Langford James was the senior counsel on behalf of the plaintiff and the defendant's senior counsel was Mr. Sarkar. It

appears that on the date on which the case was on the list, those learned counsel entered into negotiations on their clients' behalf, one with the other. They appear to have done so shortly before the case was called on, either in the corridor of the Court or in the bar library. They appear to have reduced to writing certain terms as terms upon which they were prepared to settle the case. They came in accordingly when the case was called on before the learned Judge. They explained to him that the case was settled. They consented before him to the terms of settlement and, according to the affidavit of one witness, the learned senior counsel for the defendant stated that he was settling the matter on his own responsibility.

The actual order of the consent decree which was passed on the 24th January recites that

> this Court being of opinion that it would be for the benefit of the infant plaintiff that the following decree should be made, it is declared with the consent of the parties by their respective advocates that the said terms ought to be carried out and the same are ordered and decreed accordingly,

and it proceeds thereafter in terms of the compromise.

Now, the defendant, it would seem, was extremely dissatisfied with the settlement which had been made on his behalf and he launched a motion out of which this appeal arises on the 22nd February 1927. It would appear from his own account that he was determined not to settle the case at all and that he was much assisted in this attitude by the help of a retired vakil, a Mr. Mukherji. I will assume in the defendant's favour that when he found that the case, instead of being fought was settled, he was extremely surprised, this form of proceeding not doubtless having come to his notice before and I will assume also that the same surprise might very well have affected Mr. Mukherji.

The facts, however, are that the case was a partition suit to which there was no answer at all. The property jointly possessed by the parties was agreed. The shares were agreed. There was a faint suggestion that because the plaintiff was an infant the defendant might be able to resist partition and keep his hold upon the property; but there is nothing whatever in this point and it was indeed a case in which any lawyer of competent experience would say that the sensible thing was to get a preliminary decree for accounts, because the defendant's liability to account to a certain extent was admitted. There was, therefore, to begin with, nothing to fight about and until accounts were taken the suit could not progress very much further.

That being the general character of the suit, learned counsel on either side agreed upon the terms of settlement which I shall have to refer to in detail. Those terms settled the shares of the parties. They settled the joint estate. They agreed that the garden-house at Lilooah was debuttar property. Accounts were agreed upon to be taken by the master and then the terms went on to appoint the plaintiff's attorney and the defendant's attorney receivers of the joint estate without security and of the debuttar property without security on a remuneration of 5 per cent. on the gross realization, but the receivers were not to charge any commission on the debuttar property. The same two gentlemen were appointed commissioners of partition on the usual remuneration and a common form order was made as to costs.

Now, the contention on the part of the defendant who seeks to set aside this settlement is that the agreement by counsel was unauthorized because it was an agreement made out of Court and he has relied upon the circumstance that instead of the negotiations between learned counsel waiting to begin after the case had been called on for hearing and being continued while the Judge was sitting, what took place was that prior to the case being called on, this matter was settled more conveniently in the corridor of the Court or in the bar library by learned counsel. The contention is that notwithstanding that having reduced their agreement into writing, they came before the Court and assented coram judice to these terms as the terms which they had prepared for that purpose, and notwithstanding that it was their duty (which they in fact appear to have discharged) to explain to the Court that these terms were for the benefit of the infant and to satisfy the Court to that effect before these terms could be binding, the com-

promise was invalid as being a compromise made out of Court.

As usual, these contentions are based on decided cases which very commonly have nothing to do with similar facts. There is a passage in *Matthews* v. *Munster* (1), in which Lord Esher says that the duty of counsel is to act for his client in Court and to advise him out of Court. There is the case of *Green* v. *Crockett* (2), where a suit was adjourned and the two solicitors on either side instructed their leading counsel to try to settle it. The counsel met in the chamber of one of them and drew up minutes of a consent decree. In that case the client on the one side hearing of the arrangement objected. Thereupon the other party put in a petition and asked to have a decree upon the basis of the terms to which the other party was objecting. It was held in these circumstances, there being no agreement coram judice at all, that the agreement was not binding between the parties. There is a further case where the attorney on one side met counsel on the other side in the street and it was held that the authority of counsel did not extend to such a case as that. But there is no authority which at all suggests that the proceeding which was adopted in the present case is outside the authority of counsel. It does not vitiate the consent made to the Court and in the presence of the Court that counsel on either side have considered the matter in the corridor or in the bar library.

The case of *Askaran Chautmal* v. *The E. I. Ry. Co.* (3) decided by Mr. Justice Page is again clearly distinguishable on the facts. A suit had been on the list for hearing on the 11th of November 1924, but was adjourned by consent. On the 20th or 21st of November there was a meeting, apparently, in the bar library. A settlement was arrived at and on the 24th of November the defendant objected to the settlement. On the 25th of November this objection was mentioned in Court and on the 3rd of December the plaintiff launched a motion for the recording of the settlement. That is a case where one side in spite of the objection of the other was asking the Court for the first time to pass a decree in accordance with the compromise. It is not a case which was ever settled in Court coram judice.

In my judgment, therefore, on this point the judgment of the learned Judge is quite correct and should not be disturbed. This point was the only point taken at the hearing of this motion before Mr. Justice Buckland. It is true that in the affidavits before him other points or materials for other points were contained. The main effort of the petition and the affidavits filed on behalf of the defendant was to make out that he had put a special restriction upon the authority of his counsel, that his counsel had shown signs at consultation of being disposed to settle the case and that he had definitely refused in substance the very settlement which his counsel afterwards put forward. Mr. Chaudhuri who was in charge of the defendant's case before the learned Judge very wisely refrained from putting forward this part of the case at all, and it is not mentioned in the learned Judge's judgment. I have no doubt that the learned counsel took this somewhat noticeable action for the very good reason that he came to the conclusion that a perusal of the affidavits would satisfy the Court that that contention was untrue and I hold it to be entirely and somewhat palpably untrue that any such restriction was put by the defendant upon the authority of his senior counsel.

In this Court, however, we have been asked to entertain various objections and to two of them only will I refer. The authority of counsel to compromise a suit coram judice in Court is limited to matters involved in the suit and it does not extend to collateral matters. If a bargain is to be made so as to bind a client upon collateral matters then learned counsel should take care to get express authority from his client. The frame of this suit is a partition suit. It is true that in the plaint the Lilooah property was put forward as an item in the joint estate to be partitioned. In the written statement is set up the deed of trust by Hira Lal and the defendant making it debuttar and in the terms of settlement it is agreed that the property is debuttar. The question

(1) [1887] 20 Q. B. D. 141=57 L. J. Q. B. 49=57 L. T. 922=52 J. P. 260=36 W. R. 178.
(2) [1865] 34 L. J. Ch. 606=13 W. R. 1052=12 L. T. 749.
(3) A. I. R. 1925 Cal. 696=52 Cal. 386.

arises whether to appoint a receiver of the debuttar property was a matter within the scope of this partition suit or was a matter merely collateral to the suit. I have the greatest difficulty in understanding why receivers should have been appointed of this debuttar property at all and I am quite clear that it is a matter collateral to the suit and not within the scope of the general authority of learned counsel engaged in this particular partition suit. That being so, it seems to me that that part of the terms of compromise was as a matter of law outside the authority of learned counsel and that in this respect and on this particular point the learned counsel was under a misconception as to the reach of his general authority.

I do not think that we need consider what the effect of the inclusion of this part of the bargain in the decree would be in law. As a matter of fact, learned counsel did purport to agree to the appointment of these gentlemen as receivers of the debuttar property. It may be that that is a severable part of the agreement, but the Court below has made a decree to carry out this among other terms of the compromise and, so far as this term is concerned, I think that the compromise was without authority. The decree must, I think, be interfered with in that particular at least and as we have to interfere with the decree it is necessary for us to consider carefully to what extent we shall interfere with this decree. The question is not merely one of contract whether this term is severable or is not severable. The question is a question of the Court appointing a receiver—the Court appointing a commissioner of partition whose award as commissioner will be a part of the Court's proceeding—a part of the machinery by which the case before the Court is to be dealt with. The Court is being asked for its assistance, to use the language of Lord Halsbury in *Neale* v. *Gordon Lennox* (4).

This introduces a further consideration of some little importance. The defendant had employed the firm of attorneys, Messrs. Dutt and Sen, to act as his attorneys in this case on his behalf, and Mr. Susil Sen was a partner in that firm. He was a person acting as attorney for the defendant. He and the opposing attorney were appointed receivers of the joint estate and were made joint commissioners of partition. There is objection to appointing these attorneys as receivers. The objection is that an attorney has a certain duty to his client : to see to the rights of the client in the matter of the receiver's charges and, indeed, it may be in other matters. In the same way Mr. Susil Sen was a person whom the defendant had appointed to fight his case and to advise him as regards the matters in suit ; and when Mr. Susil Sen is appointed commissioner of partition acting together with the attorney on the other side the defendant will either have to get somebody else to act as his attorney on his behalf in matters which the commissioners have to decide or he will have to go without representation. The question is whether an arrangement that interrupts the relationship of attorney and client in the manner in which this arrangement does is one that should be forced upon the client now that the Court is for the first time made aware that the client is objecting.

The learned Judge who made the consent decree had no reason to suppose that the client was objecting. It is another question whether, in the circumstances of this case, it being proved that the client has objected at once, this Court ought to confine its interference with this decree to the mere question of the receivership of the debuttar property. The learned Judge in his judgment has stated that it was intimated to him that the plaintiff contended that the defendant consented to the settlement. If that means that the plaintiff assented to the particular terms before the Court, that is contrary to the evidence adduced by the defendant himself. There is not only no evidence to this effect, but the evidence is the other way. This, therefore, is a case where it may be taken for certain that the defendant was not personally consulted and the matters must rest on the exercise by the learned counsel of his general authority. In my judgment to make the two attorneys receivers and commissioners of partition is a very strong exercise of the general authority of counsel to settle a case. The inter-

(4) [1902] A. C. 465=71 L. J. K. B. 939=87 L. T. 341=66 J. P. 757=51 W. R. 140=18 T. L. R. 791.

ruption of the client's arrangement as regards his defence is so direct and fundamental that it would be well if no such bargain was even made without the express agreement of the client on either side. Having regard to this feature, I am of opinion that we have jurisdiction to set aside, on certain terms, the decree that was passed by consent on the 24th of January 1927.

It is quite true that the basis of the exercise of discretion in the case of *Neale* v. *Gordon Lennox* (4) was the fact that the plaintiff in that case had expressly stipulated that no settlement should be made without the withdrawal of the imputations made against her. The element of special restriction is not, as I hold, present in this case. But I do not think that takes the case out of the doctrine of *Neale* v. *Gordon Lennox* (4). Even where there is a special restriction, unless it be communicated to the other side, the party will ordinarily be bound. It is the overriding power and duty of the Court to make a proper order for the conduct of its own business which is the ground of the doctrine laid down by the House of Lords in that case; and although I do not say that the present case is so strong a case as *Neale* v. *Gordon Lennox* (4), it having been brought to the notice of the Court that the client objects, that he was not consulted on these particular terms, that part of the agreement is outside the general authority which is limited to the suit, and those other parts have the effect of making the attorney a receiver and commissioner, that is enough to justify us in saying that we will set aside the decree. It is quite right, however, that the decree should be set aside on terms as to costs. The defendant must pay all the costs thrown away on the 24th of January 1927 and he must pay all costs of the plaintiff before Mr. Justice Buckland and in this Court.

**Mitter, J.**—I agree.

D.D. *Decree set aside.*

---

## A. I. R. 1927 Calcutta 718

SUHRAWARDY AND CAMMIADE, JJ.

*Rajani Kanta Kayal* and *others*—Accused—Appellants.

v.

*Bistoo Moni Dassi*—Complainant—Respondent.

Criminal Appeal No. 8 of 1927, Decided on 21st March 1927, from the Order of the 2nd Addl. S. J., Howrah, D/- 1st September 1926.

✲ (a) *Criminal P. C., S. 476B—Appeal to High Court—Limitation Act, Art. 155 applies.*

An appeal preferred under S. 476 B against an order of the lower Court to the High Court is governed by Art. 155, Limitation Act: *A. I. R.* 1925 *Cal.* 1223, *Appl.* [P 719 C 2]

✲ (b) *Limitation Act, S. 5—Decision of High Court giving differing opinions of two Judges about limitations—Appellant probably misled—Time should be extended.*

Where there was a case decided by two Judges of theHigh Court, where one was of opinion that an appeal under S. 476 B, Criminal P. C., must be treated as an ordinary appeal under the Criminal P. C. but the other was of opinion that such an appeal must be treated as a miscellaneous civil appeal and regulated by O. 41, Civil P. C.,

*Held*: that the difference of opinion between two Judges may afford a reasonable ground for a party to suppose that such an appeal was a civil appeal and he had 90 days' time from the date of the order to prefer an appeal and in such a case extention of time should be granted. [P 720 C 1]

(c) *Criminal P. C., S. 476—Court must itself record a finding that enquiry should be made and should itself make complaint.*

Section 476 requires that the Court should record a finding that in the circumstances of the case before it an enquiry into the offences mentioned should be made and that he should make a complaint in those terms in writing signed by him. A note made by the presiding officer to his office: "Write to A. M. D. about the matter" is not in any way a recommendation or a complaint to the criminal Court to take action in the matter. [P 720 C 1]

(d) *Criminal P. C., S. 476—Application to take action made to successor of Judge—Notice to opposite parties should be given.*

When an application is made under S. 476 before a Judge who had not heard the case, it is preferable to issue notices upon opposite parties and pass proper orders after hearing them. [P 721 C 1]

✲ (e) *Criminal P. C., S. 476—Appeal from main case pending—Proceeding under S. 476 should await disposal of appeal.*

Where an appeal is pending from the main case in a higher Court, the proper course is to wait for the result of the appeal before proceeding under S. 476. [P 721 C 1]

(f) *Criminal P. C., S. 476—Court before whom offence is committed is to take initiative* (*Cammiade, J.*).

The law requires that when certain classes of offences are committed, no Court should take

cognizance of such offences unless the Court, before whom or in relation to the proceeding before which such offences have been committed moves for this purpose and removes the legal bar to the prosecution. [P 701 C 2]

*Sitaram Banerjee* and *Diptendra Mohan Ghosh*—for Appellants.

*Anil Chandra Roy Chowdhury*—for the Crown.

*Prakash Chandra Pakrasi*—for Complainant.

**Suhrawardy, J.**—This is an appeal under S 476 B,, Criminal P. C. against an order of the second Additional District Judge of 24-parganas complaining or purporting to complain under S. 476 against the appellants recommending their prosecution under various sections of the Indian Penal Code. The facts are that an application for the appointment as guardian of two minors was made by the third appellant Surendra Nath Haldar under an authority purported to have been given by the father of the children appointing Surendra Haldar as the guardian of the minors after the father's death. Subsquently the mother of the minors (the respondent Bistoomoni Dassi) applied to have the order appointing Surendra as the guardian of the minors revoked. In the course of these proceedings an award was filed on behalf of Surendra compromising the case on certain terms. This award was objected to by Bistoomoni and the whole case was then tried by the then Second Additional District Judge, Mr. G. N. Roy, who by his judgment dated the 8th May, 1926, held that the authority conferring the guardianship and the award were both false documents; and the learned Judge revoked Surendra's certificate of guardianship and appointed Bistoomoni guardian of the minors. Against this order an appeal has been preferred to this Court (being M. A. 312 of 1926) and this appeal is pending.

On the 1st September, 1926 an application was made by the respondent Bistoomoni before Mr. Jameson who succeeded Mr. G. N. Roy as the Second Additional District Judge for an order under S. 476, Criminal P. C. complaining against the appellants under several sections of the Indian Penal Code mentioned therein. On that application an order was passed by Mr. Jameson (to which I will refer later) on the day namely the 1st September 1926. This order was passed exparte. The papers were sent to the Additional District Magistrate of Alipore and summonses were issued against all the appellants, excepting the appellant Kishore Gayen which were served upon them on the 20th October 1926. The appeal to this Court was presented on the 5th January 1927, when it was placed before the Court and admitted. Mr. Roy Chowdhury who represents the Crown has taken a preliminary objection on the ground that the appeal, at any rate of the first four appellants, was filed out of time and is therefore barred under Art. 155 Limitation Act not having been presented within 60 days of the order appealed against. The appellants are not entitled to any allowance of the time occupied in taking the necessary copies as appears from the dates mentioned on the back of the copy; but it is argued on their behalf that they are entitled under Art. 156 Limitation Act to 90 days from the date of the order. This contention of the appellants is clearly wrong The appellants having come to know of the ex-parte order passed against them on the 20th October last the appeal presented by them on the 15th January 1927 is on the face of it time-barred.

The appellants argue that this is an appeal from the order of a civil Court and should therefore be considered as an appeal in a civil case. This view is erroneous inasmuch as the right to appeal is given by the Criminal P. C. against an order passed under that Code, In *Chunder Kumar Sen* v. *Mathuriya Debya* (1), it was held that an appeal under S. 476 B,, must be presented within the time prescribed by Art. 154 Limitation Act—the appeal in that case being to a Court subordinate to a High Court. The same rule of law will apply to an appeal preferred under S. 476B against an order of the lower Court to the High Court the governing article being Art. 155, Limitation Act. In this view the appeal of the first four appellants must therefore be held to be time-barred. But there is another circumstance which we cannot lose sight of. The appeal was admitted by our learned brothers Cuming and Gregory, JJ. The facts on which the appellants rely for an extension of time if the appeal was held to be out of time, are mentioned in the petition. We are not

(1) A. I. R. 1925 Cal. 1228=52 Cal. 1009.

in a position to say that these facts were not brought to the notice of the learned Judges who admitted the appeal and they might have thought that it was a proper case for concession in favour of the appellants. This view gains some strength from the decision of this Court in the case of *Hamid Ali* v. *Madhu Sudan Das* (2). There Chotzner J., was of opinion that an appeal under S. 476 B, Criminal, P. C. must be treated as an ordinary appeal under the Criminal P. C. But Duval, J., was of opinion that such an appeal must be treated as a miscellaneous civil appeal and regulated by O. 41, Civil P. C. This difference of opinion between two learned Judges may afford a reasonable ground for appellants to suppose that the appeal was a civil appeal and they had 90 days' time from the date of the order to prefer an appeal to this Court. In this view we propose to hear the appeal of the first four appellants.

As regards the appeal by Kishore Mohan: there is no doubt that it is within time. The order for the issue of summons against him was passed on the 6th December 1926 and it was actually served upon him on the 18th December 1926. The fact that Kishore's appeal is in time, and that we have to hear it, has induced us to a certain extent to admit the appeal of the other four appellants.

Now, to come to the real question in the case, namely whether there was a proper order under S. 476, Criminal, P. C. upon which action could be taken by the criminal Court. The opposite party, Bistoomoni Dasi, filed an application on the 1st September stating all the circumstances of the case and prayed:

> Your Honour may be graciously pleased to lodge a complaint with the Magistrate for trial of the opposite parties Nos. 1, 2, 3, 4 and 6 under Ss. 463, and 193, I. P. C., and of the opposite party No. 1 under Ss. 463, 471, 193 and 196, I. P. C., and of the opposite party No. 5 under S. 193, I. P. C.

On the margin of this application the order written by the learned Judge Mr. Jameson is:

> Write to A. D. M. about the matter and ask him to proceed under S. 476, Criminal P. C.

It is not apparent what further proceedings were taken in this matter, but it appears from the Magistrate's record that in all probability this application, with the order thereon, was sent to the Magistrate because there is a letter dated the 16th November, 1926, from Mr. Jameson to the District Magistrate in which it is stated that no preliminary enquiry as was asked for by the Magistrate was necessary as prima facie the case had been made out in the judgment of his predecessor. On receipt of this letter the Additional District Magistrate passed the following order:

> The order of the Additional District Judge on the margin is treated as a complaint and cognizance taken. I have made over to S. D. O. Diamond Harbour, for disposal.

This shows that the order written by Mr. Jameson on the margin of the application of the opposite party was treated as a complaint upon which criminal proceedings were started under S. 476, Criminal P. C. S. 476, so far as it is relevant for our present purpose, runs like this: When any civil Court is of opinion that it is expedient in the interest of justice that an enquiry should be made into any offence referred to in S. 195, &c., which appears to have been committed in or in relation to a proceeding in that Court, such Court may record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court and shall forward the same to a Magistrate, &c. The section therefore requires that the Court has himself to find that in the interest of justice an enquiry should be made; as also that he should record a finding to the effect that such enquiry should be made into any offence committed in relation to a proceeding in that Court. The Court has further to make a complaint thereof in writing signed by the presiding officer of the Court. Complaint' has been defined in S. 4, Criminal P. C, as:

> An allegation made orally or in writing to a Magistrate with a view to his taking action under this Code that some person whether known or unknown has committed an offence.

The section therefore requires that the Court should record a finding that in the circumstances of the case before it an enquiry into the offences mentioned should be made and that he should make a complaint in those terms in writing signed by him. In the present case the only order was "write to A. D. M. about the matter." This order was presumably passed upon the office and was not in any way a recommendation or a complaint to the criminal Court to take action in

(2) A. I. R. 1927 Cal 284=54 Cal. 355.

the matter. It is not therefore an order passed under S. 476, Criminal P. C., nor a complaint within the meaning of the Criminal Procedure Code.

But it has been argued on behalf of the Crown, as well as by Mr. Pakrashi who appears for Bistoomoni Dassi that the order must be construed with reference to the petition upon which it was passed. Though I am not sure that it would be correct for a Court to refer to a petition in passing an order like this according to the terms of S. 476, but conceding that it can be read along with the petition I do not find that there is any order which can be said to be a complaint to the criminal Court. I am accordingly of opinion that the order upon which the proceedings have been started in the criminal Court is not an order under S. 476, Criminal P. C. It is not necessary in this view to set aside the order passed by Mr. Jameson on the 1st September 1926, in so far as it directs the office to take certain steps. But if it is regarded as an order under S. 476, it must, in my opinion, be discharged.

I should like to add that in the circumstances of this case, when an application was made under S. 476, Criminal P. C., before a Judge who had not heard the case it would have been a better exercise of discretion to issue notices upon the opposite parties and pass proper orders after hearing them. In the present case the opposite party had already filed an appeal to this Court against the order of Mr. G. N. Ray. If this fact was brought to the notice of Mr. Jameson, it was possible that he might have stayed his hands till the disposal of the appeal.

It is still open to the respondent opposite party to apply for a fresh order under S. 476, Criminal P. C., in which case the learned Judge will no doubt act according to law. But considering that an appeal is pending in this Court, in my opinion, the proper course is to wait for the result of the appeal. In this view I will allow the appeal.

**Cammiade, J.**—I agree with what has fallen from my learned brother and with the order which he proposes to pass. I wish to add that in a case such as the present it was necessary for the Judge who intended to make a complaint to look into the facts of the case and to decide what offences had been committed by what particular person. Mr. Jameson did not try the case for revocation and he was not aware of the facts. The judgment which was delivered by his predecessor does not contain anything from which it can be ascertained that particular persons had taken part in the commission of any particular offence. The law requires that when certain classes of offences are committed, no Court should take cognizance of such offences unless the Court, before whom or in relation to the proceeding before which such offences have been committed, moves for this purpose and removes the legal bar to the prosecution. There is nothing on the record to show that Mr. Jameson applied his mind to this matter or decided what offences had been committed or who had committed them; and therefore it must be taken that the second letter written by him to the Magistrate cannot by any stretch of language amount to a complaint. In my opinion that complaint, if it is treated as one, should be quashed because it is not in compliance with law. I would further point out that in the petition that was filed by Bistoomoni there is a prayer for the prosecution of the accused persons (appellants before us) on charges under S. 463. No offence is punishable under that section, for S. 463 defines forgery. The offence is punishable under S. 465. I find from the record that the Magistrate has issued summons under S. 463, I. P. C. This would lead to trouble later on. In all these circumstances I agree with the order which my learned brother has passed.

D.D. *Appeal allowed.*



---

## A. I. R. 1927 Calcutta 721

SUHRAWARDY AND CAMMIADE, JJ.

*Ismail Khan*—Accused—Appellant.

v.

*King-Emperor*—Opposite Party.

Criminal Appeal No. 817 of 1927, Decided on 21st March 1927, from the order of the Ch. Presy. Mag., Calcutta, D/- 11th December 1926.

*Arms Act, S. 29—Entering case in a case-book and making out a charge is not institution of proceeding.*

Entering a case in the case book and making out a charge is not institution of proceedings under

S. 29. The proceedings really start when the accused is placed before the Court.

[P. 722, C. 2; P. 723, C. 1]

The word "proceeding" in S. 29 does not mean that no action can be taken by any officer, police or otherwise, in the matter without a previous sanction of the Commissioner of Police: 17 *Cal.* 574, *Expl. and Dist.* [P.722, C. 1]

*Mrityunjoy Chatterjee, Basanta Kumar Mukherjee* and *Bholanath Dutta*—for Appellant.

*Masih*—for the Crown.

**Judgment.** — The appellant Ismail Khan has been convicted by the Chief Presidency Magistrate of Calcutta under S. 19 (f), Arms Act (11 of 1878) and sentenced to two years' rigorous imprisonment. The first and the only substantial ground taken on his behalf is that proper sanction not having been obtained before the proceedings against the petitioner were instituted, the trial and the conviction are bad in law. The facts of the case are that the prosecution inspector on receipt of certain information arrested the accused, with a pistol and 23 live cartridges, in the presence of search witnesses on Prem Chand Boral Street about 7 p. m. on the 6th September last. Thereafter he took the accused to the Muchipara police station and entered a case against him under the Arms Act and searched his house. The charge was entered in the crime sheet. Sanction was secured on the 7th and the man was then sent up with a chalan and placed before the Court. The argument on his behalf is that under S. 29, Arms Act, no proceedings should have been instituted against the accused without the previous sanction (in this case) of the Commissioner of Police. It is urged that entering a case in the case-book and making out a charge is institution of proceedings under S. 29 and therefore the absence of proper sanction previous to the entry in the thana book has vitiated the entire trial. We do not think that this argument has any substance in it. S. 29 says that no proceedings should be instituted against any person in respect of an offence under S. 19 (f), Arms Act, without the sanction of the Commissioner of Police, if the offence is committed in a presidency town. The meaning which is sought to be attached to the word "proceeding" is that no action can be taken by any officer, police or otherwise, in the matter without a previous sanction of the Commissioner of Police. It is difficult to see what the arresting inspector was expected to do in the circumstances of this case; but it is suggested that he might, if the offence was a cognizable one, have taken the accused into custody and, without entering a charge in the diary book, asked for the sanction of the Commissioner of Police and on receipt of it made the necessary entries in the station books. We feel no hesitation in saying that this argument is far fetched and that it has never been the intention of the legislature to lay down such an awkward procedure and make the prosecution open to the charge that no entry equivalent to a first information was made immediately after the arrest.

In support of the view urged on behalf of the appellant reliance has been placed on the Full Bench decision of this Court in the case of *Karim Buksh* v. *The Queen-Empress* (1). There it was held that the lodging of a false information with the police of a cognizable offence is instituting a criminal proceeding within the meaning of S. 211, I. P. C., Wilson, J., who delivered the judgment of the Full Bench, took particular care to say that the meaning which he gave to the words "institution of criminal proceedings" in S. 211, I. P. C., must be limited to the scope of that section. No analogy can be drawn by putting S. 211, I. P. C., alongside S. 29, Arms Act, which deals with totally different matters. Under S. 211, I. P. C., the complainant is said to institute a proceeding if he prefers a false charge of a cognizable offence to the police who are expected to move in the matter, and if they are satisfied that there is a prima facie case against the accused will send him up for trial. It was pointed out in that case that there are two sorts of institutions of criminal proceedings: one was by giving information to the police which would in all probability move them into action and the other by filing a complaint in Court with the idea that the Court will take action in the matter. In either case the police or the Court may refuse to proceed further but the complainant has done all he could to charge his adversary with the alleged offence. It was in this view held that making a false charge to the police of a cognizable offence is the

(1) [1890] 17 Cal. 574.

institution of criminal proceedings within the meaning of S. 211, I. P. C.

In a sister piece of legislation, that is, the Explosive Substances Act, a similar sanction is providedfor by S. 7 of Act 6 of 1908. S. 7 of that Act runs as follows :

> No Court shall proceed to the trial of any person for an offence against this Act except with the consent of the local Government or Governor-General in Council.

There is no much difference between consent and sanction, the absence of either of them being a bar to the initiation of prosecutions under the Acts. S. 7, Explosive Substances Act, provides that consent to the prosecution should be obtained before the Court proceeds with the trial of the accused. The idea underlying S. 29, Arms Act, is the same. By entering the charge in the office diary or preparing the charge sheet no criminal proceedings are instituted, the acts being really routine and administrative. The proceedings really start when the accused is placed before the Court. In S. 195, and the following sections of the Criminal Procedure Code which speak of sanction, it is laid down that proper sanction should be obtained before the Court takes cognizance of the case. By obtaining sanction a bar is removed to prosecution for a particular offence ; in other words, in order to enable the Court to take cognizance of it proper sanction must be obtained from proper quarters. An objection similar to this was taken in the case of *Ahmed Hossein* v. *The Queen-Empress* (2). In that case the objection was not particularly dealt with in the judgment of the learned Chief Justice but it was overruled. We are accordingly of opinion that no error of procedure has been made in the present case and that sanction was properly obtained from the Commissioner of Police before the accused was placed on his trial.

It is next urged by Mr. Mrityunjoy Chatterjee for the accused that possession found with the accused by the Magistrate was not sufficient for a conviction under S. 19, (f). That clause says that any person who has in his possession or under his control any arms, etc. We fail to understand what the real ground of objection is ; but it is probably based on the case for the defence which we are asked to accept as true. The defence case is that the bundle which contained the pistol and ammunition was the property of a friend of the accused named Idu who was proceeding with him along the street and had just made over the bundle to him and gone away on the pretext of answering a call of nature. The police in the meantime came up and arrested the applicant. The suggestion is that the case was a manufactured one and that the police had engaged Idu to decoy the accused. There is no evidence worth the name to support the defence story. Two witnesses have been examined on behalf of the appellant. The first witness says that the accused came to his shop one day to bring some offerings and the next day he came to him and told him that he had been arrested. While the witness was weighing the offerings, an old man came and called the accused and took him away. The old man had a bundle wrapped in cloth in his own hand. The second witness says that he saw the accused and another man in the street and the other man had a bundle in his hand and told the accused "hold this for a few minutes as I have to answer a call of nature." Within five minutes the accused was arrested. It is not contested that the accused was found in possession of a bundle containing articles. The story now set up by the accused was not put before the police at the time of the arrest, and in the cross-examination of the prosecution witnesses the case for the defence was not put to them in the way in which it has now been attempted to be put. We think that the story set up on behalf of the accused was an afterthought. In his statement the accused named only one person by the name of Elahi who saw the appellant going with an old man ; but this man Elahi was not examined and two other persons were produced to support the defence story. In these circumstances we have no hesitation in holding that the appellant has failed to prove his case and that he being found in possession of the articles is liable to be convicted under the Arms Act.

Then it is urged that the sort of possession found is not inconsistent with the innocence of the accused. The possession found by the lower Court is that the accused was arrested with a bundle containing those articles. He was em-

(2).[1900] 27 Cal. 692=4 C. W. N. 750.

ployed on board a sea-going vessel and had shortly before the occurrence came to the town. The weapon found is of foreign make which is not ordinarily to be found in the city. Taking these and other circumstances into consideration the learned Magistrate found that the appellant was possessing those articles with a guilty knowledge and we think that he has been rightly convicted. The appeal fails and is dismissed.

D.D. *Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 724

C. C. GHOSE AND CAMMIADE, JJ.

*Lal Mohan (Saha) Poddar*—Accused—Petitioner.

v.

*King-Emperor*—Opposite Party.

Criminal Revision No. 324 of 1927, Decided on 15th June 1927, from an Order of the Dy. Mag., Dacca, D/- 11th February 1927.

*Income-tax Act* (1922), *S. 37—Account books produced in pursuance of notice under S. 23 (2) found to be false—Prosecution under S. 196, I. P. C., cannot be sustained.*

Section 37, being a penal section, has to be construed strictly. There is no reference whatsoever in the section itself to S. 196, I. P. C., therefore, a person cannot be prosecuted under S. 196 for producing account books in pursuance of notice under S. 23 (2) where the books were found to be false. [P 725 C 1]

*Provas Chandra Mitter, Bhagirath Chandra Das* and *Suresh Chandra Taluqdar*—for Petitioner.

*Khundkar*—for the Crown.

**Judgment.**—This rule must be made absolute and for the following reasons: It appears that the petitioner before us is a member of a family who carry on an ancestral business in the district of Dacca as cloth merchants and money-lenders. The firm in question were asked by the income-tax authorities to submit a return of their income for purposes of assessment of income-tax. A return was filed, but thereafter a notice was served on the firm under the provisions of S. 23 (2), Indian Income tax Act, 1922, requiring the production of certain account books for the 1329 and 1330 B. S. The petitioner before us as stated above is a member of the firm but he is also a legal practitioner at Narainganj. It appears that the petitioner on two days, namely, the 8th September 1925 and the 25th November 1925, produced certain books belonging to the firm in question before the additional income-tax officer. It is said that he attended before the addititional income tax officer for the purpose of explaining the accounts contained in the said books to the additional income tax officer. It was found, however, in the course of further investingation by the income-tax authorities that the books in question were false account books and had been prepared for the purposes of the assessment of income-tax. Thereafter the petitioner along with another person was prosecuted for having committed an offence punishable under S. 196, I. P. C. He was convicted and sentenced to pay a fine of Rs. 500 and to be detained in Court till the rising. The petitioner thereafter moved this Court and obtained the present rule.

On behalf of the petitioner Sir Provas Mitter has argued that the petitioner could not be convicted under S. 196, I. P. C., having regard to the provisions of S. 37, Indian Income Tax Act. Section 37 of the Act runs as follows:

> The income tax officer, Assistant Commissioner and Commissioner shall, for the purposes of this chapter, have the same powers as are vested in a Court under the Civil Procedure Code 1908, when trying a suit in respect of the following matters, namely: (a) enforcing the attendance of any person and examining him on oath or affirmation; (b) compelling the production of documents, and (c) issuing commission for examination of witnesses, and any proceeding before an income tax officer, Assistant Commissioner or Commissioner under this chapter shall be deemed to be a "judicial proceeding" within the meaning of Ss. 193 and 228, I. P. C.

It would appear from what is contained in S. 37, Indian Income Tax Act, that any proceeding before an income tax officer, Assistant Commissioner or Commissioner under the chapter in which S. 37 finds a place [it may be noted that a proceeding pursuant to a notice under S. 23 (2) is a proceeding under the said chapter] would be deemed to be a "judicial proceeding" for the purpose of sustaining convictions under Ss. 193 and 228, I. P. C. As we read S. 37, it seems to us to be clear that the legislature has, for the purpose of punishing offences under Ss. 193 and 228, I. P. C. (and under no others), converted proceedings before the officers mentioned therein

which are not judicial proceedings ordinarily, into " judicial proceedings." Section 37, being a penal section, has to be construed strictly, and as will be seen from what is stated above there is no reference whatsoever in the section itself to S. 196, I. P. C. Therefore having regard to the terms of S. 37, it cannot be said that the proceedings which took place before the additional income tax officer on the production of the account books on the two dates referred to above were " judicial proceedings." If that is so, having regard to S. 37 there is no room whatsoever in it for attracting into it the provisions of S. 196, I. P. C.

The result therefore is that the conviction and sentence of the petitioner under S. 196, I. P. C., must be set aside and the fine, if paid, will be refunded.

D.D. *Conviction set aside.*

---

## * A. I. R. 1927 Calcutta 725

RANKIN, C. J., AND BUCKLAND, J.

*Bengal National Bank, Ltd.*—Defendant—Appellant.

v.

*Janoki Nath Roy* and *others*—Plaintiffs—Respondents.

Appeal No. 98 of 1926, Decided on 7th April 1927, from an order of C. C. Ghose, J., D/- 24th May 1926.

* (a) *Transfer of Property Act, S. 116—Tenant holding over and paying enhanced rate as contained in a renewal clause—Landlord accepting the rent—Tenant is not monthly tenant but is deemed to have taken a renewal.*

Where lessees remain in possession after lease period and pay rent at an enhanced rate as per terms of a renewal clause contained in the original lease deed and the lessors accept the rent, the lessees must be deemed to have remained in possession under the renewal clause of the lease as persons who had exercised the option given to them by the renewal clause and whose right so to do had been acknowledged by the lessors and acted on by both parties: *Mayor* v. *Tyler*, (1854) 8 *Q. B.* 95, *Rel. on.* [P 727 C 1]

* (b) *Transfer of Property Act, S. 108 (j)—Lessee holding over under renewal clause—Mortgagee from such lessee is liable to lessor for rent.*

Mortgagee in the form of an English mortgage from lessee who has continued to hold as per terms of a renewal clause contained in original lease is liable to the lessor for rent from the date of mortgage, and he cannot escape liability for rent by reason of the fact that the lessee had not obtained a formal registered instrument creating a fresh term of lease. [P 730 C 1]

*N. N. Sarkar* and *A. K. Roy*—for Appellant.

*Binode Mitter*, *B. K. Ghosh* and *R. N. Roy*—for Respondents.

**Rankin, C. J.**—Plaintiffs are lessors of 31-3, Marquis Street and the Anglo-American Motor Car Company were lessees under a registered lease, dated 21st December 1920, for a term of three years from 6th November 1919 at a rent of Rs. 500 per month. That lease contained the following clause:

Provided further that if the lessees shall regularly and punctually pay the rent hereby reserved and duly observe and perform the covenants and conditions on their part to be observed and performed, then the lessees shall be entitled to a renewal of this demise for a further period of three years on the same terms and conditions as are contained in these presents except that the monthly rent shall be six-hundred rupees instead of five-hundred rupees and that there will be no covenant for a further renewal.

Also a covenant not to assign or sub-let or part with the possession of the said demised premises without the consent in writing of the lessors first had and obtained, but such consent shall not be unreasonably withheld.

The original term having expired on 5th November 1922 the lessees continued in occupation and in November 1923 the plaintiffs sued them for rent in arrear (Suit No. 3017 of 1923) setting out in their plaint the renewal clause and complaining inter alia that for January, February and March 1923 the lessees had paid rent at the rate of Rs. 500 only "in breach of the covenants in the said lease." The lessees by their written statement denied that they had paid only Rs. 500 for January, February and March and said that they had paid the rent in full for these months and also for April and May 1923 and that for June they had paid Rs. 500 leaving Rs. 100 owing. They admitted a certain sum as due and owing on this basis, namely, Rs. 2,647, and for this udgment was obtained on admission.

It seems that the lessees had erected a factory or workshop and some sheds on the premises and had certain plant, machinery and other things thereupon. They were being financed by or accommodated with a loan from the appellant bank. the Bengal National Bank, Limited, by means of a cash credit loan account. On 18th February 1924 a registered mortgage deed was entered into by these parties which contained the following operative words:

And this Indenture also witnesseth that in further pursuance of the said agreement and in consideration of the premises the Company doth hereby transfer and assign unto the Bank first all that piece or parcel of land containing by measurement one bigha and ten chittaks situate and lying at 31-3, Marquis Street, particularly mentioned and described in the first Schedule hereunder written and all other premises comprised in and demised by the said lease of twenty-first December one thousand nine hundred and twenty aforesaid or expressed so to be and all that the benefit and advantages thereunder; secondly all those the workshop factory buildings and sheds machineries, apparatus, tools, implements, plants and stores which have been or may hereinafter be erected and are used in connexion with the business carried on by the Company on the demised premises or at No. 5, Chowringhee.....To have and to hold unto the Bank as to the premises first hereinbefore transferred and assigned for all the residue now unexpired of the terms created by the said lease subject to the payment of the rents reserved by the said lease and performance of the covenants and conditions in the said lease contained and as to all other the premises hereby transferred and assigned unto the Bank absolutely and for ever, subject to a proviso for redemption. There was a declaration that in case of default by the company the bank should be entitled to enter into possession of the said land, hereditaments and premises and to seize and sell the machinery, etc. Also that the deed should be construed as an English mortgage as defined in the Transfer of Property Act, 1882.

And the Company doth hereby covenant with the Bank that the Company now hath full power and absolute authority to grant convey and transfer and assign the said premises herein comprised and hereby mortgaged unto the Bank in manner aforesaid that the said lease dated twenty-first day of December 1920 is still valid and subsisting..... to hold and enjoy etc,

The Company went into voluntary liquidation at some date in November or December 1924 which does not appear clearly from the record and in February 1925 a compulsory winding-up order was made against it, a Mr. S. K. Dey being appointed official liquidator. The plaintiffs had several grounds of forfeiture had they chosen to proceed to forfeit the term—rent was in arrear for over a month, the covenant against assignment had been broken and the Company had gone into liquidation.

The bank in November had entered into possession and put up a notice-board with the name of the bank. That the plaintiffs' solicitors did not know of the terms of the deed of 18th February 1924 or that it purported to be an absolute assignment of the premises is clear. The correspondence shows that the bank repudiated liability to pay rent claiming inter alia that by merely taking possession of the assets mortgaged to them they were not in possession of the premises. It seems that from 17th November 1924 to some date in March 1925 various executions were levied on the assets, but in what way this affects the bank's position is not intelligible to me. The plaintiffs' solicitors continued to allege by their letter that the bank was in occupation, that it was liable for rent or at least to pay for use and occupation. They continued also to claim against the company. At last, on 30th June 1925 they gave both the company and the bank notice to quit at the end of July, but the liquidator could not get the bank to do so, and on 27th August 1925 the plaintiffs brought this suit for rent against both.

The plaint was originally based as against the bank on the allegation that the bank were mortgagees of goods which they had kept on the premises and were in occupation of the premises "without the leave or license of the plaintiff." The suit came on for hearing on 21st April 1926 when certain issues were framed and learned counsel for the Bank contended that the plaint disclosed no cause of action against his clients. The plaintiffs in the meantime had come to know the terms of the mortgage deed. They obtained leave to amend and the amended plaint proceeded as against the bank on the basis that by taking an assignment of the term the bank made itself liable for the rent but it alleged in supplement of this contention that the bank had been in possession of the premises and claimed to hold the bank liable till the premises should be vacated.

The defence to the amended plaint denied that the lease had been renewed and contended that the company, after the expiry of the original term, were only monthly tenants and had been so treated by the plaintiffs. It alleged that the company thereafter had no lease. It denied that the bank was ever in possession or had ever been recognized as transferees of any lease or as tenants.

The learned Judge has held that after the expiry of the original term the defendant company was not merely in the position of a tenant holding over by the month and in this I think he is clearly right. The question is one of

fact and although it is not impossible that a tenant should hold over at an enhanced rent [*cf Mayor of Thetford* v. *Tyler* (1),] it is clear that these lessees remained in possession under the renewal clause of the lease as persons who had exercised the option given to them by this clause and whose right so to do had been acknowledged by the lessors and acted on by both parties. This appears abundantly from the pleadings in suit No. 3017 of 1923 as from the terms of the mortgage-deed of 18th February 1924. The drafting of that deed proceeded on the basis that the lease of 21st December 1920 was a registered instrument, which by its own force created two terms or at least that in February 1924, there was a residue unexpired of the term granted by the lease of 1920. This view may be technically incorrect, but it is clear enough that the company were in possession under the renewal clause.

Having found that the company were not merely holding over with the landlord's consent as contemplated by S. 116, Transfer of Property Act, and finding that the mortgage deed of February 1924 was expressed to contain an absolute assignment of the lessee's right the learned Judge has held the appellant bank liable for the rent which accrued due after the date of the deed. He did not decide the question whether the appellant bank was or was not in possession of the premises from November 1924 onwards, but treated them as liable to pay the rent by privity of estate.

The main contention of the appellant bank in this appeal is that the renewal clause is not itself a lease for a new term commencing in November 1922, but is a mere covenant or agreement to grant a future lease, provided that the lessees should comply with certain conditions and should be desirous of obtaining a fresh term ; that the assignee of a person in possession under an agreement for a lease has no privity of estate with the lessor ; and that, apart from privity of contract such as would arise by the assignee's attorning tenant to the lessor, the only way in which the lessor could claim to hold an assignee liable upon the covenants which run with the land, is by making out a right to specific performance, on the principle illustrated by the case of *Walsh* v. *Lonsdale* (2). On this last point it is contended : (1) that as laid down in *Grey* v. *Shyer* (3), the plaintiffs must make a proper case for specific performance on their pleadings, showing that they were ready and willing to grant a proper lease and to accept the appellant bank as assignee of the term. This, it is said, is particularly necessary in view of the notice to quit given to the appellant bank on the 30th June 1925, by the plaintiff's solicitors ; (2) that as shown by the case of *Purchase* v. *Lichfield Brewery* (4) equity will not grant specific performance for the purpose of making a mortgagee liable to the lessor for rent and convenants. To do so would be contrary in effect to the principles laid down In *Moore* v. *Grey* (5) and *Cox* v. *Bishop* (6). It is denied that the appellant bank did enter into possession of the premises but it is admitted that they entered upon the land to take possession of the mortgaged chattels. Possession, however, is immaterial according to the appellants' argument save as an element in any question of privity of contract, and as the possession, if any, in this case was accompanied from the first by denial of possession and a refusal to admit liability for rent there can be no question here of privity of contract and possession is altogether immaterial. Neither the original nor the amended plaint makes the case that the bank entered into possession or was accepted by the lessors as tenant ; indeed the original plaint is to the contrary.

I propose first to decide the question of fact whether the appellant entered into possession of the premises, that is to say, went upon the land and occupied it claiming to have exclusive right of occupation. On that point we have the correspondence and the evidence of Nanda Lal Sen. No evidence has been given by the appellant bank on this question. I pay much more attention to what the appellant bank said and did

(1) [1845] 8 Q. B. 95=15 L. J. Q. B. 33=10 Jur. 68.

(2) [1882] 21 Ch. D. 9=46 L. T. 858=52 L. J. Ch. 2=31 W. R. 109.

(3) [1922] 2 Ch. 22.

(4) [1915] 1 K. B. 184=111 L. T. 1105=84 L. J. K. B. 742.

(5) [1848] 2 Phillips 717=42 E. R. 1120=18 L. J. Ch. 15=12 Jur. 952.

(6) [1857] 8 De. G. M. & G. 816=44 E. R. 604

vis a vis the company than I do to such a letter as that of 15th December 1924, by the bank's solicitors to the plaintiffs' solicitors. I find as a fact that the bank entered into possession of the premises and was in possession of the premises down to the institution of the suit.

The law of India as to the liability of assignees of leaseholds is in no way in a satisfactory condition. The Transfer of Property Act, by S. 105 defines lease as a "transfer of a right to enjoy" and by S. 107

> a lease of immovable property from year to year or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

By S. 103 it is provided that the benefit of the covenant of quiet enjoyment

> shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is, for the whole or any part thereof, from time to time vested.

It is also provided that

> the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching the lease.

By S. 109 the principle applied in cases of assignment of the reversion is that the lessor can part with his rights to the assignee but cannot substitute his assignee in his place to shoulder his liabilities except with the lessee's consent. These would appear to be the only express provisions bearing upon the present question, though it is true that as between mortgagor and mortgagee S. 65 provides that the mortgagor of the leasehold is responsible for the payment of the rent so long as the mortgagee is not in possession.

The English law upon this subject depends entirely upon a distinction between the legal and equitable estates, a distinction for which the Transfer of Property Act has left no room in India and which is not to be imported into Indian law. By English law, a term is not merely a right but an estate : *Doe* v. *Watts* (7). Notwithstanding the language of S. 105, Transfer of Property Act, such cases as *Kunhamjan* v. *Anjelu* (8) show that this principle has always been recognized in India. Even since *Williams* v. *Bosanquet* (9) overruled *Eaton* v. *Jaques* (10) a mortgagee who takes a legal assignment of the term is liable in England for such covenants as run with the land like any other assignee of the legal estate ; but no equitable mortgagee is so liable and there is no equity on the part of the lessor to compel such a mortgagee to accept a transfer of the legal estate even when the assignee goes into possession of the premises. The commonest case in practice is the mortgage by sub-demise which is devised to exclude privity of estate. These are authorities which are difficult to apply when the distinction between law and equity has been eliminated, and the provisions of the Transfer of Property Act give little assistance to overcome the difficulty. The statute indeed contributes difficulties of its own as S. 108 says that " the lessee may transfer absolutely or by way of mortgage" while S. 58 as part of its definition of an English mortgage employs the phrase ;

> transfers the mortgaged property absolutely to the mortgagee but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage money.

Now, there are indications in the Indian authorities of an attempt to strike out a new line and to hold as it is expressed in a well-known text-book (Sir Rash Behari Ghose's Law of Mortgage) that a mortgagee, simply as such, cannot be sued as the assignee of the mortgagor on the covenants in the lease but that where the subject of the mortgage is leasehold property and the mortgagee is put in possession of it he becomes liable as a rule to pay the rent. The Chief Indian cases appear to be as follows: *E. Macnaghten* v. *Bhukaree Singh* (11), *Kannye Lall Sett* v. *Nistarini Dassi* (12), *Lala Bharub* v. *Lalit Mohan* (13), *Kunhamian* v. *Anjelu* (8), *Timmappa* v. *Rama* (14), *Vithal Narayan* v. *H. H. Shriram Savant* (15) and *Thethalan* v. *The Eralpad Rajah* (16).

Where this doctrine comes from unless it be an adaptation of the opinions ex-

(7) [1826] 5 B. & C. 111.
(8) [1894] 17 Mad. 296.
(9) [1819] 1 Br. & B. 238=3 Moore 500=21 R. R. 585.
(10) [1780] 2 Douglas 455.
(11) [1878] 2 C. L. R. 323.
(12) [1884] 10 Cal. 443.
(13) [1885] 12 Cal. 185.
(14) [1897] 21 Bom. 311.
(15) [1905] 29 Bom. 391=7 Bom. L. R. 313.
(16) [1917] 40 Mad. 1111=40 I. C. 841=32 M. L. J. 442.

pressed by Lord Mansfield and Mr. Justice Buller in *Eaton* v. *Jaques* (10), it is not easy to say and in the case of *Thethalan* v. *The Eralpad Rajah* (16), Wallis, C. J., has questioned it, holding that apart from privity of contract a mortgagee cannot be liable for rent and covenants in any case in which he has not taken a transfer of the whole interest of the lease and that a simple mortgage as defined by S. 58, Transfer of Property Act, and illustrated by the document in *Vithal Narayan's* case (15), is not such a transfer.

Russel, J., in the last-mentioned case affirmed the following proposition :

> In India there being an equity of redemption in the lessee (mortgagor) and there being no distinction between his legal and equitable estates, his "whole estate" is not transferred by the mortgage.

Notwithstanding the discrepancy already alluded to between the language of S. 58, Transfer of Property Act and the language of S. 108, Cl. (j), this proposition seems to me to be too broad to be a correct statement of the Indian law. The reasoning of Dallas, C. J., in *Williams* v. *Bosanquet* (9), seems to me to be valid in India with reference to such a mortgage as that with which we are concerned in the present case :

> The assignment of a lease for the whole term, whether absolute or subject to a proviso for re-assignment in a certain event, is as far as concerns the interest to be transferred precisely the same ; and the assignment as in the present case, is of all the right, title and interest of the assignor in the lease assigned. So completely does the interest pass from the one and vest in the other, that there is a covenant to re-assign when the money shall be re-paid. The whole interest is, therefore, assigned and the whole is to be re-assigned. It vests then absolutely, till such re-assignment, in the party who is to re-assign, and is not less absolute, because, by agreement between the immediate parties, to which the lessor is no party, the assignor may, in an event which may or may not happen, entitle himself to a reconveyance by the money being repaid.

I am not prepared to hold that in India the lessor does not part with his "whole estate" under an English mortgage. His right to redeem is a right on certain conditions to get it back and in India this right cannot be looked on as an "equitable estate existing before re-assignment.

Again if in the present case the plaintiffs' right to succeed depends upon their showing that they are entitled as against the appellant bank to claim specific performance of a mere agreement for a lease, then in my judgment their suit must fail. I am not satisfied that it is in consonance with any principle of equity that a mortgagee should be compelled to perfect his title at the suit of the lessor, for the purpose of enabling the lessor to cast upon him the burden of the covenants of the lease in the absence of any privity of contract between these parties. It is true that in *Purchase* v. *Lichfield Brewery Co.* (4), the assignees while they had done acts which showed that they had accepted the assignment, had never been in possession of the premises. The judgment of Lush, J., is guarded by the sentence :

> I do not think it is necessary to say how the case might have stood if the defendants had ever taken possession.

But I have the greatest difficulty in seeing how possession taken in the circumstances of the present case can alter the position. I do not consider that either the pleadings or the evidence before us entitles us against the appellant bank to proceed on the basis of specific performance.

Apart from specific performance of the covenant for renewal, what is the effect of the Transfer of Property Act when applied to the facts of the present case ? The statute uses the word "lease" not merely for interests which can only be created by registered instrument, but for all interests of the character defined by S. 105. S. 106 speaks of a "lease from month to month" and S. 116 which deals with the effect of holding over says that

> the lease is in the absence of an agreement to the contrary renewed from year to year or from month to month according to the purpose for which the property is leased as specified in S. 106.

This provision must I think be regarded as supplemental to and in qualification of Cl. (a) S. 111 which states that a lease determines by efflux of the time limited thereby. But I do not think it can be read as meaning that if there is no agreement to the contrary the lease is renewed from month to month, but that if there is an agreement for any other period then the lease is renewed for that period however long. This would seriously trench upon the policy of S. 107. The intention of S. 116 is in my

judgment that the lessee holding over with the landlords' mere consent has still a lease but only from month to month : he gets this, but no greater interest; and he does not even get this if there be an agreement with the landlord that he is to be a mere licensee, tenant on sufferance or tenant-at-will. The tenant continuing in occupation under a special agreement for a further lease is a different case from the tenant holding over merely by consent, but if for any reason his agreement has to be disregarded he can fall back upon the landlords' mere consent and claim his rights under S. 116. If the matter be regarded in the first instance as between lessor and lessee the position is that the the latter is either : (1) by virtue of the doctrine of specific performance or otherwise clothed with the estate and right given by the special agreement; or (2) the holder of a lease from month to month. It is doubtless true that if at the expiry of the original term the person who continues in occupation is not the lessee, but his representatives or assigns, there is nothing in S. 116 to enable the lessor by mere consent to convert such representative or assign into a monthly tenant. Such a person in the absence of agreement is a trespasser : cf. *Vadapalli* v. *Doonamraju* (17). But where the original lessee holds over by consent and becomes a tenant I see nothing in the Transfer of Property Act to justify the view that his interest is not assignable, though of course the lessor can determine it by giving the notice specified in S. 106. The stipulation against assignment does not involve that the assignment is void though it might have been made a ground of forfeiture.

In these circumstances I am not of opinion that the appellate bank is in a position to escape liability for rent by reason of the fact that the company had not obtained a formal registered instrument creating a fresh term of three years. Their assignment was an absolute assignment of the whole interest of the company and if the doctrine of privity of estate is to be applied under the Transfer of Property Act at all it is as applicable to the interest of a tenant holding over by consent as to any other interest within S. 105. The apnellant bank cannot set up the covenant for renewal to exclude S. 116 and at the same time deny to the lessors any right which specific performance would give to them. By English law, choses in action were not assignable at law and the doctrine of covenants running with the land is applicable only to demises under seal. Such principles cannot be imported into the Indian statute and in any case we are here concerned merely with rent and not with collateral covenants and with the liability of an assignee who took his assignment on 18th February 1924 and who entered into possession in November 1924.

I think the appellants are not only liable for the rent since November 1924, but since February 1924 up to the 15th August 1925 as claimed. The notice to quit given on 30th June 1925 for the end of July would appear to be bad as the monthly tenancy was from the 6th of the month to the 5th of the next.

I think the appeal should be dimissed with costs.

**Buckland**, **J**.—This appeal is against a judgment of C. C. Ghose, J., dated the 24th May 1926 whereby he held that the appellant bank was liable for rent of the premises No. 31/3, Marquis Street, from the 19th February 1924 and for interest.

The date from which he has held the bank to be so liable is the date of an instrument in writing whereby the defendant company by way of mortgage assigned to the appellant bank their leasehold interest in the premises and certain moveable property there situated.

The company were lessees of the premises under a lease for three years from the 6th November 1919 with an option to extend it for a further period of three years at an enhanced rent. At the expiry of the term the lessees continued in occupation of the demised premises. That they ever exercised the option in any formal manner does not appear. The lease does not so require nor that the option shall be exercised at any particular point of time. The lessees would have had the right had they exercised the option to call upon the lessors to execute a lease in their favour for a further term of three years, though such right may have become modified by subsequent events. The

(17) [1907] 31 Mad. 163=18 M. L. J. 26.

lessees, however, did not do so whether the option is to be taken as having been exercised or not. They went into voluntary liquidation towards the end of 1924, and on the 12th February 1925 a compulsory winding-up order was made. By that time the appellant bank had taken steps under their assignment.

It has been contended that the appellant bank did not take possession of the demised premises. In addition to the oral evidence the bank's letter of the 11th November 1924, in which it said that they intend to take possession of the properties mortgaged and "we appoint 2 o'clock tomorrow to take possession" leaves but little room for a decision favourable to the bank on this point. The learned Judge, however, has not decided this question nor in the view which he took was it necessary that he should do so. He held that the appellant bank was liable for rent of the premises from the date of the assignment on the ground of privity of estate.

This conclusion has been assailed on appeal on the ground that the lessees did not exercise the option and that whatever right the lessors might have had to require specific performance, had the option been exercised, never arose. So far there is not much difficulty. But the appeal has further been argued upon the footing that the option was exercised, the lessees being taken to have continued in possession under the renewal clause and that therefore a state of affairs arose within the principle of *Walsh* v. *Lonsdale* (2).

It is contended that in such circumstances the appellant bank would be liable for the rent. This point has been argued at length by learned counsel but *Purchase* v. *Lichfied Brewery Co., Ltd.* (4), which has been cited in argument, makes it clear that the principle of *Walsh* v. *Lonsdale* (2) cannot be invoked against mortgagees who take an assignment of leaseholds by way of security. But apart from that decision the lessors are not in a position to allege, as must be done where specific performance is claimed, that they are, and at all material times have been, ready and willing to execute a lease in favour of the appellant bank, for on the 30th June 1925 through their solicitors they gave the appellant bank notice to quit.

If the case stood there the appellant bank might be entitled to succeed but there is another aspect of it which has yet to be considered.

The lease in fact was never renewed, but the lessees remained in possession of the premises after it had determined. This prima facie brings them within S. 116, Transfer of Property Act. The words "in the absence of a contract to the contrary" must be taken as relating to what follows them in the section, that is to say, a contract inconsistent with the renewal of the lease from year to year or from month to month, as the case may be. There is nothing inconsistent with that in the covenant for renewal in the original lease; rather I should say that by holding over the lessees indicated their intention to take advantage of it (a question which must in each case be dependent upon the form of the renewal clause and provision as to notice), though until they gave notice of renewal they might be deemed to be holding over as provided by this section. There is to my mind no third alternative view open, for it cannot by any process of argument be contended that the lessees were mere trespassers.

If then the lessees are regarded as being tenants from month to month under S. 116, Transfer of Property Act, after the expiration of the lease the final question still to be determined is what is the effect of the assignment of the 19th February 1924.

The Transfer of Property Act contains no definite provision as to the relative rights and obligations of the lessor and an assignee of the lessee's interest. S. 108 (j) permits the transfer absolutely or by way of mortgage or sublease of the lessee's interest in the property and provides that the lessee shall not by reason only of such transfer cease to be subject to any of the liabilities attaching to the lease. It is a matter of inference that the sub-section contemplated that while the liability of the lessee is preserved the assignee of the lessee may become liable to the lessor. But it does not say so and so far as the point has been considered the view appears to have been taken that the subsection cannot be construed as having that effect though liability may be established otherwise.

Section 65 (d) which is to be found in the chapter on mortgages deals with the case of a mortgage of a lease for a term of years. By the latter part of the sub-section taken with the section itself the mortgagor is deemed to contract with the mortgagee that he will so long as the security exists and the mortgagee is not in possession of the mortgaged property pay the rent reserved by the lease or, if the lease is renewed, the renewed lease, etc. This section also lends itself to the inference that where the mortgagee enters into possession of the mortgaged property he becomes liable to the lessor for the rent. But as to this too the comment has been made that the section only deals with the rights and liabilities of the mortgagee and mortgagor.

There are authorities from which it may be argued that possession is a determining factor but upon examination I do not think they support that view. In *E. Macnaghten* v. *Bhukaree Singh* (11), a case decided before the Transfer of Property Act, 1882, the judgment in favour of the plaintiff appears to be based upon the mortgagee's possession. The report, however, states that the mortgage was in the English form, though in the judgment itself it is stated that the contract between the plaintiff and the appellant who had taken a transfer of the mortgage from the transferee of the original mortgagee, was not before the Court. Though I think certain principles can be deduced as running through the later cases this authority to my mind is uncertain as a guide, though the principles to which I shall presently allude in no way conflict with it. In *Kunnye Lal Sett* v. *Nistarini Dassi* (12) it was decided that a mortgagee of leasehold property who is put into possession under circumstances which amount to an assignment or transfer of the leasehold interest becomes liable as a rule to pay the rent. The learned Chief Justice, however, in his judgment observed that S. 65 which relates to the duties of mortgagors contains no rules applicable to the case which was therefore governed by the general law. He seems to have regarded possession not as imposing liability per se, but as evidence from which he arrived at the conclusion that the lessee's interest had been wholly transferred. This was followed in *Lala Bharub Chandra Karpur* v. *Lalit Mohan Singn* (13).

In *Kunhamian* v. *Anjelu* (8), S. 65 was not referred to but S. 108 (j) was said not to exclude the liability of the assignee which was founded on the privity of estate created by the assignment and arising from the vesting of the assignor's interest in the assignee. *Madhubmony Dassee* v. *Nando Lal Gupta* (18) is a case which might at first sight appear to support the appellant bank, but though the learned Judges held that the lessor on the expiration of the original lease made a bargain with the lessee to hold over on an enhanced rent they also very definitely decided that the assignment did not pass the lease as well as the stock-in-trade and fixtures of the lessor who was a veterinary surgeon and livery stable-keeper. I agree with the learned Chief Justice in what he has said as to the observations of Russell, J., in *Vithal Narayan* v. *Shriram Savant* (15) which has been commented upon by Wallis, C. J., in *Thelhalan* v. *The Eralpad Rajah* (16), where the learned Chief Justice observed that in his opinion the authorities did not support the decision. I venture to think with all respect to the learned Judge that he overlooked that the decisions cited by him were founded on a complete assignment of the lessee's interest in each case and he seems to have regarded them as based upon an implication of S. 65, Transfer of Property Act. It is also to be observed that the mortgage in that case was not a mortgage in the English form, a material distinction which must be borne in mind in considering this class of cases.

In *Thethalan* v. *The Eralpad Rajah* (16) the English cases and the sections of the Transfer of Property Act were considered with reference to a mortgage of which the form is not given but which the judgment indicates was not in the form of an English mortgage as defined in S. 58 (e) of the Transfer of Property Act for it was not an out and out transfer of the mortgagor's interest. The head-note to the report, in that it does not distinguish between one form of mortgage from another, is misleading for the learned Chief Justice in his judgment differentiated as regards privity of estate between mortgages where the lessee mortgages his whole interest and

(18) [1899] 26 Cal. 338.

where a subsidiary interest is carved out of the lessee's interest.

The authorities to which I have referred, with the exception of *Vithal Narayan* v. *Shriram Savant* (15) appear uniformly to require that for the mortgagee to be liable for rent the whole of the lessee's interest must have been transferred. Where the mortgage is in the English form but little question arises; the difficulty is in those cases where the mortgage is in the form more generally employed in the mofussil. In those cases, as I read them, liability is not based upon possession as such, but the fact of possession has been taken into account as a matter for consideration in determining whether the whole interest of the lessee has been transferred to the mortgagee.

In the case with which we are concerned the whole interest of the lessees was assigned. The English rule as laid down in *Williams* v. *Bosanquet* (9) has been quoted by the learned Chief Justice and I need not repeat it. A similar rule has been followed in India in cases to which I have referred and indeed in *Thethalan* v. *The Eralpad Rajah* (16) the learned Chief Justice in referring to *Kunhamian* v. *Anjelu* (8) and *Kannye Lal Sett* v. *Nistarini Dassee* (12), accepted the view that it obtained in this country in cases of a complete transfer of the lessee's interest.

Though the lessee's only interest, apart from their right to a renewal of the lease, a point with which I have already dealt, was, at the date of the assignment, their interest as tenants who were holding over under S. 116 Transfer of Property Act, nevertheless in my judgment that was an assignable interest which was assigned by the document of the 19th February 1924 and the appellant bank is liable for the rent. I agree that the appeal should be dismissed with costs.

D.D. *Appeal dismissed.*

---

## * A. I. R. 1927 Calcutta 733

B. B. GHOSE AND S. C. MALLIK, JJ.

*Nalinakha Sinha*—Appellant.

v.

*Ram Taran Pal* and *others*—Respondents.

Appeal No. 1363 of 1924, Decided on 16th March 1927, from the appellate decree of the Dist. Judge, Murshidabad, D/- 26th May 1924.

(a) *Civil P. C., O. 41, R. 20 — One of two plaintiffs not appealing against dismissal of suit—Suit decreed in appeal — Defendant appealing but joining only the appealing plaintiff —Appeal is not infructuous.*

Two plaintiffs filed a suit which was dismissed. Plaintiff 1 did not appeal nor was he party to the appeal which was filed by plaintiff 2. The appeal was allowed in favour of both plaintiffs. Defendant then filed a second appeal in which plaintiff 1 was not impleaded.

*Held*: that his absence does not make the appeal infructuous. [P 735 C 2]

* (b) *Civil P. C., S. 105 — Interlocutory order made and costs allowed to the unsuccessful party — Party taking costs — He is not barred from challenging the order in appeal.*

If an interlocutory order is made in favour of one party but for some reason costs are allowed unconditionally to the unsuccessful party, the unsuccessful party is not precluded from questioning the order on appeal by accepting the costs of the hearing. [P 735 C 2]

(c) *Civil P. C., O. 6, R. 17—Suit by two plaintiffs—Whether one can apply for amendment.*

Whether a plaint of two persons can be amended on the application of one of them is a matter of doubt. [P 735 C 2]

(d) *Civil P. C., O. 6, R. 17—Defendant losing valuable right if amendment allowed — Amendment should not be allowed.*

Where a suit is brought for declaration of title and confirmation of possession, the Court generally allows an amendment asking for recovery of possession if it is found necessary to give the plaintiff the appropriate relief. But where by allowing the amendment, a valuable right of the defendant depending on limitation is lost, the amendment should not be allowed. [P 736 C 2]

(e) *Bengal Patni Regulation* (1819), *S. 14—Sale held under regulation can be set aside only as provided by S. 14.*

A sale held under the regulation can only be set aside by a suit as provided under S. 14, Regn. 8, 1819 and it cannot be challenged by proceedings of a different character. [P 736 C

(f) *Bengal Patni Regulation* (1819), *S. 14—Nature of suit illustrated.*

Where a suit was brought not only agains the zamindar and the purchaser but als

against one who had derived his title from the purchaser, as well as the previous owners of the patni,

*Held* : that the suit was not one for setting aside the sale under the patni regulation.

[P 736 C 1]

*S. C. Bose, S. C. Maiti* and *Apurba Charan Mukherji*—for Appellant.

*Brojo Lal Chakravarti, Gopendra Nath Das* and *Narendra Krishna Bose*—for Respondents.

**B. B. Ghose, J.**—This is an appeal by defendant 6 against the judgment and decree of the District Judge of Murshidabad reversing those of the Subordinate Judge of that place. Two plaintiffs brought the suit out of which this appeal has arisen. Defendant 1 was the zamindar of the property in question. He gave a usufructuary mortgage of the property to defendants 2 to 5 with possession. Within the zamindari there was a patni which is said to have been in the possession of pro forma defendants 7 to 12. Defendants 2 to 5 being in possession of the interest of the zamindar brought the patni to sale under Regu. 8, 1819 on the 1st Jeyth 1325 B. S. At the sale the patni was purchased by plaintiff 1. It is alleged that plaintiff 1 conveyed 8-annas share in the patni to plaintiff 2. The plaintiffs, after their purchase, did not pay the patni rent. For the arrears of the year 1326 B. S. the patni was again put up to sale on the 1st Jeyth 1327 B. S. under Regn, 8, 1819 and it was purchased by defendant 1. Defendant 1 being the zamindar himself, he created a patni with regard to the property in favour of defendant 6. The present suit was brought on the 18th May 1921. The question is as to the nature of the suit. The plaintiffs originally brought the suit as one for a declaration that the sale on the 1st Jeyth 1327 is illegal and void and does not affect the plaintiffs' right. They alleged that they, the plaintiffs, were in possession notwithstanding the regulation sale; and they made various statements as regards the right of defendants 2 to 5 to the property in question and also with regard to the service of notices required under the regulation. There was also a prayer for confirmation of possession. Various questions were raised in the trial Court. The Subordinate Judge decided the important issues against the plaintiffs and dismissed the suit. The principal questions decided by him were that the plaintiffs were out of possession and could not therefore maintain a suit for a merely declaratory decree under S. 42, Specific Relief Act; that defendant 2 was entitled to bring the patni to sale under Regn. 8, 1819; and that the notices required to be served under the regulation were duly served.

Against that decree only plaintiff 2 preferred an appeal to the Court of the District Judge. Plaintiff 1 was not a party to the appeal either as appellant or as respondent. Before the appellate Court the appellant, plaintiff 2, only applied for amendment of the plaint. Notwithstanding the objection of the respondents the learned Judge allowed the amendment asked for, which was to this effect: That if the Court holds that the plaintiffs were dispossessed by the defendants a decree for khas possession may be made in favour of the plaintiffs and the plaintiffs may be directed to pay the ad valorem Court-fee. This amendment was made on the 29th April, 1924. After having allowed the amendment the District Judge was of opinion that the question as regards the maintainability of the suit did not any longer arise. He next decided the other questions raised in the case, namely, first, whether the predecessor of defendants 2 to 5 had any right to put up the property to sale under Regn. 8, 1819; and, secondly, whether the usufructuary mortgage in favour of the predecessor of those defendants was invalid and void in law. These two questions he decided against the plaintiffs. The third question was with regard to the service of the requisite notices. This he decided in favour of the appellant and thereupon he allowed the appeal and made this decree: that the patni sale in question be declared void and the plaintiffs be restored to possession of the patni mahal (as it stood before the sale in question) ousting the defendants therefrom. Defendant 6, who took the patni from defendant 1 after his auction purchase in Jeyth 1327 B. S., is the appellant in this Court and he has made plaintiff 2 and the other defendants respondents in this appeal.

The contention on behalf of the appellant is: first, that the suit is not a suit as contemplated under S. 14, Regn. 3,

1819 and that it is the only suit that is allowed to the previous patnidars under the law for reversing the patni sale under the regulation. The second contention is that the amendment of the plaint ought not to have been allowed having regard to the fact that at the time when the amendment was allowed the right of the plaintiff was barred by limitation and the valuable right acquired by defendant 6, the appellant before us, was affected by this amendment. It was also endeavoured on behalf of the appellant to show that the decision of the lower appellate Court with regard to the question of notices was arrived at upon insufficient grounds and on erroneous reasonings. With regard to the last ground it is not possible for us to examine the findings of the learned Judge in the Court below. These are questions of fact and I do not think we can interfere with his finding in second appeal even if the reasons of the learned Judge be unsatisfactory. The only questions which remain to be decided are, first, with regard to the question of amendment; secondly, whether the suit as framed is maintainable under the law.

Before I deal with the arguments on behalf of the appellant the ground should be cleared by disposing of two objections raised on behalf of the respondent-plaintiff 2 who will henceforth be described as the respondent. Defendant 1 appears in this Court and he supports the argument of the appellant. It is urged, first, on behalf of the respondent that this appeal is not maintainable on the ground that plaintiff 1 has not been made a party respondent. Plaintiff 1 was not a party in the lower appellate Court. He did not appeal against the decree of the Subordinate Judge and it may be taken that he was content with the decree that was passed by the trial Court. It is urged that the effect of the decree of the District Judge is that it was in favour of the appellant before the Court, that is plaintiff 2, as well as plaintiff 1 who was no party to the appeal and that in order to have the decree set aside by his appeal here, defendant 6 was bound to implead plaintiff 1 along with plaintiff 2 in this Court. Not having done so the appeal is incompetent. In my judgment no substantial reason has been shown in support of this contention. If the appellant had impleaded that plaintiff in this Court he might have come and said:

> I have no concern with the case since it was disposed of by the trial Court. I was satisfied with that decree and did not further question the right of the defendants. The appellant having dragged me up here unnecessarily is bound to pay me the costs, whatever might be the result of his appeal.

What answer then could the appellant have to that claim? No authority has been cited before us in support of the contention that the absence of that plaintiff makes the appeal infructuous. I do not therefore think that the appellant was bound to make that plaintiff a party to this second appeal and that the appeal should fail on that ground.

The next objection urged is this: That with regard to the application for amendment of the plaint before the District Judge he heard the pleaders of both sides and he made the order in favour of the plaintiff-appellant allowing the respondents' costs for that hearing. As the respondents have realized the costs, it is not open to them to contend here on appeal that the amendment was wrongly allowed. I am unable to accept this contention. If an interlocutory order is made in favour of one party but for some reason costs are allowed unconditionally to the unsuccessful party, I do not think that the unsuccessful party is precluded from questioning the order on appeal by accepting the costs of the hearing. This argument seems to me to be of no substance.

I shall next deal with the questions raised by the appellants namely whether the amendment was properly allowed or not and if so allowed what would be its effect. One defect in the order of amendment is that the plaint was the plaint of two plaintiffs. The application for amendment was made by only one of them, without any reference to the other. Whether the plaint of two persons can be amended on the application of one of them seems to be a matter of doubt, but apart from that, the question in this case is with regard to the substance of the amendment. It is argued on behalf of the appellant that this amendment takes away the valuable right which the appellant had acquired by reason of limitation. The respondent on the other hand contends that all the necessary facts were stated in the plaint and the

amendment was only a verbal amendment which does not alter the nature of the suit. Strong reliance is placed on the case of *Charan Dass* v. *Amir Khan* (1). It is argued that the present case bears a strong resemblance to the case before the Judicial Committee.

There an amendment was allowed under peculiar circumstances which was asked for in the trial Court but was refused. That case and the present seem to me to be quite different in essential matters, which I need not state in detail. It is quite true that where a suit is brought for declaration of title and confirmation of possession, the Court generally allows an amendment asking for recovery of possession if it is found necessary to give the plaintiff the appropriate relief. But the difficulty in the present case does not seem to me to lie there. The sale is in this case held under the provisions of the statute and the statute provides how a suit can be brought for setting aside a sale held under it. In my judgment a sale held under the regulation can only be set aside by a suit as provided under S. 14, Regn. 8, 1819 and it cannot be challenged by proceedings of a different character. The relevant provisions of the law are contained in paras. 2 and 3 Cl. 1, S. 14, Regn. 8, 1819. They are these :

It shall, however, be competent to any party desirous of coutesting the right of the zamindar to make the sale, whether on the ground of there having been no balance due, or on any other ground, to sue the zamindar for the reversal of the same, and upon establishing a sufficient plea, to obtain a decree with full costs and damages. The purchaser shall be made a party in such suits, and upon decree passing for reversal of the sale, the Court shall be careful to indemnify him against all loss, at the charge of the zemindar or person at whose suit the sale may have been made.

Such a suit as this must be brought within one year under Art. 12 (d) of the Limitation Act. The limitation for this suit as originally framed is six years and the period of limitation for the suit for possession, as amended, is 12 years. This suit cannot be held to be one under the regulation. The suit was brought not only against the zamindar and the purchaser but also against defendant 6 who had derived his title from the purchaser as well as the previous owners of the patni before the sale of 1325. Under these circumstances it can hardly be held that the present suit as originally framed or even after the amendment was one for setting aside the sale under the patni regulation. That the District Judge who allowed the amendment did not treat the suit as such is apparent from the fact that no provision was made in his decree for indemnifying the purchaser at the auction sale. The right of the purchaser to bring a suit against the zemindar was barred when the amendment was allowed on 29th April, 1924. It cannot also be said that the plaintiffs brought the suit in the present form under any misapprehension. Suits for setting aside a patni sale are quite common and it is not explained why the suit was brought in such a form or why no proper amendment was asked for in the trial Court in spite of an objection raised by the defendants. As a rule we are always willing to allow amendment of pleadings in a proper case, and might have allowed it in this case even here, in order to make this a suit under the patni regulation had not the rights of others been prejudicially affected. Defendant 6 has paid a considerable sum of money as selami in order to obtain a patni from the zamindar. By allowing an amendment the valuable right which defendant 6 has obtained on the ground of limitation will be prejudiced. On general principles therefore such amendment should not be allowed.

Under these circumstances in my judgment this appeal should succeed and the plaintiffs' suit dismissed with costs. Plaintiff 2 alone will be liable for the costs in this Court as well as in the lower appellate Court.

**Mallik, J.**—I agree.

D.D. *Appeal allowed.*

---

(1) A.I.R. 1921 P.C. 50=48 Cal. 110=47 I.A. 255 (P.C.).

## * A. I. R. 1927 Calcutta 737

B. B. GHOSE AND ROY, JJ.

*Susil Kumar Biswas* and *others*—Plaintiffs—Appellants.

v.

*Rajani Kanta Chakrabutty* and *others* Defendants—Respondents.

Appeals Nos. 458 and 576 of 1925, Decided on 22nd July 1927, from the appellate decrees of the Sub-J., Faridpur, D/- 18th November 1924.

* *Landlord and Tenant—Rent—Suspension—English common law rule of, is to be applied in exceptional cases, as a rule of equity—Court should apportion wherever possible — Lump rent—Tenant not put in possession of part of leased property—Rent per acre or bigha—Rule of suspension does not apply.*

The technicalities of the English common law as to the rule of suspension of rent should not be imported in this country, particularly in the mofussil, irrespective of any consideration whether the application of such rule would meet the ends of justice. To hold that, in every case of dispossession of the tenant from a part there should be an entire suspension of rent so as to entitle the tenant to hold the remainder rent-free in perpetuity, is not consistent with justice. [P 739 C 2]

The Court should always endeavour to apportion the rent whenever possible and be very careful in applying the rule of suspension of rent which is to be applied in India as a rule of equity, justice and good conscience and which can only be allowed in exceptional cases having regard to the circumstances of the case. [P 740 C 1]

The doctrine of suspension of payment of rent, where the tenant has not been put in possession of part of the subject leased has no application to a case where the stipulated rent is so much per acre or bigha. But it cannot be laid down that where the rent is fixed in a lump, there would be suspension of rent on the ground of dispossession of a part of the demised premises by the landlord and there should not be any apportionment in any case: *A. I. R.* 1925 *P. C.* 97, *Expl.* and *Rel. on.*; *Reeve* v. *Bird* (1834) 1 *Cr. M. & R.* 31; *Stokes* v. *Cooper* (1814) 3 *Camp.* 514 *n*; *Neale* v. *Mackenzie* (1836) 1 *M. & W.* 747 and *Upton* v. *Townend* (1885), 17 *C. B.* 30, *Expl.* [P 740 C 1]

*Prokash Chandra Majumdar*—for Appellants.

*Jadu Nath Kanjilal* and *Nirmal Chandra Chakravarti*—for Respondents.

**Judgment.**—These appeals are by the plaintiffs and arise out of two suits for rent. The suits are based upon two kabuliyats Exs. B and B (1), which refer to eight-annas share each of the land in question which originally belonged to two owners. The plaintiffs have purchased the interest of both the landlords and thus they are entitled to both the shares. The fact that there were two kabuliyats was the reason for bringing two suits. The question in both the appeals is the same. The defendant pleaded that there was no relationship of landlord and tenant between the parties; and secondly, that the whole rent had been suspended as they have been dispossessed of some portion of the demised premises. The following may be taken from the judgment of the lower appellate Court which dismissed the plaintiffs' suit affirming the decision of the Munsif.

> The defendant is an auction-purchaser of the tenancies at a rent sale held at the instance of the plaintiffs. So the defendant is a tenant under the plaintiffs in respect of the tenancies in arrears. Now, the question is whether the plaintiffs are entitled to get a decree for the arrears claimed, and this leads us to the consideration of the next point. . . . . .

Then the Subordinate Judge states the history of the previous litigations and the fact that the plaintiff obtained a decree for rent for the year 1314 B. S., the landlords put the tenure to sale in execution of that decree and both the tenancies were purchased by the defendant under two sale-certificates, Exs., K and L. The Subordinate Judge then states that

> after the purchase the defendant took symbolical possession but, when he attempted to take actual possession he found that out of an area of 94 bighas, 14½ cottahs of lands covered by the two kabuliyats, nearly 50 bighas of lands were in possession of Bidan Sheikh and others, who secured a lease from the landlords on the basis of a subsequent registered kabuliyat Ex. M.

The Subordinate Judge finds that the kabuliyat Ex. M. was accepted by the landlords and it was so conceded on behalf of the plaintiffs before him. It was also found that the 50 bighas out of the kabuliyat Ex. M. were actually portions of the lands of the aforesaid two kabuliyats Exs. B and B (1) executed by the previous tenant. The question that the Subordinate Judge decided was that, under the circumstances, there should be an entire suspension of rent with regard to these two tenancies. There is another fact which should be mentioned, that both the kabuliyats were permanent leases. Ex. M also appears to have been a permanent lease. The question to be decided in this case is whether on account of such dispossession of the tenant the entire rent should be suspended. There is one other fact which should be mentioned that the rent

reserved in the kabuliyats was Re. 1-10-0 per bigha and not a consolidated rent for the entire area that was stated in the kabuliyats to have been demised to the defendant. The rule that rent is suspended on account of dispossession of the tenant from a portion of the demised premises is one derived from the English common law. An application of this rule to this country in its rigid form can hardly lead to justice. The origin of the rule in England has its historical basis. I need not detail those circumstances. The application of this rule may be salutary in certain circumstances but it can only be applied in this country as a rule of equity, justice and good conscience. In many cases where permanent leases are granted to tenants of lands which have not been measured or the boundaries of which are indefinite, it so happens that when a lease is granted of contiguous lands to another tenant, the subsequent tenant oversteps the boundaries of his leasehold and encroaches upon the lands included in the former lease. In such a case, if the previous tenant does not take any steps to recover possession of his own property and allows the trespasser to remain in possession for the statutory period, he has been held in some of the cases decided in this Court, to be entitled to raise the plea of suspension of rent if under that circumstance the landlord sues him for rent. This appears to me to be a wrong application of the rule of suspension of rent. In England, so far as I have been able to see, the rule is not so stringent, The cases which are relied upon as having decided the question in England in favour of suspension of rent may be examined to see whether they support the rule as applied here to the full extent. The first of the case is *Reeve* v. *Bird* (1). That was a case in which the landlord brought assumpsit for not keeping a certain messuage and other premises in tenantable repair. The facts are these, which may be taken from the head-note:

A, the tenant of a house, three cottages and a stable and yard, let at an entire rent, for a term of seven years, before the expiration of the term assigned, all the premises to B, for the remainder of the term, the house and cottages being in the possession of under-tenants, and the stable and yard in that of A. The landlord accepted a sum of money as rent up to the day of the assignment, which was in the middle of a quarter. B took possession of the stable and yard only. The occupiers of the cottages having left them after the assignment, and before the expiration of the term, the landlord re-let them. A paid no rent after the assignment, but the landlord received rent from the under-tenants. Before the expiration of the term the landlord advertised the whole of the premises to be let or sold.

It was held under the circumstances that there was a surrender by operation of law of all the premises and the plaintiff was non-suited. Baron Alderson concluded his judgment thus:

Under all these circumstances, the question is, whether the plaintiff did not accept another person as his tenant; and whether there was not, consequently, a surrender by operation of law. If the question had been left to the jury, they could hardly have entertained any doubt.

The case, therefore, is not a case of suspension of rent for dispossession of a portion of the premises by the landlord. In the course of the argument, however, the counsel for the landlord argued that

although, after an eviction from part, the landlord cannot recover upon the original contract and the tenant by giving up possession of the remainder is entirely discharged, yet that, if the tenant after the eviction continues in possession of the residue, he may be liable upon a quantum meruit,

and he cited the case of *Stokes* v. *Cooper* (2), in support of his contention. Baron Parke observed that

that decision was at variance with the older authorities. The distinction was between an eviction by the landlord and an eviction by a stranger.

On the basis of this observation by Baron Parke, this rule has been held to be established but, as will be found in a note at page 193 in Foa's "Landlord and Tenant," (6th Ed.), where, citing the case of *Reeve* v. *Bird* (1), as well as *Neale* v. *Mackenzie* (3), the learned author observes:

In neither of these cases, however, it was actually decided (in accordance with Parke B.'s dictum and as it seems with principle) that no payment of compensation in lieu of rent could be enforced if possession of the residue be retained. The law is also stated to the effect given in the text in I Wms. Saund, 211 (Ed. 1871).

By reference to Wms. Saund it will be found that the learned editor deals with the previous cases including *Neale* v. *Mackenzie* (3), and the opinion of Dallas, C. J., in *Stokes* v. *Cooper* (2), is cited as having laid down that, even where there was an eviction from a part of the demised premises by some act of

(1) [1834] 1 Cr. M. & R. 31=4 Tyr. 612=3 L. J. Ex. 282.

(2) [1814] 3 Camp. 514n=14 R. R. 829n.

(3) [1836] 1 M. & W. 747=3 L. J. Ex. 263=2 Gale. 174.

the lessor, the tenant may be liable upon the quantum meruit if he continues in possession of the residue.

The next case I propose to deal with is the case of *Neale* v. *Mackenzie* (3). That was a case of trespass for breaking and entering the dwelling-house of the plaintiff, and seizing and distraining divers household furniture, etc., (see for the facts the report of the case in the Court of Exchequer, 2 C. M. & R. 84). There a lessee of 100 acres of land accepted the lease and entered upon the land. Upon his entry he found eight acres in the possession of a person entitled under a fixed lease from the lessor and that person remained in possession until a half-year's rent became due, and excluded the lessee from the enjoyment during that period, the lessee continuing in possession of the remainder. The prior lease was for a term extending beyond the duration of the latter lease. It was held, on appeal (reversing the judgment of the Court of Exchequer) that the latter demise was wholly void as to the eight acres : and that the rent was not apportionable, and the lessor was not entitled to distrain for the whole rent or any part of it. It was argued on behalf of the plaintiff (the tenant)

> whether he (the landlord) has a right to distrain or not depends on the question whether the rent, under the circumstances disclosed in the pleadings, was apportionable or not.

Lord Denman, C. J., observed in his judgment at page 263 :

> We are not aware of any case where an entire rent reserved has been held to be apportionable, in which the tenant has not been at some period subject to the entire rent by virtue of the demise. Here, the right of apportionment is not founded upon any eviction, or other matter occurring subsequently to the demise, but upon an original defect in the demise itself by which the entire-rent was reserved.

His Lordship next dealt with the case in which apportionment was allowed. The observation that I desire to make on this case is that it was decided with reference to the right of the landlord to distrain under the English law. The power of distress there is said to have been derived from the ancient feudal law. This power became the means of great oppression in the hands of the barons and continual enactments were passed for a series of years for the protection of tenants. The right of distress is hemmed in with a number of conditions. One of the conditions of the right to distrain at common law is that there must be an actual demise at a fixed rent : See Woodfall, Landlord and Tenant, 21st edition, pp. 525, et seq, p. 534 ; Foa, 6th edition, p. 533. In order to appreciate the decision in that case one must bear in mind the technicalities of the common law in England as regards the right of distraint. But even in that case Lord Denman did not lay down any rule that there can be no apportionment of rent where the landlord dispossesses the tenant of a portion of the demised premises subsequent to the demise and the tenant continues in occupation of the rest. The last case which is often cited in support of the rule is the case of *Upton* v. *Townend* (4). The facts of this case are very peculiar and I need not discuss them in detail. Eviction by the lessor may be an answer to the claim on the covenant, but it seems that the landlord is not absolutely debarred from claiming upon the quantum meruit for the remainder in posession of the tenant. I do not think that the cases can be said to have laid down any general rule as stated in some of the decided cases here.

But whatever may be the law in England I do not think that the technicalities of the English common law should be imported in this country, particularly in the mofussil irrespective of any consideration whether the application of such rule would meet the ends of Justice. It is conceivable that cases may arise where suspension of rent as a penalty may be properly imposed on the landlord, e. g., when a house is let and the landlord dispossesses the tenant from some of the rooms depriving the tenant of the enjoyment of the house. But to hold that in every case of dispossession of the tenant from a part there should be an entire suspension of rent so as to entitle the tenant to hold the remainder rent free in perpetuity, where the lease is permanent and the landlord is unable to put the tenant into possession of the whole for some reason or other, seems to me ,hardly consistent with justice. We may apply any rule of English Law as a rule of equity, justice and good conscience with reference to the circumstances of a case, but such a rule must be applied with caution. In this country

(4) [1855] 17 C. B. 30=1 Jur. (N. S.) 1039=25 L. J. C. P. 44=4 W. R. 56.

the Courts are always open to the tenant to give redress in the case of a trespass by any person. If the tenant does not take any step, but allows the trespass to continue it may be because he finds it advantageous to himself. I do not see why he should not pay rent for the land of which he remains in possession. In my judgment the Court should always endeavour to apportion the rent whenever possible and be very careful in applying the rule of suspension of rent which can only be allowed in exceptional cases having regard to the circumstances of the case.

The rule of apportionment of rent has been applied in several cases in this Court: See *Dhunput Singh* v. *Mahomed Kazim* (5) and *Annada* v. *Mathura* (6). This case was dissented from in *Manindra* v. *Narendra* (7) relying upon *Neale* v. *Mackenzie* (3), which I have already dealt with; *Rai Charan Shar Muzumdar* v. *Administrator-General* (8) and *Narendra* v. *Manindra* (9).

I should, however state that the present case falls within the observations of their Lordships of the Privy Council in the case of *Katyayani Debi* v. *Udoy Kumar Das* (10). At page 166 (52 *I. A.*) their Lordships say:

> The doctrine of suspension of payment of rent, where the tenant has not been put in possession of part of the subject leased, has been applied where the rent was a lump rent for the whole land leased, treated as an indivisible subject. It has no application to a case where the stipulated rent is so much per acre or bigha.

In the present case, the rent was stipulated at Re. 1-10-0 per bigha. So, according to this observation, the rule can have no application to the present case. But I venture to think that their Lordships did not lay down that where the rent is fixed in a lump, there would be suspension of rent on the ground of dispossession of a part of the demised premises by the landlord and there should not be any apportionment in any case, It was not necessary for their Lordships to express either disapproval or approval of the application of the doctrine of suspension of rent in the cases in which it has been applied, but their Lordships only stated the circumstances in which it has been applied. In my opinion the judgment and decree of the Subordinate Judge must be set aside.

The next thing we have to consider is whether a decree should be made in favour of the appellant here or the case sent back for further consideration. The only consideration necessary in this case is to find what is the actual area in the possession of the tenant. The kabuliats mention 94 and odd bighas as being included in the demised premises. If the tenant has been dispossessed by the landlord of any land having less than 94 and odd bighas in his possession, he is entitled to an abetment of that quantity of land at the rate of Re. 1-10 annas per bigha. If it is found that the tenant is in possession of the full area of 94 bighas and odd, then the landlord would be entitled to the rent which has been claimed at the rate of Re. 1-10 annas per bigha. There has been a local investigation in this case. But it is disputed before us by the learned advocate for the defendant-respondent that the commissioner has not found definitely what is the area of the land actually in possession of the defendant as comprised within the kabuliyats, Exs. B and B (1). The learned vakil for the appellant informs us that, according to the measurement of the commissioner of the lands, as pointed out by the defendant as comprised within their kabuliyats the land in their possession is much in excess of 94 and odd bighas. As the point is disputed and the evidence does not appear to have been dealt with by the Court below at the request of the learned advocate for the defendant-respondent we send back the case to the Court below in order to come to a decision as to the actual area in the possession of the defendant. In no case, however, the plaintiffs could be entitled to a decree for any amount in this suit in excess of their claim. The plaintiffs-appellants are entitled to the costs of the appeal as well as the costs of the Courts below. The subsequent costs will depend upon the result.

Whether or not the parties will be allowed to adduce additional evidence will be considered by the lower Appellate Court in the exercise of its discretion.

(5) [1896] 24 Cal. 296.
(6) [1909] 13 C. W. N. 702=2 I. C. 123=9 C. L. J. 585.
(7) [1919] 46 Cal. 956=52 I. C. 13=23 C. W. N. 585,
(8) [1909] 36 Cal. 856=9 C. L. J. 578=2 I. C. 169=13 C. W. N. 853.
(9) A. I. R. 1922 Cal. 153=49 Cal. 1019.
(10) A. I. R. 1925 P. C. 97=52 Cal. 417=52 I. A. 160 (P. C.).

But any order for adducing additional evidence by the defendant must depend upon his previous payment of costs of all the Courts and appeals hitherto incurred.

D.D. *Case sent back.*

---

## * A. I. R. 1927 Calcutta 741

B. B. GHOSE AND G. N. ROY, JJ.

*Indu Bhusan Bose* and *others*—Defendants—Appellants.

v.

*Sarajubala Debi* and *others*—Plaintiffs—Respondents.

Appeal No. 172 of 1921, Decided on 28th February 1927, from the original decree of the 4th Offg. S-Judge, Dacca, D/- 30th June 1921.

* *Fishery — River shifting — Grantee can follow so long as waters form part of river system—But he cannot claim right over another's land also because the river flowed there for a short time.*

In Bengal it is settled that the Government's grantee can follow the shifting river for the enjoyment of his exclusive fishery so long as the waters form part of the river system within the upstream and the downstream limits of his grant, whether the Government own the soil subjacent to such waters as being the long established bed, or whether the soil is still in a riparian proprietor as being the site of the river's recent encroachment: *A. I. R.* 1914 *P. C.* 48, *Appl.* [P 743, C 1]

But there is no authority for the proposition that the grantee would not only enjoy the right of fishery in the bed of the tidal navigable river as granted, but would also retain the right of fishery on the land of another over which the river flowed for a short interval but ceased to do so, if there is a sheet of water on defendants' land which is connected with the river. [P 744, C 1]

*Jogesh Chandra Roy, Gobinda Chunder De Roy, Troilakhya Nath Ghose, Asita Ranjan Ghose, Prakash Chandra Pakrashi* and *Kiron Kumar Roy*—for Appellants.

*Dwarka Nath Chakravarti, Surendra Nath Guha, Upendra Lal Roy, Jitendra Kumar Sen Gupta* and *Kiron Mohan Sircar*—for Respondents.

**B. B. Ghose, J.**—This appeal arises out of a suit for declaration of right to and recovery of possession of fishery right in a piece of water, described as a jala or kole, lying within the estate of defendants 1 to 9 called Chandabar, by virtue of the plaintiffs' right to two jalkars named Bartail and Chandraghope Nayaganga. Plaintiffs allege that Bartail appertains to touzi No. 9316 and Chandraghope Nayaganga to touzi No. 1180 of the Dacca Collectorate, both permanently settled estates. Plaintiffs, including the original defendants 42 and 43, who were transferred to the category of plaintiffs, claim 10-annas share of jalkar Bartail and 12-annas share in jalkar Chandraghope Nayaganga in accordance with their shares in the two estates. Their case is that the two jalkars were different names of portions of a big tidal navigable river now named Dhaleswari. This river flowed to the east of a certain number of mauzas, Chamta, Chandhar and others. In 1897 the river broke through the lands of the mauzas lying on its west and flowed over those lands. It continued to do so till about 1910. In 1911 the river again turned towards the east and returned more or less into its old bed, but it had a channel over the jala in dispute through which it continued to flow as it did through the channel on the east. The plaintiffs allege that the jala in claim forms a part of the river system and so they are entitled to the fishery right in it as they have in the main channel. The plaintiffs enjoyed their fishery right till about the end of 1913 when they were dispossessed by the defendants of a portion of the jala. They annexed a plan to their plaint which showed that the jala in suit is connected with the river at both ends, flowing out of it and into it. The Court below made a decree in favour of the plaintiffs. The principal defendants who are the owners of estate Chandhar appealed to this Court. The other defendants were lessees of the fishery rights under the appellants. The appeal was heard previously by a Division Bench of this Court. The learned Judges remanded the case to the Court below by an order dated the 15th August 1924 for findings on certain points stated, without deciding any of the questions raised before them, retaining the appeal on the file of this Court. The parties led evidence before the lower Court after remand which was recorded by a different Subordinate Judge, while the findings on the questions required by this Court were recorded by a third Subordinate Judge. The appeal has now

come up before us for hearing on all the questions raised.

The disputed jalkar is part of a sheet of water which is marked below in the case map leaving out portions to the north and to the south of it. The defendants do not deny nor are they interested in denying that the plaintiffs had a right to jalkars Baratail and Chandraghope Nayaganga, but what they say is that those jalkars were not in the bed of the large navigable river Dhaleswari which is not a new name given to the river as alleged. They state that the plaintiffs' jalkars were in two small rivers within their estates which are depicted in the survey map of 1858-59 (Ex. 36a) as existing in the land between Boorigauga and Dhaleswari rivers. It was in 1861 during resumption proceeding that a Mr. Wise, the predecessor-in-interest of the plaintiffs, set up the case that those two jalkars were in the bed of the river newly called Dhaleswari. This claim was negatived by the revenue authorities, but Wise succeeded in two civil suits, Nos. 35 and 44 of 1863, in establishing his right to the fishery in the bed of the Dhaleswari river as against the Government on the ground that the right of the Government to the fishery was barred by limitation. The defendants contend that the plaintiffs may have acquired a right to fish in a portion of the bed of the river by prescription against Government, but they are not clothed with the rights of a grantee of the fishery right in a river from the Government with the result that they should be held entitled to a fishery right on another's land on the ground that the river flowed on that land by changing its course.

The second point is that the disputed jala is entirely closed on the north end and it is not connected with the river throughout the year on its south-east end as shown in the case map, and therefore the plaintiffs cannot claim any fishery right in it under any circumstance.

It is next urged that, even assuming that there is some connexion of the jala with the river, it, not being a flowing stream, is not a part of the river system and the plaintiffs cannot have a right of fishery in it.

It would be convenient to record my opinion first on one matter remitted by this Court on the previous occasion for a finding and that is with regard to the upstream and downstream limits of the right of fishery of the plaintiffs in the river Dhaleswari. Whether that right was by grant limited to territorial waters of the river, or of a several exclusive fishery, or whether the right was acquired by prescription prior to the change in the course of the river, the evidence with regard to those limits is the same. The Subordinate Judge has after remand found that the northern limit of plaintiffs' right in the bed of the river is much to the north of the horizontal line drawn from the north end of the jala or kole in question, and the southern limit is also far to the south of the south-eastern end of the jala. It is argued by the appellants that these limits could not be satisfactorily found unless a commission was taken and the places with reference to which those limits have been found were pointed out in the locality and depicted in the map prepared by the commissioner. That course would no doubt have been more satisfactory. But the Subordinate Judge has gone elaborately into the evidence and has come to his conclusion. I do not find any reason to differ from his opinion.

The most important question of fact in this case is whether the disputed jala or kole is connected with the main stream of the river Dhaleswari throughout the year. Admittedly plaintiffs can not succeed in this case if they fail to establish this fact. (The judgment then discussed the evidence and continued as follows as regards the evidence of the plaintiffs.) Their evidence does not satisfy me that there is connexion at all seasons of year. On the contrary the evidence is ample that at certain seasons of the year there is no connexion. The fact that the plaintiffs have advanced no claim to the jala to the north or to the south of the portion of the disputed kole also supports that conclusion. This finding disposes of the case, but as the other questions have been elaborately argued I think I should deal with them also.

I shall then take up the question whether assuming there is some connexion throughout the year between the jala and the river the plaintiffs are in the circumstances of this case entitled

to the jalkar claimed on the ground that it is a part of the river system. Both parties have cited and commented at length on the case of *Sreenath Roy* v. *Dinabandhu* (1). That was a case in which the right to follow the river was in question, but all the cases cited before us were referred to by their Lordships of the Privy Council in their judgment. Each party claims that the principles laid down in that case favour his contentions. Their Lordships say:

> It must now be taken as decided in Bengal that the Government's grantee can follow the shifting river for the enjoyment of his exclusive fishery so long as ths waters form part of the river system within the upstream and the downstream limits of his grant, whether the Government own the soil subjacent to such waters as being the long established bed, or whether the soil is still in a riparian proprietor as being the site of the river's recent encroachment: 41 I. A. at p. 235.

Again, in dealing with the question of injustice to the landowner their lordships observe (at p. 246):

> There is some begging of the question here; the waters are not his waters, nor is the change confined to the flooding of his fields. It is the river that has made his land its own: the waters are the tidal navigable waters of the great stream. In physical fact the landowner enjoys his land by the precarious grace of the river, whose identity is so persistent, and whose character is so predominating, as almost to amount to personality; and is it fundamentally unjust that in law too he should lose what he has lost in fact, and be precluded from taking in substitution for his lost land an incorporeal right which has been granted not to him but to another? The sovereign power lawfully invests its grantee with jalkar rights in part of the river; is it unjust that when that river shifts its course, changing in locality but not in function, the owner of those rights should still enjoy them in that self-same river, instead of being despoiled of them by the course of nature, which he could neither foresee nor control?

In my judgment none of the circumstances mentioned above applies to this jala or kole in question. The river which made the defendants' land its own has given it up. The waters cannot be said to be the waters of the great stream. The land lost has been thrown up and the defendants do not claim an incorporeal right. The owners of the jalkar right in the river, of which they claim to be the grantees from the sovereign power, still enjoy the self-same right in the bed of the river, but they want to have some thing more than what was granted to them because the river for some time gave up its bed and flowed over the defendants' land, but having gone back to its old bed has left a sheet of water on defendants' land through which it does not now flow, but touches it at some place. On what principle can the plaintiffs get an extension of their right and the defendants be deprived of the right to fish in their own water, because it happens to be connected with the river? The claim is sought to be supported, as it were, on the ground that unto every one that hath a grant of a several fishery shall be given, and he shall have abundance; but from him who hath not such a grant shall be taken away even that which he hath. This seems to me to be very questionable justice. If the plaintiffs' contention be correct then a sand barrier of a few inches saves the right of the defendants and its absence takes it away. I am of opinion that the jala is not a part of the river system in its present condition.

But it is contended on the part of the plaintiffs that their case is supported by authority and the cases of *Bhaba Prasad* v. *Jagadindra Nath Rai* (2) and *Krishnendro* v. *Surno Moyee* (3) are cited. The first case cited is in my opinion quite different in its facts and does not apply to the present circumstances. There plaintiffs had a jalkar right in the river. Portions of the bed dried up leaving certain dobas. The proprietor of the zamindari dispossessed the plaintiffs of their right of fishery in those dobas. It was held that the grantees of the fishery would not lose their right of fishing in the dobas so long as they are connected with the river throughout the year. It was not a question of extension of the right under the original grant, but of retaining the right of the grantee of the right of fishery in the original bed of the river so long as a piece of water in its bed is connected with the main stream. The case of *Krishnendro* v. *Surno Moyee* (3), however, is similar to the present case on the facts. There the Court reluctantly followed the rule which it deemed to have been settled by two cases which it considered it was bound to follow. If, however, the two cases referred to are examined, it will be found that they are not cases in which the river broke through the land of

(1) 41 I. A. 221=A. I. R. 1914 P. C. 48=42 Cal. 489 (P. C.).

(2) [1906] 33 Cal. 15=9 C.W.N. 934.
(3) [1873] 21 W. R. 27.

another person and then returned to its old bed abandoning the new channel. The case of *Kalee Soondur Roy* v. *Dwarkanath* (4), which was thought to be precisely similar was, it seems to me, a case where it was held that the right of fishery in the dried up portion of the bed of a river is not lost if the water in it is connected with the main stream. The defendants who acquired a right to the land by accretion would hold it subject to the plaintiffs' prior right of fishery. It was not a case, as I have already stated, of plaintiffs having his own original right of fishery and getting also the right in the waters on defendants' land. The other case of *Grey* v. *Anund Mohan* (5) was also one of right of fishery in the bed of the river included in the original grant which bed was left, but there were some koles. There is therefore no authority properly so called which lays down that the plaintiffs would not only enjoy the right of fishery in the bed of the tidal navigable river as granted, but would also retain the right of fishery on the land of another over which the river flowed for a short interval but ceased to do so, if there is a sheet of water on defendants' land which is connected with the river. In my opinion the plaintiffs cannot maintain such a right.

The last qu stion is whether there was a grant of several fishery in the bed of the river Dhaleswari by the Government to the plaintiffs. The earliest document of the plaintiffs is Ex. L, dated 1791. By it fishery of Chandraghope Nayaganga was leased out by the plaintiffs' predecessor as appertaining to certain mauzas within the grantor's purchased taluk. Similarly by Ex. L1 dated 1814, fishery in river Bartail appertaining to Joarh Bartail within the grantor's Kharija taluk was let out. In the quinquennial papers of 1796-97 (Exs. 6 and 7) submitted by the zamindar, the jalkars were included in the return of two taluks Ram Kishore Basu. The predecessor of the plaintiffs, Mr. Wise, was exercising right of fishery in the river Dhaleswari, and in 1860-61 resumption proceedings were taken under Regulation 11, 1819 with regard to the fishery by the revenue authorities. By an order of the Collector, dated 23rd July 1861, the jalkars were resumed on the ground that no grant was made of fishery in the river Dhaleswari. This order was confirmed by the Commissioner. Mr. Wise then brought two suits in the civil Court for confirmation of possession and title to the two jalkars, Bartail and Chandraghope Nyaganga, both described as recently called Daleswari. Those were suits No, 35 and 44 of 1863. In the judgment of the Principal Sadar Amin two issues were raised [Ex. 23 (a)] : (1) whether the order of Government of assessment of revenue on the said jalkar is barred by limitation or not; and (2) whether the plaintiff has got zamindari interest in the disputed jalkar, or whether the Government has got its ordinary right. The Judge held that although the Government was entitled to jalkar in flowing river it did not care to take possession of its own properties and the right of the Government to assess revenue was barred. The judgment in the other case was also in the same terms Ex. 23.: It is argued for the appellants that no grant of several fishery in the river was claimed then nor was it found. What was claimed was territorial fishery as appertaining to the zamindaries. In any case the right of the plaintiffs having been confirmed on the ground of limitation the plaintiffs can only claim the right to the fishery in the waters that flowed in the bed at that time and cannot claim to follow the river on another's land if the river abandons its old bed. I do not think it is necessary for us to decide this question in this case as it involves the right of the Government with which we are not concerned here. One thing may, however, be noted that Mr. Wise does not seem to have claimed any right to the khals flowing out of the river towards the west through Chandbar and other mauzas in 1863, which might have established his right to fishery in the river system of Dhaleswari by a grant of a several fishery. Those khals are depicted in the survey map Ex. 36.

In my opinion the claim of the plaintiffs has not been established. The appeal must be allowed and the suit dismissed with all costs to the defendants-appellants in both Courts, including the cost of the previous hearing in this Court. The other defendants will bear their own costs. It should be noted that

(4) [1872] 18 W. R. 460.
(5) [1864] W. R. 108.

original defendant 9 died while the suit was pending in the lower Court and his mother Sorojini was substituted in his place. But by a mistake her name was not entered in the decree.

**Roy, J.**—(After stating facts and discussing evidence as to whether the kole remained connected with the river throughout the year, the judgment proceeded). The balance of evidence is in favour of the defendants and the conclusion is that the kole was not connected with the river at all seasons of the year. Even if there was a connexion I do not think that the plaintiffs can succeed considering the situation and position of the kole. We have constantly been referred to the judgment of their Lordships of the Judicial Committee in the case of *Sreenath Roy* v. *Dinabandhu Sen* (1). Their Lordships reviewed and discussed the whole series of decisions in Bengal on the subject of fishery rights in navigable rivers from 1807 to 1905. The right "to follow the river" is now settled. It was held that it must be taken as decided in Bengal that the Government's grantee can follow the shifting river for the enjoyment of his exclusive fishery so long as the waters form part of the river system within the upstream and downstream limits of his grant, whether the Government owns the soil subjacent to such waters as being the long-established bed, or whether the soil is still in a riparian proprietor as being the site of the river's recent encroachment. We have a converse case here and the question we have to decide is how far a grantee can claim his right in what the river has abandoned. Some of the cases discussed by their Lordships relate to abandoned beds or channels and the contention is that the principle has been settled that the grantee of a general right of fishery in a navigable river is entitled to fish not only in the main channel of the river, but also in such arms, inlets and lakes, so long as any communication between them and the main channels remains open during all seasons of the year. This rule seems to have been affirmed in certain cases.

We have to examine the position. It was pressed before their Lordships that it is unjust that a landowner should not only lose the use of his land when the river overflows it, but also the right to fish over his own acres and in his own waters, in order that another may unmeritoriously fish in his place. The answer of their Lordships is:

> There is some begging of the question here; the waters are not his waters, nor is the change confined to the flooding of his fields. It is the river that has made the land its own; the waters are the tidal navigable waters of the grant stream. In physical fact the land owner enjoys his land by the precarious grace of the river, whose identity is so persistent, and whose character is so predominating, as almost to amount to personality; and is it fundamentally unjust that in law too he should lose what he has lost in fact, and be precluded from taking in substitution for his lost land an incorporeal right which has been granted not to him but to another? The sovereign power lawfully invests its grantee with jalkar rights in part of the river; is it unjust that when the river shifts its course, changing in locality but not in function the owner of these rights should still enjoy them in that self-same river, instead of being despoiled of them by the course of nature, which he could neither foresee nor control?

Now when the grantee desires not only to follow the river, but also keep the abandoned channel, on what principle of justice and equity can his claim be sustained? I can find no answer to the claim of the despoiled proprietor that now that the river has left his property he should have it back. The grantee could only claim if the abandoned channel is still a part of the river or forms part of the river system. Can this be said for the disputed kole? I think not. It has lost its identity with the Dhaleswari. The personality of the Dhaleswari has deserted it. When the suit was brought it was a mere back water within the defendants' mauza with dry land on all sides except a channel to the south connecting it with the Dhaleswari. If the grantee can go wherever the river flows it follows that he cannot remain in a piece of water where the river has ceased to flow.

I venture to think that the rule that the grantee can retain a bed when it has connexion with the main channel at all seasons of the year has been stated too broadly. The reasoning is apparently that the abandoned channel is still a part of the river or of the river system. With great respect I would say that in these cases the rule was laid down by the Court on the findings of fact arrived at in each case There are three cases to which we have been specially referred. There is the case of *Jogendra Narayan Roy* v. *Craw-*

*ford* (6). There the piece of water in dispute was connected with the river only in the rains and their Lordships proceeded on the finding of fact that the piece of water was still an arm of the river. The case of *Krishnendro* v. *Surno Moyee* (3) was quoted. As their Lordships of the Judicial Committee pointed out the Court somewhat reluctantly followed the rule which it deemed to be settled that the grantee

> can exercise his right in the open channels and also in closing or closed channels abandoned by the river, up to the time when the channel became finally closed, i. e. so long as fish can pass to and fro.

Ainslie, J., who laid this down refers to a case, *Kalee Soondur Roy* v. *Dwarkanath* (4), as his authority. It would appear however from an examination of the latter case that it refers to a different set of circumstances, where the defendants set up their right to accretion. It was urged that the present case is very similar to the case of *Bhaba Prasad* v. *Jagadindra Nath Rai* (2). There the question was in respect of three dobas left by the receding Brahmaputra. It was held that two dobas had lost connexion with the river and could not be considered any longer as part of the Brahmaputra. Their Lordships referred to the case of *Grey* v. *Anund Mohun Moitro* (5), where the argument was put forward that the grantee can have no right where the Government right itself was gone. The Court gave a decree for the third doba on the idea that it was part of the river Brahmaputra because there was connexion and the right of the Crown to grant a fishery subsisted. The situation of the kole in dispute here is such that I cannot hold that it is part of the river Dhaleswari, and I do not think that the Crown could successfully maintain that the kole is still a part of a navigable river.

Mr. Chakravarti for the plaintiff-respondents referred to the fact that the fish can pass to and fro from the river when there is connexion. In the case of *Krishnendro* v. *Surno Moyee* (3) the Court gave a decree. "So long as fish can pass to and fro."

Now there are innumerable creeks and channels, some blind, some current which connect with the mighty navigable rivers of Bengal. They are territorial waters and the Crown does not claim any rights therein. The Government rights exist only in navigable rivers. I am of opinion that the plaintiffs cannot be allowed to claim fishery rights in the kole which lies within the defendants' mauza and which lies in a bed which the navigable river has abandoned.

It was said that the defendants own only a few chaks in their estate and that the plaintiffs have the largest share in the mauza. This aspect of the case was not raised in the suit and it is not possible to examine it. If the plaintiffs have a right to the mauza their right to the kole as appertaining to the mauza is jeopardized by this decision.

The plaintiffs' title to the jalkars in the Dhaleswari as appertaining to their taluks Nos. 9316 and 1180 of the Dacca Collectorate has been the subject of much adverse comment. It is contended that the plaintiffs not having alleged any grant in the plaint the suit should fail, that the grant was negatived by the resumption proceedings and that Mr. Wise having brought suits to establish his rights to the jalkar as part of his zamindari and having succeeded, the plaintiffs cannot now fall back on a grant. It is argued that the effect of the resumption proceedings and the suits decreed is not to create a several fishery in favour of Mr. Wise and the plaintiffs therefore must be confined to the Dhaleswari within their zamindari. I can appreciate the argument of the defendants that the plaintiffs' title being appurtenant to their zamindari it would be hard if they were allowed to travel into theirs. In para. 5 of the plaint, plaintiffs claimed, their jalkar, however, even if the river shifts its course by virtue of this title which their predecessor achieved in 1863. The river flowed at the time through their zamindari. Their case was that they had a right to the jalkar of the river and the Government had no right to assess revenue for the jalkar. It is not very clear to me that because at that time they did not assert a grant they should not be allowed to raise the question of a grant from considerations which apply to grants over a century old. The conception of a lost grant from long user was not known in 1863. Suppose Mr. Wise had alleged a grant at

(6) [1905] 32 Cal. 1141=2 C. L. J. 569.

that time his position would not have been difficult before the Court even though the revenue authorities resumed the jalkar on the ground that there had been no grant. It seems to me (I speak with diffidence), therefore, that the plaintiffs should not be precluded from pursuing their rights as if it was a grant. Apparently they have done so since 1863. The defendants after all are remotely concerned with the question. If the Dhaleswari leaves the plaintiffs' zamindari the Crown may question the plaintiffs' right and until the Crown succeeds the defendants are not in a position to question the plaintiffs' right.

On these grounds I agree with the conclusions arrived at by my learned brother. The result is that the appeal should be allowed and the suit dismissed with costs in all the Courts.

D.D. *Appeal allowed.*

---

## * A. I. R. 1927 Calcutta 747

C. C. GHOSE AND GREGORY, JJ.

*Ishwari Prasad Sharma* and *another*—Petitioners.

v.

*King-Emperor*—Opposite Party.

Criminal Revision No. 546 of 1927, Decided on 13th July 1927, from the order of the Chief Presidency Magistrate, Calcutta, D/- 23rd May 1927.

* *Penal Code, S. 153A — Article should be read as a whole.*

The intention of the writer has to be judged not only from the words used in a particular part of an article in a newspaper but from the article taken as a whole. [P 747 C 2]

*Narendra Kumar Basu, Probodh Chandra Chatterjee* and *Bireswar Chatterjee*—for Petitioners.

*Khundkar*—for the Crown.

**C. C. Ghose, J.**—The petitioners before us are two in number, (1) Iswari Prashad Sharma who is the editor of a weekly newspaper published in the Debnagri character in Calcutta called "Hindi Punch"; and (2) Mukund Lall Burman who is the printer thereof. They have been convicted by the learned Chief Presidency Magistrate of Calcutta under S. 153A, I. P. C., and sentenced as follows: the first petitioner has been sentenced to suffer rigorous imprisonment for a period of six months and the second petitioner to suffer rigorous imprisonment for four months.

The subject-matter of the charge against the two petitioners is the publication of an article in the form of a drama called *Balidan* (sacrifice) at page 109 in the issue of the newspaper in question dated the 27th January 1927. The immediate occasion, as far as one can gather from the English translation of the article which has been placed before us, for the publication of the drama in question was the murder of the late Swami Shradhanand at Delhi on or about the 22nd December, 1926. The murder according to the learned Magistrate was an event which deeply moved the Hindu world and not only the Hindu world but all classes and conditions of men, and there can be no question that the Hindu community in particular all over India was intensely agitated after the assassination of Swami Shradhanand. In the drama the murder of Pandit Lekhram in Lahore in 1897 by a Mahomedan is recalled a *propos* of the assassination of Swami Shradhanand, and the writer after indulging in an attack on the miscreants, urges in support of his argument that the salvation of India lies in what is called the Suddhi movement, the fact that at diverse times the Hindus have not received at the hands of Mahomedans the treatment which they thought they had a right to receive from them. The last words are our paraphrase of many of the expressions used by the writer in the drama.

So far as the isolated expressions appearing in scene 4 of the drama in question, to which the learned Magistrate has drawn attention in the course of his judgment, are concerned, there can be no doubt whatsoever that those expressions deserve the condemnation of all right-thinking men who are familiar with the history of Islam, not only in India but in other countries beyond the confines of India. If those expressions had stood by themselves, and if the article were confined only to scene 4 the learned Deputy Legal Remembrancer would have had no difficulty in inducing us to hold that the article came within the purview of S. 153A, I. P. C. But the intention of the writer has to be judged not only from the words used in scene 4 of the drama but from the drama taken as

a whole. The drama taken as a whole, as has been pointed out, is one which was written at a time of great public excitement. It is possible that the writer may have without any malicious intention and honestly thought that he should express himself in the manner in which he did with a view to the removal of causes which according to him were promoting or had a tendency to promote feelings of enmity or hatred between different classes of His Majesty's Indian subjects, to wit, the Hindus and Mahomedans. Bearing that in mind and reading the article as a whole from that point of view it is difficult to say that the intention of the writer of this drama was to promote feelings of enmity or hatred between different classes of His Majesty's Indian subjects. We think that the writer was quite honest in the view which he took (it may be that it was a wrong view) that the only way to prevent murders like those referred to above was to take steps in the direction indicated in the concluding portion of the drama. If that was so, the writer could not in our opinion be brought within the mischief of S. 153A, I. P. C.; at any rate there is much in the drama which entitles to us to give the benefit of the doubt to the accused.

In this view of the matter the conviction and sentence of the petitioners must be set aside. The petitioners who are on bail will now be discharged from their bail bonds.

D.D. *Rule made absolute.*

---

## A. I. R. 1927 Calcutta 748

CUMING AND MALLIK, JJ.

*Shiba Kali Kumar* and *others*—Plaintiffs—Appellants.

v.

*Chuni Lal Chatterjee*—Defendants—Respondents.

Appeal No. 1593 of 1924, Decided on 24th May 1927, from the appellate decree of the 2nd Addl. Dist. J., 24-Perganas, D/- 9th May 1924.

(a) *Bengal Tenancy Act* (1885), *S. 5—Flower garden.*

Land taken for the purpose of a flower garden is taken for an agricultural purpose. [P 749 C 1]

(b) *Bengal Tenancy (Amendment) Act* (1 of 1907), *S. 19—Non-occupancy tenant is not affected.*

The status of a non-occupancy raiyat was not affected by the passing of the Bengal Tenancy Amendment Act (1 of 1907): 20 *C. W. N.* 258, *Appr.* [P 749 C 1, 2]

(c) *Interpretation of statutes—Amending Act.*

An Act is not to be considered to take away the rights and privileges conferred by a former Act unless it is quite clear from the provision that it does so. [P 749 C 2]

(d) *Interpretation of statutes—Retrospective effect—Intention must be clearly expressed.*

*Mallik, J.*—It is a well-established principle of law that retrospective effect ought not to be given to a statute unless an intention to that effect is expressed in plain and unambiguous language. [P 750 C 2]

(e) *General Clauses Act* (1897), *S. 6—Rule applies to Act of Provincial Council.*

*Mallik, J.*—When an Act of the Governor-General in Council repeals any enactment, then, unless a different intention appears, the repeal shall not affect any rights acquired under the enactment so repealed. This rule also applies to an Act of the Bengal Council. [P 750 C 2]

(f) *Bengal Tenancy (Amendment) Act* (1907)—*Act is not declaratory.*

*Mallik, J.*—Act 1 of 1907 is not an Act of a declaratory character. [P 750 C 2]

(g) *Calcutta Municipal Act* (1899), *S. 637—Section could not by itself include any area in Calcutta town.*

*Mallik, J.*—S. 637 provided for the inclusion of areas within the limits of the Calcutta Municipality. It could not, taken by itself, include any area within the town of Calcutta. Such an inclusion could be made only under Act 1 of 1907. [P 750 C 2, P 751 C 1]

*Sarat Chandra Basak, Probodh Chandra Chatterjee* and *Satindra Nath Mukerji*—for Appellants.

*Amullya Ch. Chatterji* and *Radha Binode Pal* for *Sadhan Ch. Roy Choudhuri*—for Respondent.

**Facts.**—The plaintiff sued to eject the defendant on the ground that he was a ticca tenant on Rs. 9-4-0 a month. The defendant's case was that he had a right of occupancy in the land as he took settlement of it for horticultural purposes and he was not liable to be evicted. On the 9th September 1904, the defendant was granted a lease for three years of a piece of land somewhere in Entally for the purpose of growing flowers. At the time when the lease was granted the land was outside what is known as the town of Calcutta at that time. By Act 1, 1907, the town of Calcutta was extended and then included the land in dispute which then became excluded from the operation of the Bengal Tenancy Act,

This Act actually came into force on the 22nd May 1907.

The three years' lease expired on the 8th September 1907, that is to say, after Act 1 of 1907, came into force and the land in question was excluded from the operation of the Bengal Tenancy Act. The trial Court held that the status of the defendant was that of a non-occupancy raiyat, that the land was used for horticultural purposes and the notice was not sufficient and he was not liable to eviction. He, however, gave the plaintiff a decree for rent. On appeal the finding was upheld.

**Cuming, J.**—(After stating facts the judgment proceeded.) It has first of all been argued that the land was not taken for an agricultural purpose and so it could not be governed by the Bengal Tenancy Act. The findings on this point are conclusive. The land was obviously taken for the purpose of a garden which has been held to be an agricultural purpose,

The next point taken is that the land is no longer governed by the Bengal Tenancy Act, but by the Transfer of Property Act; that it ceased to be governed by the Bengal Tenancy Act, when Act 1 of 1907, came into force and that the defendant's non-occupancy right was then extinguished. To support this part of his case, the appellant relies on S. 19 (1), Bengal Tenancy Act as now amended by Act 1 of 1907. His argument is that S. 19 (1), Bengal Tenancy Act, preserves, so far as land which was excluded from the operation of the Bengal Tenancy Act, by Act 1 of 1907, only the right of occupancy and that hence non-occupancy rights are destroyed by that section. He points out that S. 19 (2) only preserves these rights in the case of lands which are excluded from the operation of the Bengal Tenancy Act, by S. 637, Calcutta Municipal Act and reading the section as a whole contends that it was the intention of the legislature to destroy all rights excepting occupancy rights in the area excluded by Act. 1 of 1907 from the operation of the Bengal Tenancy Act. The sheet anchor of the respondent's case is the decision of *Jotiram Khan* v. *Jonaki Nath Ghose* (1). Now it was held in *Jotiram Khan* v. *Jonaki Nath Ghose* (1), that the status of a non-occupancy raiyat was not affected by the passing of the Bengal Tenancy Amendment Act (1 of 1907). The appellant contends that the decision is wrong and that the case should be referred to a Full Bench of this Court.

As far as can be seen the rights of a non-occupancy raiyat were created by the Bengal Tenancy Act of 1885 (S. 44 of that Act). Act. 10 of 1859 certainly has no section corresponding to S. 44.

One Act is not to be considered to take away the rights and privileges conferred by a former Act unless it is quite clear from the provision that it does so. In amending S. 19, so far as the first part of the section is concerned, all that has been done is to insert the words "or the Bengal Tenancy (Amendment) Act, 1907."

No doubt the section does specifically mention that rights of occupancy are preserved. I do not think that we are entitled to draw the conclusion from that, that any other rights are deliberately destroyed. In enacting Act 8 of 1885 the enactors had no doubt in their mind the occupancy right which was the most important right that the raiyat had, and they wished to make it clear beyond all controversy that this important right was preserved. So far as regards non-occupancy raiyats, Act 10 of 1859 seems to be silent except to provide that such raiyats were entitled to get a patta.

By the Tenancy Act of 1885 a number of rights were created and I think it is for that reason that in the second part of S. 19, viz., S. 19 (2), which is a new enactment, the legislature speak of any right, obligation or liability. I see no reason to dissent from the case of *Jotiram Khan* v. *Jonaki Nath Ghose* (1). The result is the appeal fails and is dismissed with costs.

**Mallik, J.**—(After stating facts the judgment proceeded.) The only question in controversy in the present appeal is whether the plaintiffs are entitled to a decree for ejectment. The answer to this question will depend on the status of the defendant and on the rights acquired by him.

The first contention before us was that the defendant was not a tenant under the Bengal Tenancy Act. I do not think that this contention can be entertained for a moment. There is a concurrent finding of the two lower Courts that the land was leased out for horticultural purposes, and it is settled law that a

(1) [1914] 20 C. W. N. 253=33 I. C. 54.

tenant who takes a lease of land for horticultural purposes is a raiyat under the Bengal Tenancy Act. There is no doubt, therefore, that the defendant was a raiyat within the meaning of the Bengal Tenancy Act when he held the land in question and there is no doubt either that, as a raiyat under the Bengal Tenancy Act, he acquired certain rights in respect of the holding one of which was the right not to be ejected therefrom except under the provisions of S. 45 of the Act which requires six months notice.

It appears that the land lies in Entally and is, and has been so from before 1899, within the limits of the Calcutta Municipality. The defendant came into possession of the land on executing a kabuliyat for three years on the 9th September 1904, but before the term of the kabuliyat expired the Bengal Tenancy Amendment Act (Act 1 of 1907) came into force. It was contended that the result of this amending Act by which Entally ceased to be subject to the operation of the Bengal Tenancy Act, was the extinction of the right to six months notice, a right which the defendant had acquired before Act 1 of 1907 came into force. The question then for consideration is whether Act 1 of 1907 could and did extinguish the rights which a non-occupancy raiyat like the defendant had previously acquired in his holding. Dr. Basak contended that it did extinguish such rights and his argument was that as neither the Bengal Tenancy Act of 1885, nor the amending Act of 1907, safeguarded the rights of a non-occupancy raiyat as it did in the case of a raiyat having rights of occupancy, the Acts by implication extinguished the rights of a non-occupancy raiyat, and in support of this contention he invoked the aid of the legal maxim *expressio unius est exclusio alterius*. This argument will not, in my opinion, bear a close scrutiny. There is no doubt the doctrine of *expressio unius est exclusio alterius* ; but great caution is necessary in applying this maxim which is not of universal application. Then to hold that Act 1 of 1907 by repealing S. 45, Bengal Tenancy Act extinguished the right which had been acquired under that section would be to give the Act a retrospective effect. But it is a well-established principle of law that retrospective effect ought not to be given to a statute unless an intention to that effect is expressed in plain and unambiguous language. Then S. 6, General Clauses Act (Act 10 of 1897) lays down that when an Act of the Governor-General in Council repeals any enactment, then unless a different intention appears, the repeal shall not affect any rights acquired under the enactment so repealed. If a repealing Act of the Governor-General in Council cannot extinguish such a right, much less can an amending Act of the Bengal Council, like Act 1 of 1907, unless of course the amending Act is a declaratory Act. But Act 1 of 1907 as has been held in the case of *Jotiram Khan* v. *Jonaki Nath Ghose* (1), is not an Act of a declaratory character. The conclusion, therefore, is that Act 1 of 1907 did not extinguish the rights of a non-occupancy raiyat which had been previously acquired by him.

Then as I read the Bengal Tenancy Act of 1885 and the amending Act 1 of 1907, the rights of non-occupancy raiyats were actually safeguarded by them when there were any such rights to be saved. It is true that in Act 8 of 1885 there was only S. 19 to save the rights of occupancy raiyats and there was no provision of any kind to save the rights of non-occupancy raiyats. But that was evidently, because there were hardly any rights of a raiyat other than an occupancy raiyat which can be said to have been acquired under Act 10 of 1859 and before the enactment of Act 8 of 1885. It was after the enactment of Act 8 of 1885 that such rights of non-occupancy raiyats began to accrue ; and as I read the law these rights were actually saved when the Bengal Tenancy Act, came to be amended by Act 1 of 1907. S. 19 (2), Bengal Tenancy Act, was added by this amending Act ; and S. 19 (2) provides that the inclusion of any area within the town of Calcutta shall not affect any rights (including rights of non-occupancy raiyats) acquired previously to such inclusion.

It was said that S. 19 (2) does not contemplate the case of inclusion of areas under Act 1 of 1907, but only those which were made under S. 637, Calcutta Municipal Act 1899. This view is in my opinion clearly erroneous. S. 637 provided for the inclusion of areas within the limits of the Calcutta Municipality. It could not, taken by itself, include any

area within the town of Calcutta. Such an inclusion could be made only under Act 1 of 1907. I am, therefore, of opinion that Act 1 of 1907, by enacting S. 19 (2), Bengal Tenancy Act, did safeguard the rights of non-occupancy raiyats which they had acquired in lands previous to their inclusion within the town of Calcutta. As the defendant in the present case had before the enactment of Act 1 of 1907 acquired the right not to be evicted except under the provisions of S. 45, Bengal Tenancy Act and on six months notice, he was not liable to be ejected on the notice that was found to have been served on him. The result, therefore, is that the appeal fails and it is dismissed with costs.

D.D. *Appeal dismissed.*

---

## *'A. I. R. 1927 Calcutta 751

C. C. GHOSE AND GREGORY, JJ.

*Gopal Lal Sanyal* and *another*—Appellants.

v.

*King-Emperor*—Opposite Party.

Criminal Appeal No. 98 of 1927, Decided on 20th July 1927, from the sentence passed by the Chief Presy. Magistrate, D/- 9th February 1927.

** Penal Code, S. 124A—Section should be narrowly construed—Article should be read as a whole—Some latitude to public press should be allowed.*

**The gist of the offence lies in the intention of the writer. The intention is not to be gathered from isolated or stray passages here and there. It must be gathered from a fair and generous reading of the article in respect of which the charge has been laid. In gathering the intention, allowance must be made for a certain amount of latitude to writers in the public press. S. 124 A is in such wide terms that unless it is very strictly or narrowly construed, there is a real danger that legitimate criticizm may be stifled altogether: *A. I. R.* 1927 *Cal.* 698, and *A. I. R.* 1927 *Cal.* 747, *Rel. on.*** [P 751, C 2]

**Where it was plainly suggested in the article that the riots which took place in Calcutta in the summer of 1926 were allowed to continue because of the motive which the Government had, namely to keep the Hindus and Mahomedans apart by favouring the Mahomedans.**

***Held*: that the argument of the wtiter was to show that the only obstacle to Hindus and Mahomedans coming together was the presence of a third party, namely the Government who were animated by a bad political motive and that the writer was therefore guilty.** [P 752, C 1, 2]

*Narendra Kumar Basu*, *Suresh Chandra Talukdar* and *Ramendra Chandra Roy*—for Appellants.

*B. L. Mitter*—for the Crown.

**C. C. Ghose, J.**—In this case the appellants before us are two in number and they have been convicted by the learned Chief Presidency Magistrate under S. 124A, I. P. C., the first appellant being sentenced to simple imprisonment for two months and a fine of Rs. 350 and in default one month's simple imprisonment, the second appellant being sentenced to a fine of Rs. 100 and in default simple imprisonment for two months.

The prosecution is in respect of an article contributed by one Jnananjan Neogi, which appears in Vol. I, Part II, at page 5 of a Bengali weekly newspaper published in Calcutta called the "Atma Sakti." The original of the article which is in the vernacular has been handed to us and we have had the advantage of perusing the translation thereof which is Ex. (1) in this case.

The principles which should guide us in finding out for ourselves the intention of a person who is charged under S. 124A. I. P. C. have been recently referred to by us in our judgment in the case of *Satyaranjan Bakshi* v. *Emperor* (1) commonly known as the "Forward" case and also to some extent in our judgment delivered last week in what is known as "The Hindi Punch" case *Iswari Prasad* v. *Emperor* (2). There cannot be much doubt that the gist of the offence lies in the intention of the writer and that the intention is not to be gathered from isolated or stray passages here and there. It must be gathered from a fair and generous reading of the article in respect of which the charge has been laid. In gathering the intention, allowance must be made, as has been repeatedly held, for a certain amount of latitude to writers in the public press.

The section under which the charge is laid is in such wide terms that unless it is very strictly or narrowly construed, there is real danger that legitimate criticizm may be stifled altogether. Now, much of this article is unobjectionable; indeed the portion of the article in which the writer calls upon Hindus and

(1) A. I. R. 1927 Cal. 698.
(2) A. I. R. 1927 Cal. 747.

Mahomedans to sink their differences and to unite in a common cause for the good of the country cannot be taken exception to. But we regret to observe there is also much in the article which, by means of attribution of base, improper and dishonourable motives to the Government and by means of innuendoes, comes well within the mischief of S. 124A. In particular we desire to refer to a passage in the article which runs as follows:

> The bureaucracy scented trouble on getting a hint of this situation. If the Moslem sets himself to build up India's future, hand in hand with the Hindu, then indeed the English are helpless. That is why the bureaucray are today busy designing how the Indian Moslem can be kept under control and bringing conflict between Hindus and Moslems and making the life of the Hindus miserable. Congress, swaraj, election, khaddar, patriotic service—all—may be indefinitely postponed. The bureaucracy are now busy winning over the Moslems. That is why they are patting them on the back and are continuing to grant the unreasonable requests of Abdur Rahim. Do you think that the trickery of the bureaucracy is not thus kindling up the flame of conflict to-day? Do you ask me to believe that he, over whose empire the sun never sets, has not power enough to stop rioting or preserve the peace in Calcutta? He did stop it at last. If he wished he could have stopped it earlier also. By stopping it he has proved that he had the power and the arrangements necessary to stop it. If he had the power, why did he not stop it in time? Because he had a purpose. What was it? To set fire to the house.

It is plainly suggested in the article that the riots which took place in Calcutta in the summer of 1926 were allowed to continue because of the motive which the Government had, namely to keep the Hindus and Mahomedans apart by favouring the Mahomedans. The writer goes on to say that the Government did eventually put a stop to the riots, but he asks why was it that the Government did not put a stop to the riots at an early period. The suggestion clearly is that the Government had a motive behind their action and that such motive was no other than to prevent the Hindus and Mahomedans from uniting. There is also in the rest of the article, as indicated above, a very considerable amount of innuendoes. Therefore, taking the article as a whole and making every allowance for the portion of the article which is innocuous or inoffensive, one cannot but come to the conclusion that the argument of the writer was to show that the only obstacle to Hindus and Mahomedans coming together was the presence of a third party, namely, the Government who were animated by a bad political motive. In this view of the matter, the article comes within the rule laid down by us in the "Forward" case *Satyaranjan Prasad* v. *Emperor* (1).

The result, therefore, is that this appeal must stand dismissed. The first appellant who is on bail will surrender to his bail and serve out the sentence imposed on him. We are informed that the second appellant has paid the fine imposed on him.

D.D. *Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 752

SUHRAWARDY AND MALLIK, JJ.

*Baneswar Singh* and *others*—Plaintiffs —Petitioners.

v.

*Abdul Hassan* and *others*—Opposite Party.

Civil Revision No. 1224 of 1926, Decided on 30th May 1927, from an order of the Munsif, Habigunj, D-/ 7th June 1926.

(a) *Bengal Land and Tenant Procedure Act* (8 *of* 1869)—*Sales under—Civil P. C. does not apply—Civil P. C., O.* 21, *R.* 89.

There is nothing in Act 7 of 1869 which makes the provisions of the Civil Procedure Code applicable to sales under that Act.

(b) *Bengal Tenancy Act* (1885), *S.* 66 (2)—*Transferee of non-transferable occupancy holding cannot make deposit—Bengal Landlord and Tenant Procedure Act* (8 *of* 1866), *S.* 52, . . .

A transferee of a non-transferable occupancy holding is not entitled to make the deposit under S. 66 (2) Bengal Tenancy Act or a similar provision in other enactment, namely S. 52 of Act 8 of 1869, to defeat the landlord's decree for ejectment. [P 755, C 2]

*Hemendra Kumar Das* and *Benoyendra Palit*—for Petitioners.

*Birendra Chandra Das* — for the Crown.

**Suhrawardy, J.**—The petitioners as plaintiffs brought a rent suit against the opposite parties 5 to 10 for recovery of arrears of rent and obtained an ex-parte decree. The decree was passed on the 30th November in the following terms:

> The defendants do pay to the plaintiffs the decretal amount mentioned therein within 15 days from the date on which the decree is signed. In default the defendants be ejected from the

land in suit within 15 days from the date of the decree.

The opposite parties 1 to 4 claiming to be transferees of a portion of the holding deposited the decretal amount on their own account as such transferees. It is conceded that the holding was a non-transferable occupancy holding and that the opposite parties 1 to 4 are transferees of a portion of the holding. The landlord objected to their right to make the deposit but the Munsif accepted the deposit. The plaintiffs moved this Court as well as preferred an appeal in the lower appellate Court. The appeal in the lower appellate Court was decided against him but their case before us is that no appeal lay to the lower appellate Court and that the present application which was filed in this Court within time from the judgment of the Munsif should be heard and decided on the merits. The learned vakil appearing for the opposite parties has taken a preliminary objection that this application does not lie as the question in dispute is governed by S. 47, Civil P. C. and that the petitioners should have come to this Court on second appeal. We are unable to give effect to this contention. There is nothing in Act 8 of 1869 which makes the provision of the Civil P. C. applicable to sales under that Act.

This case comes from Sylhet where Act 8 of 1869 is in force and the decree that was passed in this case was passed under S. 52 of that Act. It is argued on behalf of the petitioners that under that section the opposite parties (we leave out of consideration the other opposite parties who are tenants and do not appear) are not entitled to make the deposit. The deposit contemplated under that section must be made by the tenant defendant himself or it may be made by any person on his behalf. On behalf of the opposite parties it is contended that the opposite parties having an interest in the property being purchasers of a portion of the holding are persons entitled to make the deposit under that section.

Reliance is placed on behalf of the opposite parties mainly upon the decision in the case of *Kali Kishore Das* v. *Gopal Ram Shaha* (1). That case in its turn follows the decision in the case of *Sarada Prasad Roy Chowdhury* v. *Nobin Chandra Dutt* (2). The learned vakil for the petitioners argues that these cases were wrongly decided and that the intention of the legislature may be gathered from the various sections of the Act to which reference will be made. We have considered this matter carefully as it raises considerations which affect the tenants in that part of the country but we are unable to accept the correctness of the above rulings if they purport to lay down an abstract proposition of law.

Under S. 46, Act, 8 of 1869, the tenant may tender the amount of rent due from him at the zamindar's malcutchery and if it is not accepted and receipt in full granted for it, it shall be lawful for him to deposit such amount in Court and such deposit shall have the effect of payment to the landlord. Under S. 47, the Court receiving deposit shall issue notice on the landlord. Under S. 48 if a suit is instituted against the tenant and if he had duly tendered the amount of rent due from him before the institution of the suit, he may pay into Court such amount without paying any costs. Under S. 49, if no such previous tender was made, the tenant himself may pay into Court what he considers to be due with costs on that amount. If the plaintiff insists after such payment to proceed with the suit and if he does not succeed, he will not be entitled to any further costs and shall be charged with defendant's costs. If, on the other hand, he succeeds in proving that the amount due to him was greater than that deposited by the defendant he is entitled to full costs of the suit from the defendant. After all these provisions regarding a suit between the landlord and the tenant comes S. 52 which is in these terms :

> Any person desiring to eject a raiyat or to cancel a lease on account of non-payment of arrears of rent, may sue for such ejectment or cancelment and for recovery of the arrears in the same action or may adduce any unexecuted decree for arrears of rent as evidence of the existence of such arrears in a suit for such ejectment or cancelment.

We pause here to consider the effect of this part of the section. It empowers the landlord consistently with the provisions of S. 22 of the Act to sue for ejectment of the tenant when his rent remains in arrear and he may for that purpose join the claim for rent along with the claim for ejectment and may adduce evidence of there being arrears in the way indicated in the clause. This clause

(1) [1918] 23 C. W. N. 132=49 I. C. 767.
(2) [1864] 1 Marshall's Rep. 417.

is followed by another clause with which we are concerned.

In all cases of suits for the ejectment of a raiyat or cancelment of a lease the decree shall specify the amount of arrears; and if such amount together with interest and costs be paid into Court within 15 days from the date of the decree execution shall be stayed.

This section follows the earlier enactment (Act 10 of 1859), S. 78, of which is also in similar terms and runs thus.

Any person desiring to eject a tenant or cancel on account of non-payment of rent may sue for such ejectment or cancelment and for recovery of the arrears in the same action or may adduce any unexecuted decree for arrears of rent as evidence of the existence of such arrears in a suit for such ejectment or cancelment. In all cases of suits for the ejectment of a raiyat or the cancelment of a lease the decree shall specify the amount of the arrears, and if such amount together with costs of the suit be paid into Court within fifteen days from the date of the decree, execution shall be stayed.

This provision of the law has been reproduced in S. 66, Cl. (2), Bengal Tenancy Act, which is as follows:

In a suit for ejectment for an arrear of rent a decree passed in favour of the plaintiff shall specify the amount of the arrears and of the interest, if any, due thereon, and the decree shall not be executed if that amount and the costs of of the suit are paid into Court within fifteen days from the date of the decree or, when the Court is closed on the fifteenth day, on the day upon which the Court re-opens.

It is to be noticed that in all these enactments it is not distinctly said by whom the amount of the decree for arrears of rent may be deposited. The sections preceding S. 52 to which I have referred speak of the part the tenant may take previous to the bringing of a suit for arrears of rent. It is not permitted by law that the tender can be made by any others than the tenant himself or by the transferee of the whole or part of his interest; nor can such person deposit the money in a suit to challenge the plaintiff's right to recover the money. It does not seem likely that the legislature intended that after the decree the door should be thrown open to the public to come and deposit in order to avoid the landlord's right to re-enter. In the case of *Sarada Prosad Roy Chowdhury* v. *Nobin Chandra Dutt* (2), the learned Judges did not discuss the question of law in all its bearings. That was a decision under S. 78, Act 10, 1859 and the learned Judges said that as the Act did dot say that the arrear must be paid by the tenant or that it should not be paid by his transferee or by any other party interested in saving the forfeiture of the tenancy the party in that case to whom the defendant had assigned his right under the pottah was entitled to pay the amount of arrears and avoid the forfeiture. This seems to me to be a very poor reasoning, for it does not seem logical to argue that because the section does not mention by whom the payment may be made, though it speaks of decree for arrears of rent against the tenant only it can be held that any one is entitled to make the deposit. The further qualification that the learned Judges fixed of the person making the payment viz., that he may be a transferee or a person interested in saving the foreiture, is not warranted by the wording of the section. According to the interpretation given by the learned Judges to the words of the section it would seem that any one, even a stranger, may make the deposit and defeat the landlord's claim for re-entry. If ordinary meaning is given to the words of the S. 52, Act 8 of 1869 they ca n only mean that if the money is not paid within time by the person who is liable to pay, the consequences mentioned in the clause will follow.

In the case of *Kali Kishore Das* v. *Gopal Ram Shaha* (1), the learned Judges (Teunon and Cuming, JJ.) did not discuss the law, but relied for their decision upon the case of *Sarada Prosad* v. *Nobin Chandra* (2) and on the Full Bench case of *Dayamoyi* v. *Ananda Mohan* (3). I have discussed the case of *Sarada Prosad* v. *Nobin Chandra* (2) and I fail to see what bearing *Dayamoyi's* case (3) has on the question before us. In that case it was held that a person who is a transferee of a portion of a holding is one who can be said to have such interest as to make him a representative of the judgment-debtor under S. 47, Civil P. C., or for the matter of that, a person interested under O. 21, R. 89, or R. 90, Civil P. C. I do not think that S. 47, Civil P. C., has any application in the present case, the question being one of construction of S. 52, Act 8 of 1869, B. C., and, therefore the decision in the Full Bench case has hardly any bearing on the point in dispute here.

It is curious that shortly before the case of *Kali Kishore Das* v. *Gopal Ram Shaha* (1) one of the learned Judges,

(3) [1914] 42 Cal. 172=20 C. L. J. 52=27 I. C. 61=18 C. W. N. 971 (F. B.).

(Teunon, J.) was a party to the decision in the case of *Brojendra Nath Mitra* v *Arman Sheikh* (4). That case was decided under S. 66, Bengal Tenancy Act; and I have tried to show that there is hardly any difference between the language of that section and that of S. 52, Act 8, 1869. There Mr. Justice Teunon, sitting with Mr. Justice Newbould, held that S. 66 (2), Bengal Tenancy Act, contemplates that the payment to be a good payment must be a payment by or on behalf of the judgment-debtor. The two decisions—one in *Kali Kishore* v. *Gopal Ram* (1) and the other in *Brojendra* v. *Arman Sheikh* (4)—seem to be conflicting for though they are under different sections of different Acts, they relate to the interpretation of almost similar language. The case of *Brojendra* v. *Arman Sheikh* (4) was cited at the hearing of the case of *Kali Kishore* v. *Gopal Ram* (1), but the learned Judges took no notice of it.

Reference to Ss. 59 and 62, Act 8, 1869 may also be helpful. These sections deal with the sale of under-tenures. Under S. 59 a certain procedure is laid down with regard to the publication of the sale of an under-tenure; and S. 62 provides that if the sum due under the decree is paid before the date of sale by the defaulting holder of the under-tenure or any one on his behalf or anyone interested in the protection of the under-tenure, such sale shall not take place. Under S. 63 of the Act if a third party claims to be in lawful possession of the under-tenure the Court may stay the sale and adjudicate on his claim. This special provision with regard to under-tenures lends strength to the contention that the legislature did not extend it in the case of sale of non-transferable occupancy holdings, for it would have been as easy for it to mention the persons by whom the payment can be made as it was easy to enumerate them in the case of under-tenures. As for the principle which may be extended to a consideration of similar questions, I am referred to the recent Full Bench decision in the case of *Jharu Mondal* v. *Khetra Mohan Bera* (5) in which it has been held that the purchaser of the whole or portion of a non-transferable occupancy holding who has not been recognized by the landlord has not an interest in the holding which is voidable on the sale and is not entitled to make a deposit under S. 170 (3), Bengal Tenancy Act. If a transferee of a non-transferable occupancy holding has not sufficient interest to avoid the sale by depositing the amount of the sale, it does not seem to me reasonable to hold that such a person is entitled to make the deposit under S. 66 (2), Bengal Tenancy Act, or a similar provision in other enactments to defeat the landlord's decree for ejectment.

We have been asked to refer this matter, as we have disagreed with certain decisions of this Court to a Full Bench. I do not think that necessity, for such a reference has arisen. The decision in *Kali Kishore* v. *Gopal Ram* (1) is based upon no reasoning and is attempted to be based on one of certain decisions which does not support it. We are further of opinion that one of the learned Judges who was a party to the decision took a contrary view in respect of a similar controversy in *Brojendra* v. *Arman* (4). Besides, the facts in *Kali Kishore's* case (1) have not been fully reported and we do not know if the decree in that case is similarly worded as the decree in the case before us which leaves no room for doubt, in my mind, that it makes the sum decreed payable by the defendant alone. Taking all these circumstances into consideration we do not think that we are called upon in this case to refer the matter to a Full Bench.

The result of all these considerations is that this rule must be made absolute and the orders of the lower Courts allowing opposite parties 1 to 4 to make the deposit are set aside. The petitioners are entitled to their costs. Considering the number of hearings this matter had in this Court we assess the hearing-fee at four gold mohurs.

**Mallik, J.**—I agree.

D.D. *Rule made absolute.*

(4) [1918] 27 C. L. J. 478=44 I. C. 977.
(5) A. I. R. 1926 Cal. 934 (F. B.).

## A. I. R. 1927 Calcutta 756

B. B. GHOSE AND G. N. ROY, JJ.

*Uma Charan Bose*—Appellant.

v.

*Rakhal Das Ray*—Respondent.

Appeal No. 16 of 1926, Decided on 16th May 1927, from the Original Decree of the Sub-J., Burdwan, D/- 3rd December 1925.

(*a*) *Will—What amounts to.*

The mere fact that a trust-deed is mentioned as part of the grant does not make the document a testamentary document or a will. [P 757 C 2]

(*b*) *Succession Act* (1925), *S.* 2—*Provision to appoint trustee after the death of executant does not make the document a will—Probate and Administration Act, S.* 3.

The fact that in the document a provision is made for the appointment of a future trustee after the death of the present trustee, does not make the document a will as defined in S. 3, Probate. and Administration Act, now replaced by S. 2, Succession Act 1925; 20 *C. L. J.* 307, *Foll.* [P 757 C 2]

*Sitaram Banerjee, Byomkesh Bose* and *Satindra Nath Roy Chowdhury*—for Appellant.

*Rupendra Kumar Mitra* and *Sanat Kumar Chatterjee*—for Respondent.

**B. B. Ghose, J.**—This is an appeal by the applicant for the grant of letters of administration with a copy annexed of what is alleged to be a will of one Upendra Nath Ray, dated the 5th July 1907. Upendra died in 1914 leaving a widow Damayanti. That lady obtained letters of administration of the estate of Upendra Nath Ray with a copy annexed of the document which was described in the grant as a trust-deed in 1916. The widow died in 1924 and the appellant thereupon applied for letters of administration with the document annexed on the allegation that on the death of the widow he was entitled to obtain letters of administration. The objector is the heir under the Hindu law of Upendra Nath Ray. This matter came up before the Subordinate Judge of Burdwan for hearing and he dismissed the application by an order dated the 3rd December 1925. The argument that was addressed to the learned Judge in the Court below on behalf of the appellant was that after the death of the widow of the executant of the document under the terms of the deed of trust, he was entitled to be a trustee of a certain portion of the property mentioned in the deed and thus he was entitled to letters of administration. Various objections were raised by the opposite party. But it is unnecessary to state them in detail as the learned Subordinate Judge has only sustained the plea that the application by this person was not maintainable. It was contended before the Subordinate Judge that the application was maintainable under the provisions of S. 37, Probate and Administration Act, 1881, now replaced by S. 250, Succession Act, 1925. The Subordinate Judge did not accept that contention and he has dismissed the application on the ground that the petitioner before him had no right to maintain the application.

It is contended on behalf of the appellant that the petitioner had a right to maintain the application with reference to the provisions contained in the deed of trust of 1907 and that the Subordinate Judge was wrong in holding that the applicant could not maintain this application. The respondent on the other hand contends that the document, on the basis of which the application is made, is not a will and therefore the applicant was not entitled to come to the probate Court in order to ask for letters of administration with the copy of the document annexed. The contention of the respondent is that under the document the property was conveyed to the different grantees and there was no testamentary disposition which was to be given effect to after the death of the testator. That being so, the application for letters of administration with the copy of the document annexed is not maintainable. In order to see what the document is it is necessary to recite some of the provisions of the document. It begins by making the usual recital as regards the necessity for making the provisions for his property as he was old and as he had no son of his own. The executant of the deed described the document as *niynmnibandha patra*, that is, a deed of trust. It then states that whoever would be his heir in future might raise a dispute with regard to the property and that in that view it was extremely necessary that a *noyampatra* (deed of trust) should be made with regard to the mode in which the moveable and the immovable properties should be enjoyed in future.....

It is not necessary to state anything with regard to para. (1) as no argument was addressed upon it. Para. (2) makes a present dedication of certain properties in favour of his ancestral deity Sri Sri Iswar Sridhar Jieu Deb and the objector is appointed a shebait after the death of the grantor. The next important passage is contained in para. (7) and with reference to that paragraph the appellant claims that there has been a testamentary disposition and he is entitled, according to the tenor of that paragraph, to ask for letters, of administration of the estate with the will annexed. The relevant passage runs thus :

I give (Arpan karilam) to the H. I. Charitable Dispensary according to the following provisions the aforesaid properties together with the government securities and furniture and loan business etc. described in schedule cha. After my death my wife Sreematy Damayanti Dasi will be the trustee of the said properties. . . . . In the absence of all those (persons) 'Sreeman Umacharan Bose (the present appellant)..... and his sons grandsons.....will act like my wife.

The next important passage is in para. (12) which runs thus :

I shall myself enjoy the properties which I shall acquire subsequently other than those which are hereby dedicated and made over for the said debsheba and the dispensary.

It is not contested by the appellant that the gift to the idol was a gift in presenti. What is contended for is that the gift to the charitable dispensary was a testamentary disposition. It is difficult to say that it is so. The words mean "present gift" and under the terms of the gift the charitable dispensary would be the beneficial owner of the property from the date of the document. If there was any doubt as regards the meaning, it is made clear by the statement in para. (12) which I have already quoted. It also appears that it was the intention of the executant of the document that the document should operate as a present gift, and this is evident from the fact that the document was stamped upon the full value of the properties given in the document itself. That would not be so if the intention was that the gift should come into effect after the death of the testator or, in other words, if it was intended that the document should take effect as a testamentary document. It was, however, contended by the appellant that the fact that the widow obtained letters of administration with the document annexed in 1916 shows that the document was treated by the learned Judge who happened to be my learned brother on the bench, as a testamentary document. But this does not appear to be so. It is not clear whether the matter was contested before him at the time when letters of administration was granted. But it was clearly put in the order for the grant of letters of administration (with the trust-deed) and it should be noted that the document was not mentioned as a will. Letters of administration was granted of the properties and credits of Upendra Nath Ray; and lower down the order runs thus:

The trust-deed is created in the life-time of the deceased and therefore, no Court-fee is payable. The value of the personal properties is Rs. 1403 odd as stated by the petitioner and probate duty has been paid on the present property only.

So it was clearly brought to the notice of the Court that the trust-deed had effect from the date of its execution and proper order was made with regard to it. The mere fact that the trust-deed was mentioned as part of the grant does not make the document a testamentary document or a will. Why it was mentioned in the order it is difficult to say at this distance of time and as the other documents relating to the proceedings are not on the record. But in my opinion, even if the document had been described as a will, that would not make it a judgment in rem under the provisions of S. 41, Evidence Act. But it is unnecessary to pursue that point further because I am clearly of opinion that this document was not treated as a will at the time of the grant of letters of administration to the widow of the executant.

It is next contended on behalf of the appellant that the fact that in the document a provision is made for the appointment of a future trustee after the death of Upendra Nath Ray makes this document a testamentary one and therefore, the document is testamentary in its disposition. But that would not make the document a will as defined in S.3, Probate and Administration Act, now replaced by S. 2, Succession Act, 1925. This question is not free from authority and it was held in two cases in our Court that the mere provision in a document for the appointment of succeeding shebaits would not make the document a will according to the Probate and

Administration Act. The cases referred to above are those of *Chaitanya Gobinda Pujari Adhikari* v. *Dayal Gobinda Adhikari* (1) and *Jagadindra Nath Roy* v. *Madhusudan Das Mokunt* (2). On this ground I am of opinion that the document not being a will the petitioner is not entitled to apply for letters of administration to the probate Court. Whatever right he has he may enforce it by a regular suit.

The next question that has been urged is that the learned Judge in the Court below has, in awarding costs to the respondent, given pleader's fees on the value of the property, which he was not entitled to do under the circular orders of this Court. This proposition is not contested by the respondent.

The result, therefore, is that this appeal must be dismissed with costs, the only variation in the decree of the lower Court being that in place of the costs allowed in the lower Court for pleaders' fees, namely, Rs. 324, only Rs. 80 will be given.

We assess the hearing-fee in this Court at five gold mohurs.

**Roy, J.**—I agree.

R.K. *Appeal dismissed.*

(1) [1905] 32 Cal. 1082=9 C. W. N. 1021.
(2) [1912] 20 C. L. J. 307=27 I. C. 24.

---

## A. I. R. 1927 Calcutta 758

BUCKLAND, J.

*International Continental Caoutchoue Compagnie*—Plaintiffs.

v.

*Mehta & Co.*—Defendants.

Original Civil Jurisdiction Suit No. 339 of 1927, Decided on 11th July 1927.

(a) *Civil P. C., O. 30, R. 3—Service effected as per directions of Court is good.*

Under R. 3, the directions of the Court must be obtained as to the method of service to be followed. If the method prescribed in each particular case is followed and service is so effected, then prima facie there has been service upon the firm. [P 759, C 1]

(b) *Civil P. C., O. 30, R. 6—Persons should file written statements on behalf of firm.*

Where persons are sued as partners in the name of their firm, they may file different written statements, but they may not do so on their own behalf, but must file them on behalf of the firm. Should they do that, the plaintiffs will be obliged to show that not one of the defences prevents a decree being made against the firm: *Ellis* v. *Wadeson* (1899), 1 *Q. B.* 714, *Ref.* [P 759, C 1]

(c) *Civil P. C., O. 30, R. 8—Person appearing under protest—Service on him on firm's behalf is nullity.*

The effect of R. 8, as affecting the proceedings against the firm, is that where a person, who has been served as a partner under S. 3, appears under protest, the service on him as service on the firm is a nullity. The plaintiff should therefore begin again and effect service upon the firm in accordance with R. 3, unless it has already been otherwise effected, as for instance, by service on some other person as a partner who has not entered appearance under protest: *A. I. R.* 1926 *Bom.* 585, *Ref.* [P 759, C 2]

A person who has been served as a partner under O. 30, R. 3, and entered appearance under protest is not entitled to file a written statement on his own behalf denying that he is a partner. [P 760, C 2]

*A. K. Roy*—for Plaintiff.

*H. C. Chatterjee*—for one of the Defendants.

**Buckland, J.**—It has frequently come to my notice that there is widespread misconception as to the correct course to be followed, where a suit is filed under O. 30, Civil P. C., against a firm, by persons who have been served as partners, but who deny that they are partners. The question arises in a practical form when such persons file, as is often done, written statements on their own behalf in no way putting forward a defence to the suit, but denying that they are partners. In some instances I have found as many as three such written statements simultaneously on the record. The case eventually comes to trial with some person or other defending the suit on behalf of the firm and with other written statements on the record on behalf of the persons who have entered appearance under protest denying that they are partners. Or, as I have also found, there are written statements by such persons, but none on behalf of the firm, with the result that the hearing of the suit which is undefended is delayed, as by reason of such written statements it is treated as a defended suit, though no partner has appeared. This is not in conformity with the latter part of O. 30, R. 8.

This in my opinion is entirely irregular, and accordingly I took the opportunity when this case appared in the list for directions a week ago of adjourning it for the purpose of having the matter argued in order to make an

attempt to put the procedure on a more correct basis.

I shall presently give such directions in this case as may be necessary. The position at present is that the plaintiff firm, under O. 30, R. 3, obtained leave to serve and served three persons as partners, it having been decided that under that rule the directions of the Court must be obtained as to the method of service to be followed. If the method prescribed in each particular case is followed and service is so effected, then prima facie there has been service upon the firm. I apprehend that in this case, in so far as any partner who has not entered appearance under protest has been served, there has been service upon the firm.

On the 17th March 1927 an appearance was entered by Mr. J. M. Rakshit as attorney, on behalf of the defendant Bhagatram Vadra. That appearance was made under protest as this defendant denied that he was a partner of the firm. On the 12th April a written statement was filed on behalf of Bhagatram Vadra in which he only says that he has no knowledge of the allegations in the plaint and he denies that he is a partner. This is an instance of what I have just referred to.

O. 30, R. 6 provides :

> Where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm.

This means that though such persons may file different written statements, they may not do so on their own behalf but must file them on behalf of the firm. Should they do that the plaintiff will be obliged to show that not one of the defences prevents a decree being made against the firm : *Ellis* v. *Wadeson* (1).

As regards persons who claim to be members of the firm, their position is provided for by R. 8, which, incidentally it may be observed, only applies when service purports to have been effected under O. 30, R. 3 (a). That rule says :

> Any person served with summons as a partner under R. 3 may appear under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving a summons on the firm and obtaining a decree against the firm, in default of appearance where no partner has appeared.

The effect of that rule, as affecting the proceedings against the firm, is that where a person who has been served as a partner under R. 3, appears under protest, the service on him as service on the firm is a nullity. The plaintiff should therefore begin again and effect service upon the firm in accordance with R. 3, unless it has already been otherwise effected, as for instance, by service on some other person as a partner who has not entered appearance under protest. This is in accordance with the opinion expressed by the learned Chief Justice in *Charry* v. *Pohoomal Bros.* (2), where he observed that the effect of such appearance under protest is merely to nullify the service altogether as regards the defendant firm and that the plaintiff may then disregard the appearance under protest and proceed again in his endeavours to serve summons in accordance with the provisions of R. 3.

The foregoing does not, however, dispose of the question when or how, as regards a defendant who has entered appearance under protest denying that he is a member of the firm, that issue can be decided.

In *Weir & Co.* v. *McVicar & Co.* (3), Atkin, L. J., observed :

> The effect of such an appearance is specially provided for by the rules, which say that a person so appearing is to take no further part in the action with which he is not concerned until after judgment has, upon a proper service on some other person, been recovered against the firm, and then, but not till then, he is entitled to have it determined whether he is a partner or not.

The point was considered in *Charry* v. *Pohoomal* (2), in which it was said that the plaintiff, after he has obtained judgment

> may apply under O. 21, R. 50, for leave to issue execution against the person who had appeared under protest, when if the liability is still disputed, the Court may order the liability of such person to be tried and determined in any manner in which any issue in a suit may be tried and determined.

As to that there is no question ; O. 21, R. 50, is quite clear on the point.

The learned Chief Justice then referred to another alternative. He adds :

> Or the plaintiff may wish to challenge at once the denial of the person served as a partner that he was a partner. If so, he should take out a summons to strike out the appearance entered on the ground that the party appearing is a partner in the firm sued or was a partner at the

(1) [1899] 1 Q. B. 714=68 L. J. Q. B. 604=80 L. T. 508=15 T. L. R. 271=47 W. R. 420.

(2) A. I. R. 1926 Bom. 585=50 Bom. 665.

(3) [1925] 2 K. B. 127.

time the cause of action accrued, or in the alternative to strike out of such appearance the denial of partnership. An order may then be made directing an issue to be tried to determine the question of partnership.

In another case *Vithaldas* v. *Hansraj* (4) the same learned Chief Justice, after alluding to the course last mentioned, also suggested that there was a third alternative, namely that the person who had entered appearance under protest had a right to ask the Court to have the question decided whether or not he is a partner in the defendant firm, the ground being that it appeared to the learned Chief Justice that it is contrary to the principles of equity that any person should be liable to have a claim of this kind hanging over him without being able to ask the Court to decide one way or the other whether or not he is liable to the claim.

In the case with which I am concerned no such question has yet arisen, for the learned Judge, in considering the procedure which may be adopted by the plaintiff or the defendant, indicated that in either case a summons should be taken out by the party who desires to have the question determined, which would involve the trial of the issue before the suit was heard on its merits. Until such a summons has been taken out no such question arises. It is not necessary, therefore, until the point comes before the Court in a concrete form, to express any definite opinion as to whether or not the law and practice admit of either of these courses being followed. I may, however, observe that it is not contemplated by O. 30, while O. 21, R. 50 provides a definite procedure whereby the issue can be determined before any execution can go against the person who has entered appearance under protest. As I read the passage from his judgment which I have quoted, Atkin, L. J., seems to have taken the view that the question could only be determined after judgment. There is also the practical aspect of the matter, that the effect might be to delay the hearing of a suit which otherwise was undefended, or time and money might be thrown away in deciding the issue before the hearing of the suit if it were ultimately dismissed. The question may have to be determined hereafter, and any view which I may have expressed is open to reconsideration should occasion arise.

It is, however, clear, and for the present purpose it suffices to say that a person who has been served as a partner under O. 30, R. 3, and entered appearance under protest, is not entitled to file a written statement on his own behalf denying that he is a partner.

It follows from what I have said that the written statement filed by Bhagatram Vadra must be taken off the file. The result, therefore, is that there is no written statement in the suit, which consequently is undefended, and the only directions necessary are that it will appear in the undefended list next Monday. It further follows from the foregoing that any proceedings taken as between the plaintiff company and Bhagatram Vadra after the filing of the written statement must also be treated as a nullity.

D.D. *Case adjourned.*

(4) A. I. R. 1921 Bom. 48.

---

## * A. I. R. 1927 Calcutta 760

MUKERJI AND G. N. ROY, JJ.

*Gohur Bepari*—Appellant.

v.

*Ram Krishna Saha* and *others*—Respondents.

Appeal No. 258 of 1926, Decided on 14th April 1927, from the Appellate order of the Dist. J., Faridpur, D/- 17th April 1926.

* *Limitation Act, Art.* 182 (2)—*R obtaining decree against G on 29th March* 1922—*G appealing—R dying during pendency of appeal —No substitution in his place—Appeal declared to have abated on 21st May* 1925—*Time will begin to run from 21st May* 1925 *and not from 29th March* 1922.

Plaintiff R instituted a suit and obtained a decree against G on 29th March 1922. G preferred an appeal. During the pendency of the appeal R, the plaintiff, died. No substitution was made in his place and on 21st May 1925, order declaring the abatement of the appeal was passed :

*Held* : that time began to run for execution from 21th May 1925, and not from 29th March 1922. (*Case law considered*). [P 761, C 1]

*Jatindra Nath Sanyal* for *Suresh Chandra Talukdar*—for Appellant.

*Radhabinode Pal* and *Ramendra Mohan Majumdar*—for Respondents.

**Mukerji, J.**—One Radha Madhab Saha instituted a title suit No. 754 of 1920, against Gohur Ali Bepari and

others. The suit was dismissed by the Munsif on the 30th August 1920. There was an appeal to the District Judge who allowed it on the 29th March 1922. Some of the defendants preferred a second appeal to this Court making the plaintiff and the other defendants respondents therein. During the pendency of the appeal Radha Madhab Saha, the plaintiff, died. The appellants in this appeal obtained a rule to show cause why the abatement of this appeal in consequence of the death of the said Radha Madhab Saha should not be set aside and his heirs substituted in his place. The rule was discharged on the 3rd April 1925. The appeal was thereafter put up for hearing and on the 21st May 1925 the following order was passed :

> The sole respondent having died and no substitution having been made in his place, the appeal abates and is dismissed without costs as the respondent has not appeared.

A decree in similar terms was then drawn up and by it the appeal was disposed of.

The question that arises in the appeal now before us is whether the period of limitation under Art. 182 Sch. 1 Limitation Act runs from the 21st May 1925 or from the 29th March 1922. The Courts below have held that it would run from the former date. The judgment-debtor Gohur Ali Bapari has preferred this appeal and his contention is that it would run from the latter date.

The main argument advanced on behalf of the appellant is to the effect that an order declaring that the appeal has abated is not a decree or order as contemplated by Cl. 2, Art. 182, Sch. 1, Limitation Act, and reliance has been placed in support of this argument upon a number of decisions which will be presently noticed and chief amongst which are the decisions of the Judicial Committee in the cases of *Batuk Nath* v. *Munni Dei* (1), and *Abdul Majid* v. *Jawahir Lal* (2).

*Batuk Nath* v. *Munni Dei* (1) was a case in which the question arose with regard to an appeal before the Judicial Committee which was dismissed for non-prosecution as the steps necessary to be taken under R. 5 of the order in Council of 15th June 1853 had not been taken by the appellant. That rule provides that

> in default of the appellant or his agent taking effectual steps for the prosecution of the appeal within such time or times respectively the appeal shall stand dismissed without further order.

Their lordships pointed out that there was no order of His Majesty in Council dismissing the appeal and that no such order was necessary to be made, and under the rule aforesaid the appeal stood dismissed without further order. It was said in that case that a dismissal for want of prosecution is not the final decree of an appellate Court within the meaning of Art. 179. In Cl.2, Sch. 2 of the Act of 1877, which for our present purposes may be taken as being the same as Art. 182, Cl. 2, Sch. 1 of the Act of 1908, no question of withdrawal arises in the case. The basis of the decision in *Batuk Nath* v. *Munni Dei* (1) has been put by Mookerjee and N. R. Chatterjea, JJ., in *Lokenath Singh* v. *Gaju Singh* (3), in these words :

> In that case there was no decree of the Court of appeal because the appeal preferred to the Judicial Committee never came up for disposal by their lordships. The appeal was dismissed by the registrar for non-prosecution, and it was ruled that the order of the registrar was not a decree of the Court of appeal.

In *Abdul Majid* v. *Jawahir Lal* (2) an appeal before the Judicial Committee was dismissed for non-prosecution under similar circumstances. Their lordships pointed out that there was no decree of His Majesty in Council in which the decree of the High Court had become merged. It was observed :

> The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognized authoritatively that the appellant had not complied with the conditions under which the appeal was open to him and that, therefore, he was in the same position as if he had not appealed at all.

These observations were quoted with approval by the Judicial Committee in a later case in which also the question of limitation arose in connexion with an appeal before that Board which had been dismissed for non-prosecution : *Sachindra Nath Roy* v. *Maharaj Bahadur Singh* (4). These two decisions of

(1) A. I. R. 1914 P. C. 65=36 All. 284=41 I. A. 104 (P. C.).
(2) A. I. R. 1914 P. C. 66=36 All. 350 (P.C.)
(3) [1915] 22 C, L. J. 333=31 I. C. 426=20 C, W. N. 178.
(4) A. I. R. 1922 P. C. 187=49 Cal. 203=48 I. A. 335.

the Judicial Committee have also been elaborately explained in *Raghu Prosad Singh* v. *Jadunandan Prosad Singh* (5) which was the case of dismissal of an appeal for non-payment of printing costs. In that case it has been held that where an appeal is presented within time any order putting an end to the appeal in any way is either a decree or order within the meaning of Art. 182 Cl. (2).

In *Fazal Husen* v. *Raj Bahadur* (6) there was an appeal by one Hardyal and an appeal against him, and Hardyal having died during the pendency of the appeals and on the failure to put Hardyal's representatives on the record, the appeals abated. It was held that the order by which the appeals were declared as having abated did not give a fresh starting point for limitation under Cl. 2, Art. 179, Sch., I of the Act of 1877. In the case of *Fazl-ur-Rahman* v. *Shah Muhammad Khan* (7) two appeals were dismissed as the counsel for the appellants informed the Court that he was unable to support them. *Fazal Husen* v. *Raj Bahadur* (6) was cited in that case. The learned Judges held that notwithstanding that the appeals had been dismissed under such circumstances limitation did none the less run from the decree of the appellate Court. They went on to observe as follows :

> If a judgment-debtor's appeal, as sometimes happens, is pending for upwards of three years, and if it were held that the appellant judgment-debtor, by withdrawing or declining to support the appeal, or by omitting to bring on the record the representatives of a deceased respondent, could, notwithstanding the fact that an appeal had been filed, cause time to run from the date of the original decree, it would in our opinion be going directly against the language of the Limitation Act and open a door to fraud.

The authority of *Fazal Husen* v. *Raj Bahadur* (6) was doubted in other decisions of the same Court, e. g. *Kewal* v. *Tirkha* (8) and *Muhammad Razi* v. *Karbalai Bibi* (9). In the last mentioned case it was held that an order declaring an appeal to have abated is in effect an affirmation of the decree of the Court below, and limitation only begins to run against the decree-holder from the date of such order and not from the date of the decree under appeal. In *Tikait Krishna Prosad Singh* v. *Wazir Narain Singh*, (10) *Fazal Husen* v. *Raj Bahadur* (6) was followed in preference to *Muhammad Razi* v. *Karbalai Bibi* (9), it being pointed out that the latter case was not one under Art. 179, Limitation Act, and also that it proceeded upon an erroneous view of the authority in the case of *Mahomed Mehdi Bella* v. *Mohini Kanta Saha Chowdhry* (11). In *Tikait Krishna Prosad Singh's* case (11) the facts were that during the pendency of an appeal in the High Court one N who was not a party to the suit or the decree of the trial Court was added respondent in the appeal, he having in the meantime obtained a decree that he was entitled to succeed to the estate of the mortgagor judgment-debtor who had died. The widow of the mortgagor judgment-debtor who was substituted in the place of her husband was the respondent against whom the appeal was originally filed. N died during the pendency of the appeal and an application was made for substituting his heirs but was eventually dropped. The appeal was then disposed of on a compromise between the appellant and the original respondent. W, an heir of N, then applied to execute the decree of the original Court and the question arose whether limitation ran from the decree of the trial Court or from the compromise decree passed by the appellate Court. It appears from the judgment of Coutts, J., that there was no order of the appellate Court declaring that the appeal had abated. In that way, as well as upon the other facts, the case was clearly distinguishable from a normal case of abatement of an appeal. It was held that W could not rely upon the decree of the appellate Court as giving him the starting point for limitation. It will be observed that in this case the learned Judges relied upon the two decisions of the Judicial Committee as supporting their view. In *Hira Lal Kumar* v. *Ganu Mahto*. (12) it was held that the fact that the appellants allowed their appeal to abate against the deceased respondent

(5) A. I. R. 1921 Patna 6=6 Pat. L, J. 27.
(6) [1897] 20 All. 124=(1897) A. W. N. 218.
(7) [1908] 30 All. 385=5 A. L. J. 580=(1908) A. W. N. 161.
(8) [1906] 3 A. L. J. 8=(1906) A. W. N. 27.
(9) [1909] 32 All. 136=5 I. C. 473=7 A. L. J. 58.
(10) [1920] 5 Pat. L. J. 731=58 I. C. 977=1920 P. H. C. C. 342.
(11) [1907] 34 Cal. 874=7 C. L. J. 305.
(12) A. I. R. 1925 Patna 585=4 Pat. 844.

could not prevent the latter's legal representatives from taking the benefit of the appellate Court's decree, and limitation ran under Art. 182, Cl. (2) from the date of the decree of the Court of appeal. The learned Judges in that case, applying the principle of the decision in *Raghu Prosad Singh* v. *Jadu Nandan Prosad Singh* (5), held that there is no distinction in principle and there ought to be no difference in the result for the purpose of Art. 182, Cl.2 when the appellant instead of withdrawing from the appeal allows it to abate. In the case of *Kalimuddin* v. *Esabakuddin* (13) it has been pointed out that where one of several respondents died during the pendency of the appeal, and his heirs being brought on the record were not properly represented, the appellants not having put in the deputy registrar's costs and the usual indemnity bond, and the appeal was first of all dismissed as against those heirs by one order and afterwards by another order, dismissed as against the other respondents on the ground that it could not proceed against them alone, the former order did not, while the latter did, amount to a "decree" within the meaning of the Code of Civil Procedure. It has been held by this Court in *Ramgati Dhar* v. *Nagendra Lal Chowdhury* (14), a short note of which is to be found in 1 *C. L. J.* 17n, that an order of the High Court declaring that an appeal has abated is, if not a decree, certainly an order which has finally disposed of the suit and that therefore an application for execution presented within three years from the date of such order is not barred. That final orders of disposal of similar character are to be regarded as being within Cl. (2), Art. 182 has been held in cases where the appeal has been dismissed on the ground of being barred by limitation [*Akshoy Kumar Nundi* v. *Chunder Mohun Chathati* (15)] or on the failure on the part of the appellant to put in deficit Court-fees [*Rup Singh* v. *Mukhraj Singh* (16)] though there is some conflict of opinion as regards the latter class of cases.

The inequities of the view propounded by the appellant have been, as already stated, clearly pointed out in *Fazl-ur-Rahman* v. *Shah Muhammad Khan* (9). In my opinion the view taken by the Full Bench in the case of *Jeeyangar* v. *Lakshmi Doss* (17), that when an appeal is entertained and an order made by the Court to which the appeal is preferred which has the effect of finally disposing of the appeal, execution runs from the date of the appellate Court, does not go beyond the range of the limits of the applicability of Cl. 2, Art. 182, Sch. I Limitation Act, of 1908.

The Courts below appear to have taken a correct view of the matter and the appeal accordingly is dismissed with costs: hearing fee-being assessed at two gold mohurs.

**Roy, J.**—I agree.

R.D. *Appeal dismissed.*

(13) A. I. R. 1924 Cal. 830=61 Cal. 715.
(14) Misc. Appeal No. 373 of 1903=1 C. L. J. 17 N.
(15) [1888] 16 Cal. 250.
(16) [1885] 7 All. 887=1885 A. W. N. 260.
(17) [1906] 30 Mad. 1=16 M. L. J. 393 (F. B.)

---

## * * A. I. R. 1927 Calcutta 763

PANTON ANE MITTER, JJ.

*Nepra*—Plaintiff—Appellant.

v.

*Sajer Pramanik* and *another*—Defendants—Respondents.

Appl. No, 2294 of 1924, Decided on 3rd May 1927, from the Appellate Decree of the Sub-J., Bogra, D/- 20th August 1924.

(a) *Interpretation of Statutes—Retrospective operation—Clear intention must be manifested.*

Enactment which are declaratory in form are not necessarily retrospective in their operation: *Young* v. *Adams*, (1898) *A. C.* 469 *Foll.* If an Act touches a right in existence at the passing of an Act no retrospective effect should be given to the Act unless a clear intention to that effect is manifested: *Colonial Sugar Refining Co.* v. *Irving*, (1905) *A. C.* 369 *Ref.* [P 764, C 2]

(b) *Interpretation of statutes—Preamble will not control the enactment.*

The preamble of an Act cannot be made use of to control the enactments themselves when they are expressed in clear and unambiguous terms. [P 765, C 2]

* * (c) *Transfer of Property Act (Amendment) Act* (27 *of* 1926)—*Act is not retrospective.*

The words "attest means" in S. 2 of the Act cannot be held to mean that the words "attest always meant" so as to make it clear that retrospective operation was intended: *A. I. R.* 1927 *All.* 1, (*F. B.*) *Foll.* [P 765, C 2]

(d) *Interpretation of Statutes—Substantive law.*

The law requiring how a document is to be completed is not a mere rule of procedure but a substantive provision. [P 766, C 1]

✲(e) *Interpretation of statutes—Subsequent Bill cannot be referred to.*

It is not permissible for a Court to refer to a Bill which is not passed into law for the purpose of construing what the provisions of an earlier Act meant. [P 766 C 1]

*Atul Chandra Gupta* and *Jitendra Kumar Sen Gupta*—for Appellant.

*Hemendra Chandra Sen* and *Nirmal Kumar Sen*—for Respondents.

**Mitter, J.**—The suit out of which the present second appeal arises was commenced by the plaintiff, now appellant, before the Munsif of Bogra for enforcing a mortgage bound executed by the defendants, now respondents. The defendants while admitting execution contend that the bond was not properly attested and the plaintiff is not entitled to a mortgage-decree and the claim for personal decree is barred by limitation as it was filed more than six years after due date of payment. The Munsif gave effect to the contentions of the defendant and dismissed the suit. Against the decision of the Munsif an appeal was preferred to the Subordinate Judge of Bogra and the learned Subordinate Judge dismissed the appeal by a judgment dated the 20th of August 1924. Against this decision the present second appeal has been preferred to this Court by the plaintiff and it has been contended on his behalf by the learned Advocate for the appellant that the Courts below were wrong in dismissing the suit on the ground of want of proper attestation of the mortgage-bond seeing that the facts of this case attract the operation of Act 27 of 1926, Transfer of Property Amendment Act.

In order to examine the validity of the ground taken it is necessary to state the findings of fact arrived at by the Court of Appeal below. The facts found are these: Both the mortgagors are illiterate persons and their names were written out in the bond by the pen of the writer Karuna Kanta who himself subscribed as such under these signatures. At the foot of the document, besides the scribe, Boyetulla and Kheru Bepari are described as attesting witnesses; Boyetulla said that he was called after the execution was over; other attesting witness, viz., Kheru Bepari was not examined and we are told by the learned Advocate on both sides that he is now dead; Thus the attesting witnesses did not see the executants sign the mortgage but merely received an acknowledgment of the execution by the executants and then signed the bond. According to the law which prevailed at the time when the suit was instituted there was no proper attestation within the meaning of S. 59 of the Transfer of Property Act: see the decision of the Judicial Committee in the case of *Shamu Patter* v. *Abdul Kadir* (1). It is said, however, that the effect of that decision has been rendered mugatary by the enactment of Act 27 of 1926, and according to this Act the word "attest" in S. 59 of the Transfer of Property Act would include attestation by a person who has received an anknowledgment of the execution by the executants. The question in controversy really depends on whether a retrospective operation should be given to Act 27 of 1926, for it is conceded that if no retrospective operation could be given to the said Statute then the plaintiff's suit must fail. It is conceded by the learned Advocate for the appellant that ordinarily no retrospective operation should be given to a Statute in matters affecting the substantive right of parties but it is said that this rule has no application if the Act or the Statute is declaratory in form and in support of this contention reliance has been placed on the decision of *Attorney-General* v. *Thubald* (2). The true rule seems to us to have been laid down in the following words of Lord Watson in the case of *Young* v. *Adams* (3):

"It may be true that the enactments are declaratory in from; but it does not necessarily follow that they are, therefore, retrospective in their operation and were meant to apply to acts which had been completed or to interests which had vested before they became law".

In *In re Pulborough School Board Election* (4), Lopes, L, J., said:

It is a well-recognised principle in the construction of Statutes that they operate only on cases and facts which come into exsitence after the Statutes were passed, unless a retrospective effect is clearly intended.

In the case of the *Colonial Sugar Refining Co.* v. *Irving* (5) the Judicial Com-

(1) [1912] 35 Mad. 607=16 I. C. 250=39 I A. 218 (P. C.).
(2) [1890] 24 Q. B. D. 557=38 W. R. 527=62 L. T. 768.
(3) [1898] A. C. 469=67 L. J. P. C. 75=14 T. L. R. 373=78 L. T. 506.
(4) [1894] 1 Q. B. D. 725=63 L. J. Q. B. 497 =42 W. R. 388=70 L. T. 639=58 J. P 572=1 Manson 172.
(5) [1905] A. C. 369=74 L. J. P. C. 77=21 T. L. R. 513=92 L. T. 738.

mittee of the Privy Council laid down that if an Act touches a right in existence at the passing of an Act, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, no retrospective effect should be given to the Act unless a clear intention to that effect is manifested. In the light of these principles let us proceed to examine the provisions of Act 27 of 1926, to see if it is restrospective by express enactment or by necessary intendment. The preamble is as follows:

> Whereas it is expedient to explain certain provisions of the Transfer of Property Act, 1882, it is hereby enacted as follows.

Then follow the provisions of S. 2 which does not declare what has always been the meaning of S. 2, but enacts that the word "attest" which was not defined in the Act of 1882 should be defined and that a new definition be inserted in S. 3 of the Act of 1882, which definition is not in accordance with the meaning of the word "attest" as was settled by a decision of the Judicial Committee of the Privy Council in the case of *Shamu Patter* v. *Abdul Kadir Rowthan* (1) so far back as 1912. The Judicial Committee re-affirmed their decision in the case of *Hira Bibi* v. *Ram Hari Lal* (6) and observed as follows:

> *Shamu Patter* v. *Abdul Kadir Rowthan* (1) decides that to be a good signature attested by two witnesses within the meaning of S. 59 of the Transfer of Property Act the persons signing as witnesses must be present at the time of the execution of the instrument. Their Lordships adopted these words of Dr. Lushington [in *Bryan* v. *White* (7)], "Attest" means the persons shall be present and see what passes, and shall when required, bear witness to the facts'. And they followed the decision of the House of Lords in *Burdett* v. *Shilsbury* (8) to the same effect.

It is clear, therefore, that by S. 2 of the Act the Legislature intended to alter the meaning of the word "attest" as interpreted by the highest Judicial Tribunal of the realm. In these circumstances the Legislature if it wanted to give a retrospective operation to the Act should have said so in clear unambiguous terms. That intention is not clear by the use of expression "means" in S. 2. In the case of *Attorney General* v. *Theobald* (2) relied on by the appellant the words used were:

> the description of property marked (c) shall be construed as if the expression 'voluntary settlement' included any trust ..... in favour of a volunteer.

and it was held that the earlier Act must be read as having the meaning given by the later Act. The effect of the later enactment was that the word "voluntary" had always that meaning and retrospective operation was given. It may be a question how far the decision in *Attorney-General* v. *Theobald* (2) is right in view of the following observations made in the case of *Young* v. *Adams* (3):

> It does not seem to be very probable that the Legislature should intend to extinguish, by means of retrospective enactment, rights and interests which might have already vested in a very limited class of persons, consisting, so far as appears, of one individual, namely the respondent. In such cases their Lordships are of opinion that the rule laid down by Erle, C. J.; in *Midland Ry. Co.* v. *Pye* (9) ought to apply. They think that, in a case like the present, the learned Chief Justice was right in saying that a retrospective operation ought not to be given to the Statute, 'unless the intention of the Legislature that it should be so construed is expressed in plain and unambiguous language, because it manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment.' The ratio is equally apparent when a new enactment is said to convert an act wrongfully done at the time into a legal act, and to deprive the person injured of the remedy which the law then gave him.

It is true that the preamble to the Act of 1926 says that it is explanatory but it is a settled rule that the preamble cannot be made use of to control the enactments themselves when they are expressed in clear and unambiguous terms. As Lord Davey observed in *Powell* v. *Kempton Park Race Course Co.* (10):

> There is, however, another rule or warning which cannot be too often repeated, that you must not create or imagine an ambiguity in order to bring in the aid of the preamble or recital. To do so would in many cases frustrate the enactment and defeat the general intention of the Legislature.

I have no doubt that the words "attest means" in S. 2 cannot be held to mean the words "attest always meant" so as to make it clear that retrospective operation was intended.

(6) A. I. R. 1925 P. C. 203=5 Pat. 58=52 I. A. 362.
(7) [1850] 2 Rob. 315=163 E. R. 1330=14 Jur. 919.
(8) [1843] 10 Cl. & F. 340.
(9) [1861] 10 C. B. (N. S.) 179=30 L J. C. P. 314=9 W. R. 658=4 L. T. 510=142 E. R. 419.
(10) [1899] A. C. 143=68 L. J. Q. B. 392=47 W. R. 585=15 T. L. R. 266=80 L. T. 538=63 J. P. 260.

It is next argued that want of due attestation of a document renders the document invalid but does not affect the substantive rights of the parties. We are unable to agree in this contention. Here the mortgagors have a right to say to the mortgagee :

You cannot make our property liable as their is no valid mortgage. You can at most get a personal decree against us if you are in time to enforce a personal decree.

The mortgagers' vested right to resist an action which intended to effect their property would be affected if retrospective operation is given to the Act of 1926. The law requiring how a document is to be completed is not a mere rule of procedure but a substantive provision : see *Gardner* v. *Lucas* (11). When the present suit was decided before trial Court the defendants were right in resisting the action on the mortgage on the ground of invalidity of attestation and they successfully resisted the same. That right cannot be taken away by a later Statute unless it was clearly stated in the later Statute that retrospective operation was intended.

We are fortified in the view we take by the decision of the majority of a Full Bench of the Allahabad High Court in the case of *Girji Nandan* v. *Hanuman Das* (12). Mr. Gupta drew our attention to the fact that a Bill has been introduced in the Council of State to make it clear that the Act of 1926 was intended to have retrospective operation in view of the decision to the contrary of the Allahabad High Court referred to above. But it is not permissible (for us) to refer to a Bill which is not passed into law for the purpose of construing what an earlier Act meant. Our function is not to legislate but to construe the law as we find it, Giving our best consideration to the matter we think that decision of the present suit does not depend on the Act of 1926 but rests on the law as laid down by the Judicial Committee in the two cases aforesaid. The Courts below were right in holding that the mortgage was not validly attested and in dismissing the suit. The appeal fails and is dismissed but without costs. It has been urged there should be a decree against one of the mortgagors as the evidence shows that there was a valid attestation with regard to him. The ground was not taken in the Courts below nor in the memorandum of appeal and we disallow it.

**Panton, J.**—I ageee,

D.D. *Appeal dismissed.*

(11) [1877] 3 A. C. 582.
(12) A. I. R. 1927 All. 1=49 All. 25 (F. B.).

---

## A. I. R. 1927 Calcutta 766

MUKERJI AND ROY, JJ.

*Syed Mahamad Maliha*—Appellant.

v.

*Choudhuri Mahammad Ismail Khan* and *another*—Respondents.

Appeal No. 290 of 1924, Decided on 14th April 1927, from the Original Order of the Dist. Judge Backergunj, D/- 14th May 1924.

(a) *Transfer of Property Act, S. 53—Provincial Insolvency Act, S. 53—Difference indicated.*

Transfers in good faith and for valuable consideration are protected under the Transfer of Property Act and also under the insolvency Act but there is this difference that under the latter Act it is the transferee who must show that the transaction was in good faith and for valuable consideration. [P 767 C 2]

(b) *Provincial Insolvency Act, S. 53—Surrender by insolvent—Landlord aware of a previous contract to sell—Transfer is not for valuable consideration.*

Surrender by an insolvent tenant in favour of the landlord, with notice of a previous agreement to sell in favour of third person, is not a transfer for valuable consideration.

*S. C. Basak* and *Mukunda Behari Mullick*—for Appellant.

*Surendra Nath Guha, Abinas Chandra Guha* and *Bhupendra Nath Das*—for Respondents.

**Roy, J.**—This is an appeal from the order of the District Judge of Bakarganj setting aside his previous order directing the sale by the Receiver of 3 Karsha holdings which were held by Shah Mafazzal Hossain who had been adjudged insolvent, and ordering the exclusion of these properties from the schedule of the insolvent's property. The appellant is the contesting creditor. It appears that the insolvent made an agreement with the appellant for the sale of these very properties (in which the insolvent had an eight annas share) for Rs. 2,000 and he took Rs. 900 as earnest money. The sale was not completed. The insolvent was unable to pay the appellant but he gave him a handnote. The appellant brought a suit on the handnote and obtained a decree on 9th May 1917. He applied for execution on 8th May 1920.

The insolvent put in an objection under S. 47 Civil P. C. alleging payment of Rs. 801 in cash. The objection was disallowed on 27th November 1920, and the application for execution also struck off. The appellant filed his second application for execution on 24th January 1922 and the insolvent was arrested on 24th January 1922. On the next day he filed his application for insolvency. He was adjudged an insolvent in due course and a Receiver appointed. Soon after the contesting creditor (the appellant) moved the Receiver in respect of these 3 Karsha properties and asked him to sell the properties.

It appears that the insolvent had in the meantime surrendered these holdings to Choudhuri Mahammad Ismail Khan the landlord who is his relative and in whose service he was at one time. The deed purports to have been executed on 3rd April 1920. It was registered on 17th June 1920. It will be noticed that the first application for execution by the appellant was on 8th May 1920, i. e. between these two dates. The Receiver held an enquiry and reported to the Judge that the deed of istafa might be declared to be a benami document. The Judge agreed and directed the Receiver to sell the properties. The insolvent appeared and filed an objection but he was overruled. Thereafter Choudhuri Ismail Khan appeared and the learned Judge held an enquiry and passed the order from which this appeal has been preferred,

There is another circumstance which has to be stated. It is this. On 2nd April 1921 a bainapatra was executed by the insolvent and his wife in favour of Ismail Choudhuri for sale of nine other properties (which were talukdari tenures) for a sum of Rs. 3000. It was stated that 8 items of these properties belonged to the insolvent but that he had transferred them to his wife in lieu of her dower and the 9th item was purchased by the wife from her own money. The actual conveyance was executed by the insolvent and his wife on 12th June 1920. The istafa in question and the kabala were registered on the same day viz., 17th June 1920. The contesting creditor appellant does not challenge the sale of the talukdari tenures. His case is that the istafa or surrender was a collusive transaction. The question for decision is whether this deed of surrender executed by the insolvent in favour of Ismail Choudhuri within 2 years of his application for insolvency is voidable against the Receiver.

The contention was advanced before the learned judge that the kabala and the istafa were part of the same transaction. The learned Judge accepted this plea and he held that Ismail Choudhuri did get an actual surrender. He was of opinion that

it is extremely probable that Mahomed Ismail Choudhuri was aware that the insolvent had already promised to sell these lands to the contesting creditor and that the latter had advanced money on this understanding.

He thought

it is possible that Mahomed Ismail Choudhuri induced his relation to relinquish the lands with the intention of doing an injury to the contesting creditor

(between whom and Ismail there has been enmity for a long time). He considered the transactions suspicious, but being of opinion that

it has not been proved that the purchaser did not act in good faith

he passed the order which is the subject matter of the appeal.

The learned Judge was probably thinking of the Transfer of Property Act. Transfers in good faith and for valuable consideration are protected under the Transfer of Property Act and also under the Insolvency Act, but there is this difference that under the latter Act it is the transferee who must show that the transaction was in good faith and for valuable consideration. The idea of the learned Judge that a part of the sum of Rs. 3,000, the consideration for the kabala, was a consideration for the istafa does not appear to be correct. It may be taken that the two deeds were conceived and achieved about the same time. Neither the bainapatra nor the kabala mentions anything about the istafa. Even in the petition of objection filed by Ismail Choudhuri he does not say that he paid anything for the istafa. He himself did not depose, but his manager did, and he does not say that anything was paid for the karsha properties. In the istafa an approximate value of Rs. 100 is put upon the karsha properties. The insolvent said he was leaving for his home in the Faridpur District and he was unable to manage the properties from a distant place. It

does not appear that he really left Barisal. He was arrested there in execution of the appellant's decree and we have it in the evidence of the manager of Ismail Choudhuri that he was Superintendent of the latter's estate for some months in 1329 B. E. The theory at the time the istafa was created was that these karshas were non-transferable holdings of no value. Whether they are worth anything or not has not been investigated, but this much is known that the appellant was willing to pay Rs. 2,000 for them. The transferor and the transferee were aware of this and when the latter decided to give them up in favour of the former it cannot be said the transfer was for valuable consideration.

The learned vakil appearing for Ismail Choudhuri contends that the surrender was valuable consideration which is that the transferor would not be liable for any further rent. Reference was made to *Mahammadunissa Begum* v. *J. C. Bachelor* (1).

That was a case of relinquishment by one co-sharer in favour of a minor relative to induce the Collector to assume charge of the minor's estate. In the particular circumstances of that case it was held that the relinquishment was not without valuable consideration. The present case where a man surrenders for nothing his lands for which he might have got Rs. 2,000 cannot stand comparison with that case.

It is not necessary to hold that the document was a benami deed. The evidence falls short of that proof. It is difficult, however, to believe that not only the insolvent, but also his brother who had the other half share, gave up these lands for nothing and the suspicion gains ground as one reads the evidence that the large sums realized from the sub-tenants by making settlements with them were shared by the brothers with their relative Islam Choudhuri Shaheb. The insolvent was certainly looking after the latter's estate long after the so called surrender. The evidence is quite sufficient to establish that the transfer was neither in good faith nor for valuable consideration. The appeal therefore must be allowed with costs, the hearing fee being assessed at 4 gold mohurs. The istafa will be annulled and the karsha properties will be available to the Receiver for administering the estate of the insolvent.

**Mukerji, J.**—I agree.

R.K. *Appeal allowed.*

(1) [1905] 29 Bom. 428=7 Bom. L. R. 477.

---

## * A. I. R. 1927 Calcutta 768

PAGE, J.

*Goculdas*—Plaintiff.

v.

*Chaganlal* and *others*—Defendants.

O. C. S. No. 900 of 1923, Decided on 31st March 1927.

* (a) *Letters Patent (Calcutta), Cl. 12—"Suit for land" means a suit in which having regard to issues the decree will affect directly title to immovable property—Suit claiming share in sale proceeds of ancestral dwelling house is not a suit for land.*

The term "suits for land or other immovable property" is not limited to suits in which the plaintiff seeks to recover possession of land or other immovable property, but means suits in which, having regard to the issues raised in the pleadings, the decree or order will affect directly the proprietary or possessory title to land or other immovable property. [P 770, C2, P 771,C1]

Where the claim is to a share of the proceeds resulting from the sale of an ancestral dwelling house outside the High Court's jurisdiction, the suit is not "a suit for land or other immovable property" within Cl. 12 : *A. I. R.* 1926 *Bom.* 1 (*F. B.*) *Ref.* **[But see A. I. R. 1927 Bom. 278 F. B. Overruling 50 Bom. 1.]** [P 776, C 1]

(b) *Letters Patent (Calcutta), Cl. 12—Suit for administration of trust for enforcement of the trust relating to property outside Court's jurisdiction is not, but, for declaration of the applicant's right to possession of trust-properties is, a suit for land.*

If a suit is brought for the administration of a trust which inter alia relates to immovable property situate outside the jurisdiction of the High Court, and the only relief sought is that the trustee should be ordered duly to carry out the trust, the suit is not a suit for land. But if the relief claimed is not confined to an order for the enforcement of the trust, and the applicant claims, e. g., a declaration of his right to the possession of trust properties situate outside the jurisdiction, then the suit would be a suit for land, and the Court would have no jurisdiction to entertain it. [P 771, C 2]

* (c) *Letters Patent (Calcutta), Cl. 12—High Court has jurisdiction to pass a decree in personam regarding property outside its jurisdiction—But Court will not pass a decree unless it is enforceable effectively by personal obedience.*

Both in India and in England the High Courts, for the purpose of doing equity, possess jurisdiction to pass decrees in personam which may affect immovable property situate beyond the jurisdiction of the Court. But while this

jurisdiction in equity is to be exercised at the discretion of the Court, the Court will act in compliance with limitations upon its discretion which have long been established. Moreover, the Court will not pass a decree in personam which indirectly affects foreign land unless the decree can effectively be enforced by the personal obedience of the defendant within the jurisdiction. It will not pass a decree that will operate in the Courts *loci situs* merely as a *brutum fulmen* (law which is not respected or obeyed.) [P 772 C 1 2]

✲(*d*) *Letters Patent (Calcutta), Cl.*.12—*'Defendant' means all defendants to the suit.*

The dwelling or carrying on business must be of all the defendants. The expression is used not as indicating an individual defendant in a suit, but the party defendants to the suit, which may be one person or several; 13 *B. L. R.* 91, *Foll.* [P 773 C 2]

*N. N. Sircar* and *S. C. Bose*—for Plaintiff.

*S. N. Bannerjee, N. N. Bose* and *R. N. Banerjee*—for Defendants.

**Page, J.**—This is a suit to recover a sum of Rs. 6,492 being part of the proceeds of the sale of a dwelling house at Bhawalpore in the Punjab. The premises in suit are situate in the Native State of Bhawalpore, and are not within the jurisdiction of the High Court at Fort William in Bengal.

The plaintiffs' cause of action is set out in paras. 9-12 of the plaint.

Para. 9.—The plaintiffs and the defendants as members of an undivided Hindu family governed by the Mitakshara School of Hindu Law had been in joint possession and enjoyment amongst others of the said ancestral house and premises in Bhawalpore, having inherited the same from their common ancestor the said Sundar Shah Rathi as stated above, till the same with all additions and alterations and improvements made thereupon with the advance of time were disposed of about three years ago as stated below.

Para. 10.—About three years ago the defendant Chaganlal acting for himself and as the constituted attorney of the other defendants sold and conveyed the said ancestral house and premises with the said additions, alterations and improvements thereupon part by part to diverse parties in the months of March and April 1920.

Para. 11.—The said sales were all effected by the defendants without the consent or knowledge of the plaintiffs or of any of them and he realised therefrom in all the sum of Rs. 19,476.

Para. 12.—The plaintiffs have been advised and they believe and submit that they are entitled to one-third of the whole of the said sum of Rs. 19,476, that is to say the sum of Rs. 6,492.

The relief claimed is:

1. Leave under Cl. 12, Letters Patent (1865), of the High Court at Fort William in Bengal.

2. Decree for the said sum of Rs. 6,492 with such interest thereon as this Court may be pleased to allow.

3. If necessary, an account, and other incidental relief.

The defence of Chaganlal and Kanahyalal, the first and third defendants, is that the plaintiffs and the defendants are members of a joint Hindu family; that they did not sell the right, title or interest of the plaintiffs in the premises in suit, and that any interest that the plaintiffs may have possessed in the said premises has been lost by adverse possession. Sohanlal, the second defendant, by way of defence stated that the family except in respect of the said house at Bhawalpore was not joint and undivided; that the defendant Chaganlal had sold the premises in suit, and that Sohanlal had received Rs. 2,000 in respect of his share of the sale proceeds.

Rukmini and Mathurabai, the fourth and fifth defendants, stated in their defence that they were the widows of two of the members of the said family, and that the members of the family for a long time had been living separately, but that there had not been a partition of the joint ancestral property. They stated further that they had received from the defendant Chaganlal Rs. 1,500, part of a sum of Rs. 3,500, which was their share of the sale proceeds of the property in suit; and they denied that the plaintiffs were entitled to any portion of the sale proceeds that had been received by them. The defendants Chaganlal, Sohanlal, and Kanahyalal also denied that the Calcutta High Court had jurisdiction to try the suit.

The first question that arises is whether, having regard to the pleadings, this Court possesses jurisdiction to try the issues that fall for determination.

Under Cl. 12, Letters Patent (1865):

The High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try and determine suits of every description, if, in the case of suits for land or other immovable property such land or property shall be situated, or, in all other cases, if the cause of action shall have arisen, either wholly, or, in case the leave of the Court shall have been first obtained in part, within the local limits of the ordinary original civil jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gain within such limits.

Leave under Cl. 12, Letters Patent was granted on the 23rd March

1923. In the plaint the defendants, Chaganlal and Sohanlal, are described as residing in the town of Calcutta, while the other three defendants are described as being beyond the jurisdiction of the Court.

After the suit had been called for hearing learned counsel stated that the plaintiffs were prepared to abandon their claim against the defendants other than Chaganlal and Sohanlal, and as against defendants 3 to 5 the suit was dismissed with costs. The defendants Chaganlal and Sohanlal contend that in those circumstances this Court has no jurisdiction to try the issues that arise, upon two grounds (i) : that the suit is a "suit for land" within Cl. 12, Letters Patent (1865) ; (ii) that at the commencement of the suit all the defendants did not dwell, carry on business, or personally work for "gain" within the local limits of the ordinary "original civil jurisdiction" of the Court, as required under the provisions of Cl. 12, Letters Patent. It becomes necessary, therefore, to ascertain and determine the meaning of the words "suits for land" as used in Cl. 12, Letters Patent. The term is ambiguous, and in *Venkoba Balshet* v. *Rambhaji* (1) the Bombay High Court held that :

We think that this is not a suit for land within the meaning of S. 5, Act 8, 1859. Comparing that section with Ss. 223 and 224 of the Code, we think that a suit for land is a suit which asks for delivery of the land to the plaintiff.

This construction of the term appears to have found favour with the Bombay High Court in *Yaswantrao Holkar* v. *Dadabhai* (2), and also with Sanderson, C. J., in the case of *Nagendra Nath Chowdhuri* v. *Eraligool Co., Ld.* (3). But *Holkar's* case (2) has recently been overruled by a Full Bench of the Bombay High Court in *India Spinning and Weaving Co., Ld.* v. *The Climax Industrial Syndicate* (4), and, having regard to the ratio of the doctrine to be found in the jurisprudence of all civilized countries that questions relating to the title to the ownership or possession of immovable property should be determined not only by the lex situs but also in foro situs. I am of opinion that this narrow construction is not correct, and that the term "suits for land or other immovable property" is not limited to suits in which the plaintiff seeks to recover possession of land or other immovable property. The sanction of the doctrine is to be found in international comity, and

the principle itself arises from the conception of international law known as eminent domain, by which is meant that the proprietary right of every sovereign state is not only absolute within its territorial limits, so as to exclude that of other nations, but also paramount with respect to the members of the state itself, so as to include the right, in case of necessity or for public safety, of disposing of all the property of every kind within the same limits :

(Foote's Private International Law, p. 223).

The defendant's judge,

Wrote Vattel :

is the judge of the place where the defendant has his settled abode or the judge of the place where the defendant is when any sudden difficulty arises provided it does not relate to an estate in land or to a right annexed to such an estate. In such a case, as property of this kind is to be held according to the laws of the country where it is situated and as the right of granting it is vested in the rule of the country, controversies relating to such property can only be decided in the state in which it depends. B. 2, Ch. 8, S. 103.

Story lays down that :

In respect to immovable property every attempt of any foreign tribunal to found a jurisdiction over it must, from the very nature of the case, be utterly nugatory and its decree must be for ever incapable of execution in rem. We have seen indeed that by the Roman law a suit might in many cases be brought either where the property was situate or where the party had his domicile. This might well be done within any of the vast domains over which the Roman Empire extended ; for the judgments of its tribunals would be everywhere respected and obeyed. But among the independent nations of modern times there would be insuperable difficulties in such a course. And hence, even in countries acknowledging the Roman law, it has become a very general principle that suits in rem should be brought where the property is situate : and this principle is applied with almost universal approbation in regard to immovable property. The same rule is applied to mixed actions and to all suits which touch the realty : Conflict of Laws, S. 511.

The learned author says that

the inconveniences of an opposite course would be innumerable and would subject immovable property to the most distressing conflicts arising from opposing titles and compel every nation to administer almost all other laws except its own in the ordinary administration of justice. S. 555 : see also Dicey's Conflict of Laws, 4th edition, p. 33 ; Wheatson's International Law (1904), p. 260 ; Westlake's Private International Law, 7th edition, p. 315.

(1) [1872] 9 B. H. C. 12.
(2) [1890] 14 Bom. 353.
(3) A. I. R. 1922 Cal. 443=49 Cal. 670.
(4) A.I.R. 1926 Bom. 1=50 Bom. 1(F.B.)[Overruled in A. I. R. 1927 Bom. 278 (F. B.)].

As I apprehend the matter the framers of the Letters Patent, 1865, when prescribing the local limits of the High Courts in India, intended to apply the rule that was followed ex comitate in other countries. In my opinion the terms "suits for land or other immovable property" in Cl. 12, Letters Patent, means suits in which, having regard to the issues raised in the pleadings, the decree or order will affect directly the proprietary or possessory title to land or other immovable property: *Delhi and London Bank* v. *Wordie* (5) *Kellie* v. *Fraser* (6), *Sreenath Roy* v. *Cally Doss Ghose* (7), *Land Mortgage Bank* v. *Sudurudeen Ahmed* (8), *Ebrahim Ismail Timol* v. *Provas Chander Mitter* (9), *Lodna Colliery Co.* v. *Bipin Bihari Bose* (10), *Sudamdih Coal Co.* v. *Empire Coal Co.* (11), *Harendra Lal Roy Chowdhuri* v. *Hari Dasi Devi* (12), *Abdul Karim* v. *Badrudeen* (13), *Sundara Bai* v. *Tirumal Rao* (14), *Vaghoji Kuverji* v. *Camaji Bomanji* (15), *India Spinning and Weaving Co.* v. *Climax Industrial Syndicate* (4), *In Re Hawthorne* (16), *The British South Africa Co.* v. *Campanhia De Mocambique* (17), *Deschamps* v. *Miller* (18).

Thus construed, the restriction upon the local jurisdiction of the Indian Courts effected under Cl. 12, Letters Patent, conforms to the rule that is observed ex comitate by other civilized countries, and is in consonance with what I conceive to be the better opinion of the Courts in India. Further, if the words "suits for land or other immovable property" bear the meaning that I have attributed to them, a simple test is provided for determining in any particular case whether the Court possesses jurisdiction to try the suit. For instance, judged by this test, a suit brought to recover damages for trespass to land beyond the jurisdiction of the Court will or will not be a suit for land according to the issues that fall to be determined. If, having regard to the pleadings, no issue is raised as to the title of the plaintiff, and the issue to be tried is merely whether the factum of the trespass by the defendant has been proved, then, if the defendant is within the jurisdiction, the Court will hear the suit, for the suit is not a suit for land. On the other hand, if the right of the plaintiff to be in possession of the land is in issue, the Court will have no jurisdiction to try the suit, for the decree will affect directly the title to the land. In *British South Africa Co.* v. *Campanhia DeMocambique* (5), Lord Herschell, C. J., observed that

> he was not satisfied that either Lord Mansfield or Story would have regarded an action of trespass to land as a suit for personal damages only, if the title to the land were in issue, and in order to determine whether there was a right to damages it was necessary for the Court to adjudicate upon the conflicting claims of the parties to real estate. In both the cases before Lord Mansfield, as I understand them, no question of title to real property was in issue.

Again, if a suit is brought for the administration of a trust which inter alia relates to immovable property situate outside the jurisdiction of the Court, and the only relief sought is that the trustee should be ordered duly to carry out the trust, the suit is not a suit for land. But if the relief claimed is not confined to an order for the enforcement of the trust, and the applicant claims, e. g., a declaration of his right to the possession of trust properties situate outside the jurisdiction, then, in my opinion, the suit would be a suit for land, and the Court would have no jurisdiction to entertain it. *Nistarini Dassi* v. *Nundo Lall Bose* (19), *Haralall Banerjee* v. *Nitambini Debi* (20), *Abdul Karim* v. *Badrudeen* (13). I am, of course, aware that

> whilst Courts of equity have never claimed to act directly upon land situate abroad, they have purported to act upon the conscience of persons living here. In *Lord Crawstown* v. *Johnston* (21) Sir R. A. P. Arden, Master of the Rolls, said: "*Archer* v. *Preston*, *Lord Arglasse* v. *Muschamp*, and *Lord Kildare* v. *Eustace*, clearly show that with regard to any contract

(5) [1876] 1 Cal. 249=25 W. R. 272.
(6) [1877] 2 Cal. 445.
(7) [1879] 5 Cal. 82.
(8) [1892] 19 Cal. 358.
(9) [1909] 36 Cal. 59=1 I. C. 472.
(10) [1912] 39 Cal. 739=17 I. C. 500.
(11) [1915] 42 Cal. 942=31 I. C. 581.
(12) A. I. R. 1914 P. C. 67 = 41 Cal. 972 = 41 I. A. 110 (P. C.).
(13) [1904] 28 Mad. 216.
(14) [1909] 33 Mad. 131 = 3 I. C. 930 = 20 M. L. J. 103.
(15) [1904] 29 Bom. 249=6 Bom. L. R. 958.
(16) [1883] 23 Ch. D. 743=52 L. J. Ch. 750=32 W. R. 147=48 L. T. 701.
(17) [1893] A. C. 602 = 63 L. J. Q. B. 70 = 6 R. 1=69 L. T. 604.
(18) [1908] 1 Ch. 856 = 77 L. J. Ch. 416 = 98 L. T. 564.
(19) [1899] 26 Cal. 891=3 C. W. N. 670.
(20) [1901] 29 Cal. 315.
(21) [1774] 1 Cowp. 161.

made, or equity between persons in this country, respecting lands in a foreign country, particularly in the British Dominions, this Court will hold the same jurisdiction as if they were situate in England:" per Lord Herschell in *British South Africa Co.* v. *Campanhia De Mocambique* (17), *Norris* v. *Chambres* (22), *Ewing* v. *Orr Ewing* (23), *In Re Hawthorne* (16), *Dumder* v. *Armsterdamsch Trustees Kantoor* (24), *India Spinning and Weaving Co.* v. *Climax Industrial Syndicate* (4).

I am not disposed to limit the jurisdiction of the High Courts. On the contrary I conceive it to be my duty to maintain, and, whenever it is meet so to do, to enlarge, the authority of the Court. *Est boni judicis ampliare juris dictionem.* In my opinion, both in India and in England the High Courts, for the purpose of doing equity, possess jurisdiction to pass decrees in personam which may affect immovable property situate beyond the jurisdiction of the Court. But while this jurisdiction in equity is to be exercised at the discretion of the Court, the Court will act in compliance with limitations upon its discretion which have long been established. In *Deschamps* v. *Miller* (1) Parker, J., observed that

the general rule is that the Court will not adjudicate on questions relating to the title to, or the right to the possession of, immovable property out of the jurisdiction. There are, no doubt, exceptions to the rule, but, without attempting to give an exhaustive statement of those exceptions, I think it will be found that they all depend on the existence between the parties to the suit of some personal obligation arising out of contract, or implied contract, fiduciary relationship, or fraud, or other conduct which in the view of a Court of equity in this country would be unconscionable, and do not depend for their existence on the law of the locus of the immovable property. Thus, in cases of trusts, specific performance of contracts, foreclosure or redemption of mortgages, or in the case of land obtained by the defendant by fraud or other such unconscionable conduct as I have referred to, the Court may very well assume jurisdiction. But where there is no conduct, no fiduciary relationship and no fraud or unconscionable conduct giving rise to a personal obligation between the parties, and the whole question is whether or not according to the law of the locus the claim of title set up by one party, whether a legal or equitable claim in the sense of those words as used in English law, would be preferred to the claim of another party, I do not think the Court ought to entertain jurisdiction to decide the matter.

In *Vaghoji* v. *Camaji* (2), Jenkins, C. J., observed that

a Court of equity in England only assumed jurisdiction in relation to land abroad, whereas between the litigants or their predecessors some privity or relation was established on the ground of contract, trust or fraud, but in no case of which I am aware has the Court of equity entertained a suit, even if the defendant was within the limits of its jurisdiction, where the purpose was to obtain a declaration of title to foreign land: see also the instructive judgment of Ray, J., in *Re Hawthorne* (16).

Moreover, the Court will not pass a decree in personam which indirectly affects foreign land unless the decree can effectively be enforced by the personal obedience of the defendant within the jurisdiction. It will not pass a decree that will operate in the Courts *loci situs* merely as a *brutum fulmen*: *Norris* v. *Chambres* (22), *Exp. Pollard* (25).

I am not aware

observed Kay, J.,

of any case where a contested claim depending upon the title to immovables in a foreign country strictly so called, being no part of the British dominions or possessions, has been allowed to be litigated in this country simply because the plaintiff and the defendant happened to be here: *Re Hawthrone* (16).

In *the British South Africa Co.'s* case (17) Lord Herschell, L. C., stated that

there appear to me, I confess, to be solid reasons why the Courts of this country should, in common with those of most other nations, have refused to adjudicate upon claims of title to foreign land in proceedings founded on an alleged invasion of the proprietary rights attached to it, and to award damages founded on that adjudication,

and his lordship added that

it is quite true that, in the exercise of the undoubted jurisdiction of the Courts, it may become necessary incidentally to investigate and determine the title to foreign lands; but it does not seem to me to follow that because such a question may incidentally arise and fall to be adjudicated upon, the Courts possess, or that it is expedient that they should exercise, jurisdiction to try an action founded on a disputed claim of title to foreign lands.

In considering whether the present suit is a suit for land within Cl. 12, Letters Patent, I have endeavoured to bear in mind the doctrine enunciated in the authorities to which I have referred, and, as I apprehend the matter, the construction that I have placed upon the term "suits for land or other immovable property" in Cl. 12, Letters Patent, conforms alike to the principle underlying the decisions of the Courts and to the rule of international law that finds its sanction in the comity

(22) [1861] 3 D. G. F. & J. 583=4 L. T. 345=7 Jur. (N. S.) 689=9 W. R. 794.
(23) [1883] 9 A. C. 34=50 L. T. 401=53 L. J. Ch. 435=32 W. R. 573.
(24) [1902] 2 Ch. 132=71 L. J. Ch. 618=50 W. R. 551=87 L. T. 22.
(25) [1839] Mont. & C. 239.

of nations. Now, applying the test that I have laid down to the issues raised in this case I am clearly of opinion that the present suit is not a suit for land. The claim is to a share of the proceeds resulting from the sale of the ancestral dwelling-house at Bhawalpore; and, having regard to the pleadings, no issue arises that can affect the title to the land and premises that have been sold. The title of the purchaser is not challenged. In this suit the plaintiffs do not seek to set aside the sale; on the contrary, both the plaintiffs and the defendants approbate the sale, and claim their share of the proceeds. The real issue to be determined in this dispute is not with respect to the title to the ancestral dwelling-house, but whether the plaintiffs at all material times were members of the joint undivided family to which the dwelling-house and premises in suit belonged. For these reasons, in my opinion, the suit is not "a suit for land or other immovable property" within Cl. 12, Letters Patent.

The defendants further contend that as it is conceded that no part of the cause of action arises within the local limits of the ordinary original civil jurisdiction of the Court. the Court has no jurisdiction to entertain the suit, because three of the defendants at the time of the commencement of the suit did not "dwell, or carry on business, or personally work for gain within such limit." In the plaint defendant 3 is described as residing at Chinsurah in the district of Hoogly, and defendants, 4 and 5, as residing at Bikaneer; both places being situate beyond the local limits of the ordinary original civil jurisdiction of the Calcutta High Court. This contention must prevail, for, in my opinion, in these circumstances the issue as to the jurisdiction of the Court is concluded against the plaintiffs by the ruling of this Court in *Hadjee Ismail Hadjee v. Hadjee Mahomed Hadjee* (26). That case was decided in 1874 and so far as I have been able to ascertain, the correctness of the decision has never been doubted during the 53 years that have passed since the judgment was delivered. Mr. Sircar frankly and properly admitted that the plaintiffs could not reasonably contend that, inasmuch as the suit had been dismissed against the three defendants who reside beyond the jurisdiction of the Court, the suit must be deemed to have commenced from the date when the only defendants remaining on the record were described as residing within the jurisdiction. Learned counsel for the plaintiffs, however, contended that as defendants 1 and 2 were, at all material times, amenable to the jurisdiction of the Court it was not open to either of those defendants to raise the defence that because they had been joined as defendants with some other persons who are not subject to the jurisdiction of the Court, the Court has no jurisdiction to entertain the suit. In *Hadjee's* case (26) the same contention was raised and prevailed before the trial judge, but it was not accepted by the Court on appeal. In that case, as in the present case, the defendants who were residing beyond the jurisdiction were interested in the issues that fell for determination, and the Court (Couch, C. J., and Pontifex, J.,) decided that the suit could not be treated as a suit brought solely against the defendants who were within the jurisdiction, and further held that

> to say that it is sufficient for one defendant to dwell or carry on business within the jurisdiction would be to insert something into this clause which is not there. It would be saying if any of the defendants or any defendant dwells or carries on business within the limits. It being necessary to give to the word "defendant" such a meaning as to include more than one, for the purpose of applying it to suits where there are several defendants, I think we ought also to hold that the dwelling or carrying on business must be of all the defendants. The expression is used not as indicating an individual defendant in a suit, but the party defendants to the suit which may be one person or several.

In those circumstances the Court ordered that the plaint be taken off the file of the Court, I am bound by the decision in *Hadjee's* case (26) and I order that the suit be dismissed, and the defendant's costs of, and incidental to, these proceedings be paid by the plaintiffs.

R.D. *Suit dismissed.*

(26) [1874] 13 B. L. R. 91=21 W. R. 303.

---

## A. I. R. 1927 Calcutta 775

BUCKLAND, J.

*Manindra Chandra Nundy*—Plaintiff

v.

*Velji Mulji*—Defendant.

Suit No. 1232 of 1927, Decided on 19th May 1927.

*Calcutta High Court Rules (Chap. 7), R. 12—Plaint verified by a person other than the plaintiff or his agent—His authority to verify must be proved by affidavit—Civil P. C., O. 6, R. 15.*

Where a plaint is signed by constituted attorney of the plaintiff, which mentions the name of another person as being able to depose to the facts of the case and is verified in the usual form by that person, it must be proved by an affidavit that he is so authorised to verify. *Martin and Co.* v. *Abdul Rahim*, Suit No. 1582 of 1925, *Diss. from.* [P 774 C 2]

**Buckland, J.**—The Master has refused to admit this plaint on the ground, that there is no affidavit proving the fitness to verify of Mr. Edwin Greaves, the gentleman who purports to have verified it. The circumstances are these :

The plaint is in a suit by the Honourable Sir Manindra Chandra Nundy, who is stated in the cause title and in the first paragraph of the plaint to carry on business by Gillanders Arbuthnot & Co., as his managing agents. It is signed by Susil Kumar Bose, as constituted attorney of the plaintiff Maharaja. As to his authority to sign the plaint no question arises. Para. 18 says that Edwin Greaves is a Chief Assistant of the Firm of Gillanders Arbuthnot & Co. and is able to depose to the facts of the case. The verification is in the usual form and is signed " Edwin Greaves."

Now this does not conform to O. 6, R. 15, Civil P. C., which provides that

> every pleading shall be verified by the party or one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

Chap. 7, R. 12, Rules of this Court provides :

> Where any person other than the party pleading verifies a pleading under O. 6, R. 15 of the Code, his fitness so to verify shall be proved by his affidavit at the time the pleading is presented.

I draw special attention to the use of the word " proved " in each of the rules quoted, and I also observe that the rule gives no scope for the exercise of the judge's discretion.

My attention has been drawn to a decision of my learned brother Mr. Justice Page in *Martin & Co.* v. *Abdul Rahim* in suit No. 1582 *of* 1925, where in circumstances in which the rule was not strictly complied with my learned brother held that no affidavit was necessary. That was a suit brought by a firm of the name of Martin & Co. The plaint was signed for Martin & Co. by Oswald Martin, a partner. Para. 9 of the plaint says that it is verified by Mr. Kailash Chandra Mahendra, a principal assistant of the plaintiff firm, who is acquainted with matters and facts connected with the suit. There is a verification by that gentleman in the usual form : but it appears that his fitness so to verify was not proved by affidavit. My learned brother said that Mr. Oswald Martin instead of signing the verification himself, which of course would have been in order, took responsibility for the verification by the paragraph which I have read, and he said that in the circumstances he was satisfied that Mr. Kailash Chandra Mahendra was acquainted with the facts of the case for the purpose of complying with O. 6, R. 15.

There was in that case no proof of the fitness of Mr. Kailash Chandra Mahendra to verify, for a plaint signed by a party or his constituted attorney is not proof of what it states. For proof evidence is necessary, and the form prescribed in this instance, is an affidavit.

My learned brother continued that it seemed to him to be mere pedantry to say that the Court should be satisfied if Mr. Oswald Martin signed the verification, but ought not to be satisfied if the person designated by Mr. Oswald Martin as being qualified to sign the verification in fact signs it.

With all respect to the learned Judge, I do not agree, and I find myself unable to follow his judgment. What may appear pedantic in one case may be a matter of the highest importance in another. Rules are provided as the most suitable for general use, and where it is within the contemplation of those who are responsible for making them that circumstances may arise where they should be departed from, discretion is frequently given to the Court or Judge. But nothing of the sort is to be found here, and I am not prepared, as at present advised, to hold that any exception whatever can be made to the mandatory provisions of the rule requiring an affidavit of the fitness of the person verifying to be presented with the pleadings.

But even if I did not take so strict a view, I should have to point out that the two cases are not similar, for in that case a plaintiff asserted that the verifier

was acquainted with the facts, whereas in this the assertion is made by the constituted attorney of the plaintiff.

I observe that my learned brother said that in the particular circumstances of the case the provisions of the order and rule have been complied with. It may be that he did not intend that his judgment should be treated as a precedent but my attention has been drawn to it as such, and this application is founded upon it.

The plaint will be returned to the attorney presenting it for compliance with the rule.

R.K. *Plaint returned.*

---

## A. I. R. 1927 Calcutta 775

MUKERJI AND GRAHAM, JJ.

*Bidhu Bhusan Bakshi*—Appellant.

v.

*Kala Chand Roy*—Respondent.

Appeal No. 2075 of 1926, Decided on 16th December 1926, from the decree of the Dist. Judge., Birbhum, D/- 10th March 1926.

(a) *Court-fees Act, S. 7 (iv) (c)—Suit apparently declaratory.*

Where reliefs appear on the face of them to be of a declaratory nature, but they are really consequential ones, ad valorem Court-fees must be paid : *A. I. R.* 1924 *Cal*, 731, *Foll* [P 775 C 2]

(b) *Court-fees Act, S. 12 (ii)—Formal decision of lower Court is not necessary.*

It is not necessary for the application of S. 12 (ii) that there should have been a formal decision on the question of sufficiency of the Court-fees in the Court below : 7 *Cal.* 348, *Foll* [P 775 C 2]

(c) *Court-fees Act, S. 12 (ii)—Appellate Court can order additional Court-fees only on registration of appeal.*

A suit comes before a Court of appeal within the meaning of sub-Cl. (ii), of S. 12, when the appeal is registered in such Court. [P 775 C 2]

*Manmatha Nath Roy* and *Surjya Kumar Aich*—for Appellant.

**Judgment.**—We have examined the prayers in the plaint and we are of opinion that although they have been worded as embodying reliefs which on the face of them appear to be of a declaratory nature, two at least of these reliefs are really consequential ones. We are of opinion that the reason of the decision of this Court in the case of *Tara Prasanna* v. *Nrisingha Moorari Pal* (1) fully applies to the present case, and the registrar is right in the view he has taken, namely that ad valorem Court-fees must be paid on the memorandum of appeal. He is also right in holding that the Court-fees paid on the plaint as well as on the memorandum of appeal which the plaintiff filed in the lower appellate Court were insufficient.

Then a question has been raised in view of S. 28, Court-fees Act, as to the propriety of the registrar's order calling upon the appellant to pay the deficit Court-fees on the plaint and on the plaintiff's memorandum of appeal to the lower appellate Court. It has been argued that there has been no reception or user in this Court of the aforesaid documents yet and therefore an order for their stamping with the requisite Court-fees cannot be passed; in other words, it is said that if and when the appeal is heard and those documents are sought to be used, and not till then, can an order of this description be made.

This contention seems reasonable enough, and were S. 28, Court-fees Act, the only section that was applicable to the present case, we would have been prepared to give effect to it. The present case, however, is one in which a plaintiff who has been unsuccessful in both the Courts below has preferred this appeal. There is another provision of the Act which is applicable, and more directly applicable, to this case and that is sub-S. (ii) of S. 12. It is not necessary for the application of this sub-section that there should have been a formal decision on the question of sufficiency of the Court-fees : *Shama Soondary* v. *Hurro Soondary* (2). Under this sub-section the plaintiff-appellant may be called upon to pay the requisite additional Court-fees on the aforesaid documents, and on his failure to pay the same within such time as the Court shall fix, the Court is bound to dismiss the suit under S. 10, sub-S. (ii). For the adoption of this course by this Court it is necessary that the suit should have come before this Court, which evidently means that the appeal should have been registered, because not till the appeal has been registered in this Court can it properly be said that the suit has come before this Court. This course is manda-

(1) A. I. R. 1924 Cal. 731=51 Cal. 216.
(2) [1881] 7 Cal. 348=8 C. L. R. 528.

tory and the power conferred by this provision of the law may be exercised at any time so long as the suit remains before this Court on appeal. The proper order to pass in the present case therefore is to direct that the appeal should be registered on the appellant supplying the deficit Court-fees as regards his memorandum of appeal to this Court. After the appeal has been registered and before it is dealt with under O. 41, R. 11, Civil P. C., it should be placed before the Court for proper orders being passed under S. 12, sub-S. (2), Court fees Act.

On the appellant's prayer we allow him further time till 3rd January 1927 to put in the deficit Court-fees for his memorandum of appeal to this Court, but it must be understood that he must put the same in by that date, and in default thereof the appeal will stand rejected.

J.V. *Time granted.*

---

## A. I. R. 1927 Calcutta 776

B. B. GHOSE AND PANTON, JJ.

*Gouranga Sundar Mitra* and *another* —Appellants.

v.

*Mohendra Narayan Mitra* and *others* —Respondents.

Appeal No. 1 of 1925, Decided on 17th November 1926, from the decree of the Offg. Sub-Judge, Dinajpur, D/- 27th September 1924.

(a) *Hindu Law—Dayabhaga—No joint family of father and sons can exist—Sons if joint in food, worship and estate after their father, can form joint family.*

Under the Dayabhaga there cannot be a joint family consisting of the father and the sons because so long as the father is alive he is the master. The sons may acquire separate properties of their own but they have no concern whatsoever with the joint family property if any property can be so called during the lifetime of the father. Sons after the death of the father may form a normal Hindu joint family. But the test is whether they are joint in food, worship and estate. [P 777 C 2]

(b) *Hindu Law—Dayabhaga—A person in more affluent circumstances supporting his brothers—Poor brothers do not form joint family with him.*

If any brother of the family amongst the Hindus in Bengal is in a more affluent circumstances on account of his earnings than others and the indigent members of the family flock to him for the purpose of assistance and support they do not form a joint family. [P 778 C 1]

(c) *Hindu Law—Joint family—Self acquisition.*

It is only when self-acquisition is claimed that it is necessary for the other members of the joint family to prove that they had also contributed to the acquisition of the property. [P 779 C 1]

*Dwarka Nath Chakravarti, Brojo Lal Chakrabarty* and *D. N. Bagchi, Gopendra Nath Das* and *Apurba Charan Mukherjee* for *Baranashibasi Mukherjee*—for Appellants.

**Judgment.**—This an appeal by defendants 1 and 5 against the judgment and decree of the Subordinate Judge of Dinajpur. The plaintiff sued as a pauper for declaration of title to and recovery of joint possession of one-fourth share of the properties in the hands of defendants 1 and 5. The story of the plaintiff's right to the property may be very shortly stated thus: There was one Kali Prosad Mitra, the ancestor of the parties, who died in 1882. He had five sons. The eldest was Kunja Behary who died only recently after the decision of the case in the Court below. Rash Behary, the second son, was the father of the plaintiff, who died in 1893. Jadav was the father of defendant 1 who died in the year 1913. Trailokhya is defendant 4 in this suit and Brojo, defendant 2, in the suit. The plaintiff's case was that Kali Prosad had a homestead and some land. The income of the property which belonged to Kali Prosad was insufficient to maintain the family. Kunja Behary, the eldest son of Kali Prosad, lived with him, but Rash Behary came to live in Dinajpur with the object of getting into some sort of service. He managed to get employment under the district magistrate and began to earn considerable sums of money. Rash Behary brought Jadav to Dinajpur. Jadav, after having served in some capacity studied law and became a pleader by passing the pleadership examination. Jadav continued to practice in Dinajpur. The two brothers Rash Behary and Jadav lived together and they kept their earnings joint. These two brothers acquired the properties in question with their joint funds and certain other properties had been acquired by the profits of those properties, some of which are in the hands of defendant 5. The plaintiff had an elder brother Rajendra who died about 1919. The plaintiff says that Rash Behary, his father, was

entitled to one-half of all the properties in suit and he being one of the sons of Rash Behary is entitled to one-fourth share of all the properties. Rajendra's widow has been made defendant 3 in the suit. The defence of defendant 1 was that Rash Behary and Jadav were never joint, that all the properties in suit were acquired by Jadav with the income which he derived in the practice of his profession as pleader and the plaintiff cannot therefore claim any interest to any share of the property. The subordinate judge has passed a decree in favour of the plaintiff to the extent of one-sixth share of the properties claimed and has decreed joint possession of the undivided share of all the properties along with defendant 1.

The subordinate judge has come to his decision upon findings which are quite different from the allegations in the plaint. He apparently comes to the finding that all the five brothers were joint in food, worship and estate forming a normal Hindu joint family; but as Kunja has been satisfied with some of the properties of the joint family and does not claim any share of the disputed properties and as Trailokhya also does not claim anything having his own property, the properties in suit must be considered to have belonged to the three brothers Rash Behary, Jadav and Brojo. Upon that finding he has come to the conclusion that the plaintiff is entitled to half of the one third share which belonged to Rash Behari

It is regrettable that there was no appearance on behalf of the respondent in this case. The learned vakil who originally appeared in the case has no instruction to appear at the hearing. We had therefore to hear the entire case argued by the learned Government pleader who appeared for the appellant and we ourselves looked into the evidence in order to ascertain whether the decision of the subordinate judge was right or not.

The first thing that would strike one on reading the judgment of the subordinate judge is that he makes quite a different case for the plaintiff from what he made himself. The plaintiff nowhere stated, nor did he suggest, that all the five brothers formed a joint Hindu family. His case really amounted to this: that the two brothers Rash Behary and Jadav combined their earnings in order to acquire properties and the whole of the property in suit belonged to the two brothers equally. The subordinate judge seems to have started with an erroneous notion of what is a true joint Hindu family in Bengal. Under the Dayabhaga there cannot be a joint family consisting of the father and the sons, because so long as the father is alive he is the master. The sons may acquire separate properties of their own but they have no concern whatsoever with the joint family property, if any property can be so called during, the life-time of the father. The subordinate judge starts with the observation that, during the life-time of Kali Prosad, the father and the sons formed a joint Hindu family. The next thing is whether it can be said that the five brothers after the death of the father formed a normal Hindu joint family. The test of course must be whether they were joint in food, worship and estate. The subordinate judge has found that the brothers were not living in the same mess. Kunja was living at a different place. It has also been found that each of the other brother Trailokhya and Brojo have their own separate properties and neither Kunja nor Trailokhya claims any interest in the disputed property. Rash Behary had also some separate property of his own, as was found in the previous suit of the plaintiff. Brojo also claims to have his own separate property. Brojo, however, made a claim to a share of the property in suit which the subordinate judge has sustained in spite of the evidence on behalf of the plaintiff that Brojo had separated long ago. The subordinate judge's judgment is long and deals with a good deal of things irrelevant to the enquiry in question and it has afforded us very little assistance in the decision of the case. Some of the reasons which he has given for accepting the evidence of some witnesses cannot be accepted. He says that the evidence of the mother of the plaintiff must be accepted as true, because she was known as the uttambau, the good daughter-in-law, as if the name which was given to the lady when she came as a new bride when she was only about 11 years old, would be any ground for deciding as to her truthfulness or other-

wise when she was 74. The learned subordinate judge has not, however, accepted her story as a whole, because he does not accept her evidence that Brojo had been separated from the other two brothers. The subordinate judge apparently relies for his findings upon the evidence of this lady and that of Brojo, as he says

> the real state of things appears from the evidence on both sides, the testimony of the plaintiff's mother and defendant 2 Brojo on the side of the plaintiff and that of Kunja Behary and Gour Chandra Roy and Panchanan Mitra and others on the other.

Now this lady proved that each of the other brothers Kunja, Trailokhya and Brojo had their separate earnings, lived at different places and had their separate funds. From the evidence which the subordinate judge has stated in great detail it appears that Rash Behary, when he obtained service in the office of the Magistrate of Dinajpur was better off than any of his other brothers, that he helped the younger brothers in their education and very likely helped Jadav during the period of struggle in his profession as pleader Probably being connected with the Magistrate's office, he was of great help in getting business for Jadav in the criminal Courts. It is common knowledge that if any brother of the family amongst the Hindus in Bengal is in a more affluent circumstance on account of his earnings than others the indigent members of the family flock to him for the purpose of assistance and support. Does that make a joint Hindu family of the member who earns money and the poorer members who live as his dependants? If that were the law then it would prevent a prosperous member of the family from being generous to the poorer members at the risk of being subjected to a claim to all the properties that he acquires by his own endeavour by those dependants. Therefore the fact of Rash Behary earning a considerable sum of money and maintaining his brother or nephews when he was in affluent circumstance is absolutely irrelevant in determining the question whether the brothers formed a joint Hindu family as it is generally understood and which determines the rights of the members of it. But it is unnecessary to state in detail all the circumstances which show that there could not have been and there was not a joint Hindu family consisting of the brothers. Plaintiff's case is that there was no nucleus of ancestral property for the acquisition of the property in dispute. Three of the brothers never supplied any funds nor did they help with their labour for its acquisition. It was not thrown into the common stock. How then could this be joint family property? The plaintiff's case was that the two brothers Rash Behary and Jadav jointly acquired the properties in question and that was the matter which was really before the subordinate judge for decision. The subordinate judge seems to have made a wrong assumption at the very outset. In the year 1915 the plaintiff brought a suit for partition of the joint family properties against these very persons. That suit was dismissed by the subordinate judge and it was finally dismissed on appeal by the High Court in the year 1917. The present suit has been brought in the year 1921. The story which the plaintiff's mother gives in her evidence is quite at variance with the statement made in the plaint in this case or in the previous case. The subordinate judge thinks that the plaintiff never asked his mother what the true facts as regards the condition of the family were, either now or previously when he brought his suit in 1915. It does not require much consideration to dismiss this suggestion on behalf of the plaintiff as absurd. The plaintiff brings two successive suits with regard to a share of the property which is valued at over Rs. 60,000 and it can hardly be believed that he never asked his mother about the facts, when she was the only person who could possibly know the facts as to what his position was. Add to this the fact that his elder brother was alive when the previous suit was brought, and that elder brother certainly would know more about the condition of the family having been born in the year 1869, long before Rash Behary died. That gentleman Rajendra never made any claim to the property in the hands of defendant 1. That itself is a circumstance which might have the subordinate judge reason to pause before coming to his conclusion that the plaintiff had any interest in the property as a member of a joint family.

The next question that arises is, has the subordinate judge given sufficient reasons for disbelieving Kunja? The statements in his evidence which the subordinate judge quotes at considerable length in his judgment for disbelieving this man really are of no consequence. He was an old man of 85 when he gave his evidence, and if he made some wrong statements which did not concern the principal question in the case but as regards what money was paid to what person for the purpose of performing sradh of some members of the family and such other unimportant matters, that is no reason why he should be disbelieved with regard to the principal question, as to the ownership of the properties in suit. His evidence, as was rightly contended before the subordinate judge, was against his own interest. It is not stated what the value of his separate property is. But from the general trend of the evidence it is quite clear that even if he had to bring it into the hotchpot and got only one-fifth of that property and in addition one-fifth of the property in suit he would be a gainer. The subordinate judge, however, says that the sons of Kunja are being educated by defendant 1 and that is probably the reason why Kunja does not claim any interest in the property. But receiving charity from a person from whom he can as of right demand one-fifth of the property of which he is in possession cannot be such an inducement for giving false evidence in order to maintain defendant 1, in his unlawful possession of the whole of the property. Then what is the explanation that Trailakhya does not claim anything? The subordinate judge says because these two persons Kunja and Trailakhya did not contribute a cowrie for the acquisition of the property they cannot claim anything. If the subordinate judge was right in holding that it was a joint family of five brothers it was not necessary to prove that any of the brothers, contributed towards the purchase of joint family property. It is only when self-acquisition is claimed that it is necessary for the other members of the joint family to prove that they had also contributed to the acquisition of the property. It seems that the subordinate judge has mixed up the position as alleged in the plaint and the position of members of a joint Hindu family.

The subordinate judge has dicussed in his judgment the evidence of a large number of witnesses which in his own opinion did not prove anything about the real state of things. Much of it is merely hearsay and matter of opinion not based on facts. It would have been better if all such evidence were altogether left out of consideration, e. g. the enormous income which Rash Behary is alleged to have made when he was a clerk on Rs. 40 a month.

The case must then be considered as to whether the properties were the joint acquisition of Rash Behary and Jadav. With regard to this matter there is no question of any presumption. The evidence shows that Rash Behary lived in a separate house from Jadav, although the houses were side by side. There being no joint Hindu family in this case, assuming that there was reliable evidence that Rash Behary and Jadav combined their earnings for the purpose of the acquisition of the disputed properties, the plaintiff must show how much Rash Behary contributed for such acquisition and his share would be in accordance with the amount of purchase money that was found to be Rash Behary's. There is no such evidence on the record. It is in evidence that only a few properties in suit were acquired in the lifetime of Rash Behary. Under these circumstances the plaintiff's evidence does not help us in finding what share his father could have claimed in the properties which are said to have been acquired by the two brothers jointly. The evidence does not establish joint acquisition. If there is any presumption, the presumption is in favour of the defendant on the evidence that all the brothers were living separately, had their separate income and separate funds.

The plaintiff having failed to prove by any satisfactory evidence the case that he made in his plaint this appeal must be decreed and the plaintiff's suit dismissed with costs in this Court and in the lower Court.

R.K. *Appeal decreed.*

## A. I. R. 1927 Calcutta 780

BUCKLAND, J.

*International Continental Caoutchoue Compagnie*—Plaintiff.

v.

*Mehta & Co.*—Defendants,

Suit No. 339 of 1927, Decided on 27th July 1927.

*Civil P. C., O. 29, R. 1—Suit by corporation—Person signing must prove by affidavit that he is authorized to do so—Civil P. C., O. 6, R. 15—Calcutta High Court Rules (Chapter 7), R. 12.*

It is necessary in the case of a pleading filed on behalf of a corporation to establish by an affidavit that the person signing it is duly authorized to do so : 22 *Cal.* 268, *Dist.* ; *A. I. R.* 1927 *Cal.* 773, *Appl.* [P 781 C 1, 2]

*R. C. Ghose*—for Plaintiff.

**Buckland, J.**—When this suit, which is undefended, was before me for hearing, I found that there was no affidavit forthcoming as to the fitness of N. C. Dutt who has signed and verified the plaint on behalf of the company to do so. I accordingly asked the registrar to report as to what had been done in this respect and reserved judgment lest the competency of the suit might thereby be affected.

I am informed that the suit being by a corporation and there being a statement in the plaint that, 'Mr. Narayan Chandra Dutt is the banian and constituted attorney of the Calcutta branch of the plaintiff company and, as such, a principal officer of the plaintiff company. He has power to sign the plaint and the warrant on behalf of the plaintiff company and he is able to depose to the facts of this case' no affidavit has been required. This I understand, is founded upon a judgment of Sale, J., in *Sreenath Banerjee* v. *E. I. Ry. Co.* (1) in which the learned judge held that if a plaint or a written statement contains a statement to the effect that the person purporting to verify is a principal officer of the company or corporation and is able to depose to the facts of the case, the verification in the usual form would probably be sufficient. This judgment lays down no rule as suggested and it has been misapplied. I shall give my reasons for this presently; but first I propose to consider what the Civil Procedure Code and the rules of the Court require as regards verification of pleadings.

Order 6, R. 15 (1), Civil P. C., provides that every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

Chap. 7, R. 12, Rules of this Court, provides as follows :

Where any person, other than a party pleading, verifies a pleading under O. 6, R. 15 of the code, his fitness to so verify shall be proved by his affidavit at the time the pleading is presented.

With the observance of these rules in suits not by a corporation I have fully dealt in my judgment of the 19th May last in *Manindra Chandra Nandi* v. *Velji Mulji* (2), in which I came to the conclusion that no exception could be made to the mandatory provision of the rule requiring an affidavit of fitness of the person verifying to be presented with the pleadings. To this I would add that though, were it permissible, it may appear at the initial stage a case is one for relaxation of the rule, any question consequential thereupon would only arise later when the time for enforcing the rule had long passed, which is an additional reason for saying that no exception is permissible.

In the case of a corporation O. 29, R. 1, Civil P.C., provides :

In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

This does not in my opinion, supersede the application of the rules already quoted, but is in amplification of them. But for such a rule it might be difficult to determine who, in the case of a corporation, is the proper person to sign or verify a pleading on its behalf, and this rule is intended to meet that difficulty, but nothing more.

We then have to go back to the rules first quoted. The secretary, director, or other principal officer is not the party pleading. The party pleading is the company. Hence it follows that as regards every pleading on behalf of a company or corporation the fitness to verify of the person purporting to verify it must be proved by affidavit.

(1) [1894] 22 Cal. 268.

(2) A.I.R. 1927 Cal. 773.

This is entirely in accordance with the view taken by Sale, J., in the case cited. In that case there was nothing in the written statement to the effect stated above. The learned judge observed :

The decription in the verification of Richard Gardiner, as agent of the defendant company, is itself not verified, nor, if that description alone were verified, could it be assumed that he was a principal officer of the defendant company and able to depose to the facts of the case. That evidence in the case of these written statements must therefore be supplied by affidavit, and on that being done, the written statements may be presented to the registrar for admission.

As regards cases where a statement as to the fitness of the person verifying is to be proved in the plaint no distinction can be made between suits to which a corporation is a party and others. With this point I have already dealt. The judgment of Sale, J., does not touch the question of a plaint. If carefully studied it will be found to be based upon waiver by the plaintiff where there has not been strict observance of the rules in the verification of the written statement. This is another matter altogether and not one on which an erroneous practice should have grown up. Waiver can only arise in particular instances and each case in which it is said to arise must be considered independently.

The matter of the signature of the plaint depends upon another rule of which the wording is slightly different. I have stated the limited effect of O. 29, R. 1 which makes no distinction between signing and verifying a pleading on behalf of a corporation. The rule requiring pleadings to be signed is R. 14, O. 6, Civil Procedure Code, which provides as follows :

Every pleading shall be signed by the party and his pleader (if any) : Provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading it may be signed by any person duly authorized by him to sign the same or to sue on his behalf.

To all pleadings on behalf of corporations the proviso applies, for the same reason that as regards the verification proof is required of the fitness of the person verifying. Consequently to the extent and in the manner that it is necessary as regards a pleading filed on behalf of a person other than a corporation to establish that the person signing it is duly authorized to do so, it is necessary in the case of a pleading filed on behalf of a corporation to establish that the person signing it is duly authorized to do so. As to this the practice is well established and there is no need further to refer to it.

Subject to the necessary affidavit being filed, there will be judgment for the amount claimed with costs on scale No. 1 and interest on decree at six per cent.

R.K. *Suit decreed.*

---

## A. I. R. 1927 Calcutta 781

PANTON AND MALLIK, JJ.

*Umamoyee Dasya* and *another*—Appellants.

v.

*Jatan Bewa* and *others*—Respondents.

Appeals Nos. 102 and 103 of 1926, and Revision Case No. 346 of 1926, Decided on 2nd February 1927, from the orders of the Offg. Sub-Judge, Rangpur, D/- 16th January 1926.

(a) *Civil P. C., O. 21, Rr. 16 and 22—No notice served on the assignor—Fact of assignment mentioned in the notice under R. 22—Omission under R. 16 is fatal.*

Execution of a decree without service of the necessary notice as required by R. 16 on the assignor of the decree is not merely irregular but unlawful : 36 *Bom.* 58 and *A. I. R.* 1921 *Lah.* 143, *Foll.* [P 782 C 2]

(b) *Limitation Act, Art. 12—Applicability.*

Where the sale is a nullity, no question of limitation arises : *A. I. R.* 1924 *Cal.* 638, *Foll.* [P 782 C 2]

*Provash Chander Mitter* and *Jitendra Mohan Sen Gupta*—for Appellants.

*Mrityunjay Chatterji*—for Respondents.

**Panton, J.**—This is an appeal from an order of the Subordinate Judge of Rangpur, reversing an order of the Munsif, first Court, Kurigram. The matter relates to execution proceedings. A decree for rent was made on the 21st February 1922. On the 6th March 1924 the decree-holder sold the decree to appellant 1. On the 29th April 1924 the appellant sought to execute the decree. On the 13th May 1924, he prayed for service of notice on the judgment-debtors. This notice was in the form prescribed for a notice under O. 21, R. 22. But in the body of it mention is made of the fact of the appellant's pur-

chase of the decree. The order sheet in the case records that this notice was served. On the 5th July 1924, the appellant purchased the property at the execution sale and was thereafter put into possession. On the 13th November 1924, the judgment-debtor made an application purporting to be an application under O. 21, R. 90, and S. 47, Civil P. C. to have the sale set aside on the ground of irregularity in publishing and conducting it, but without reference to an alleged defect in the notice under O. 21, R. 16, to which I shall presently refer. On the 30th March 1926, the judgment-debtor made another application purporting to be an application under S. 47, complaining that no notice under O. 21, R. 16, had been served. Both these applications were dismissed by the munsif. On appeal to the subordinate judge, this order was set aside on the ground that no notice under O. 21, R. 16, had been served upon the original decree-holder who had assigned the decree.

In appeal, it is urged, first, that both these applications were barred by limitation; secondly, that the judgment-debtors did in effect have the necessary notice and showed no cause against the execution proceedings and that consequently this application was barred by constructive res judicata; thirdly, that the notice to which I have referred, although it was in the form prescribed for a notice under O. 21, R. 22, did in fact state that the applicant was an assignee of the decree and that for all practical purposes this was a notice under O. 21, R. 16; fourthly, it is urged that so far as O. 21, R. 90, is concerned it applies only to irregularities in publishing and conducting the sale and not to events which happened before. Finally, it was argued that the finding of the Court below that the price at the sale was inadequate is based on no evidence.

So far as we are concerned with the application under O. 21, R. 90, the present application was clearly barred by limitation and this part of the case needs no further consideration.

The real question for our decision is as to the effect which must be given to the failure of the present appellant to serve proper notice under O. 21, R. 16. Even if the notice to which I have referred, namely, the notice purporting to be under O. 21, R. 22, can be taken to be in effect one under O. 21, R. 16, on the judgment-debtor, it is plain that there was no notice on the assignor of the decree as the rule requires. It was held in *Kassum Goolam Hoosein Vazir* v. *Dayabhai Amarsi* (1) that execution of a decree without service of the necessary notice on the assignor of the decree is not merely irregular but unlawful. This decision was followed in *Notan Das* v. *Lachhman Singh* (2), where, after a review of the authorities, the learned judges held that a sale of this description was void. A contrary view was taken in *Brajlal Marwari* v. *E. M. Atkinson* (3). But in our opinion the facts here are such as will not admit of the application of the principle of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (4) and the sale being a nullity no question of limitation arises: see *Joggeswar Mahata* v. *Jhapal Santal* (5). In this view of the case it is not necessary to consider the other points which have been raised.

The appeal fails and is dismissed with costs. Hearing fee: one gold mohur.

This judgment will also govern the other appeal which is also dismissed with costs.

The rule is discharged with costs.

**Mallik, J.**—I agree.

R.K. *Appeals dismissed.*

(1) [1911] 36 Bom. 58=12 I. C. 547=13 Bom. L. R. 973.
(2) A. I. R. 1921 Lah. 143=2 Lah. 230.
(3) [1920] 5 Pat. L. J. 639=57 I. C. 707.
(4) [1881] 8 Cal. 51=8 I. A. 123=11 C. L. R. 113=4 Sar. 248 (P. C.).
(5) A. I. R. 1924 Cal. 638=51 Cal. 224.

---

## A. I. R. 1927 Calcutta 782

PANTON AND MALLIK, JJ.

*Dasarathi Ghose*—Petitioner.

v.

*Kartick Ch. Ghose*—Opposite Party.

Civ. Rev. No. 369 of 1926, Decided on 13th July 1926, from an order of the Sub-Judge, Hooghly, D/- 16th January 1926.

*Civil P. C., O. 21, R. 6—Small cause Court decree passed by munsif exercising small cause Court powers—Application for execution to the munsif with affidavit addressed to small cause Court—Execution by Court is in capacity of munsif and appeal lies to subordinate judge.*

An application for execution was made to the munsif who in his capacity as a small cause

Court judge had passed that small cause Court decree. [P 783 C 1]

The application for execution was addressed to the munsif, but it was accompanied by an affidavit wherein the munsif was described also as a small cause Court judge and wherein a prayer was also made for the issue of a certificate. The officer before whom the application for execution was filed and who exercised two functions, one as a small cause Court judge and another as a munsif, rejected the application for execution on the ground of limitation. Against this order an appeal was filed before the subordinate judge who allowed the appeal setting aside the order passed by the munsif.

*Held* : that the provisions about transfer and of O. 21, R. 6, were in effect complied with and that being so, the order passed by the munsif rejecting the application for execution was passed by him, not in his capacity as a small cause Court judge but as a munsif and an appeal to the subordinate judge was competent. [P 783 C 2]

*Bijon Kumar Mukerjee* and *Sudanshu Kumar Bose*—for Petitioner.

*Ramani Mohun Chatterjee* and *Moni Lall Bhattacharjee*—for Opposite Party.

**Mallik, J.**—This rule was directed against an order passed by the subordinate judge of Hooghly setting aside an order passed by a Munsif, Serampore, whereby an application for execution of a small cause Court decree had been rejected. There had been a small cause Court decree passed and when an application for its execution was made, it was made to the second munsif of Serampore who in his capacity as a small cause Court judge had passed that small cause Court decree. In the application for execution it was stated that as the judgment-debtor had no moveable properties, action might be taken against his immovable properties. The officer before whom this application for execution was filed and who exercised two functions, one as a small cause Court judge and another as a munsif, rejected the application for execution on the ground of limitation. Against this order an appeal was filed before the subordinate judge and the subordinate judge, as stated above, allowed the appeal setting aside the order passed by the munsif.

The contention on behalf of the petitioner before us has been that the subordinate judge had no jurisdiction to entertain the appeal inasmuch as the order appealed against had been passed by a small cause Court judge, an order passed by a small cause Court judge being final in these matters.

On behalf of the opposite party it was said that the order passed by the munsif against which the appeal was preferred before the subordinate judge was not an order passed by a small cause Court judge but by a munsif in his ordinary regular capacity. We have looked into the records of the case, and from the records it apears that the application for execution was addressed to the munsif, second Court, Serampore, but it was accompanied by an affidavit wherein the munsif was described also as a small cause Court judge, and wherein a prayer was also made for the issue of a certificate. On behalf of the petitioner it was argued that this was not in accordance with the provisions about transfer of an application for execution or in accordance with the provisions as laid down in O. 21, R, 6, Civil P. C. It is true that no specific order about transfer or sending the application for execution was passed by the munsif before whom the application was made, but taking the application along with the affidavit we are of opinion that the provisions about transfer and of O. 21, R. 6, were in effect complied with, and that being so, the order passed by the munsif rejecting the application for executiou was, in our opinion, passed by him, not in his capacity as a small cause Court judge but by him as a munsif. In this view of the matter the learned subordinate judge, in our opinion, was justified in entertaining the appeal and we are unable to hold that when he set aside the order passed by the munsif he passed the order without any jurisdiction.

The result, therefore, is that the rule is discharged with costs, hearing-fee one gold mohur.

**Panton, J.**—I agree.

G.B. *Rule discharged.*

---

## A. I. R. 1927 Calcutta 783

DUVAL AND MITTER, JJ.

*Debendra Narain Sarkar* and *others*—Plaintiffs—Appellants.

v.

*Satya Charan Mukerji* and *others*—Defendants—Respondents.

Appeal No. 2189 of 1924, Decided on 9th December 1926, from the appellate decree of the Sub-Judge., Burdwan, D/- 19th August 1924.

*Civil P. C., S. 9—Suit for a right to religious office is of a civil nature though no emoluments are attached.*

A suit by a person, claiming to be entitled to a religious office against a usurper, for a declaration of his right to the office is a suit of a civil nature and will therefore be entertained by a civil Court though no emoluments are attached to the office at all; 15 *Cal.* 159 and 27 *Cal.* 30, *Foll.*; 19 *Mad.* 62; 28 *Mad.* 23 and 2 *Bom.* 470, *not Foll.* [P 785 C 2]

*Provash Chunder Mitter* and *Lalit Mohan Sanyal*—for Appellants.

*Sarat Chandra Basu, Atul Chandra Gupta* and *Radhika Ranjan Guha*—for Respondents.

**Mitter, J.**—This appeal arises out of a suit commenced by the plaintiffs for a declaration of the plaintiffs' right to supervise the Saradiya Haragouri puja in village Narainpur, to prepare and offer certain offerings on that occasion and for an injunction to restrain the defendants from interfering with plaintiffs' right of management. The defence is a denial of plaintiffs' right of management. The Court of first instance decreed the suit with costs and declared plaintiffs' right of management over the worship of the image Hara Gouri Thakurani, performed annually at the autumn season at village Narainpur, and also made certain declarations with regard to plaintiffs' exclusive right to offer offerings. On appeal by the defendants, the Subordinate Judge of Burdwan dismissed the plaintiffs' suit, holding that such a suit was not maintainable in the civil Court. As the suit has been thrown out on the ground that such a suit cannot be entertained in the civil Court, it becomes necessary to set out in greater details the precise scope of the suit.

The plaintiffs state in their plaint that one Nanda Kumar Sarkar, who had 9 annas share in Narainpur putni taluk, established the autumnal worship (Saradiya Puja) of Iswar Haragouri Thakurani in the said village of Narainpur with the help of the seven annas cosharer of Narainpur patni taluk. And in order to build a mandir (temple) for performing the worship of the said image he purchased one and half cottas of land from one Munjari Dasi on the 9th of Aswin, 1257 B. S., and erected a house thereon. It was further alleged that the said Nanda Kumar Sarkar, in order to defray the expenses of the Saradiya puja, dedicated several bighas of land, and, with the voluntary contributions of the tenants of the village Narainpur, and, with the annual stipend of Rs. 3 settled by him from the zemindari sheresta, he performed annually the autumnal puja under his own supervision, meeting the balance of his expenses from his own pocket. Plaintiffs further alleged that so long as Nanda Kumar was alive he, and, after his death, his son and the father of plaintiff 3, and after his death, plaintiff 1, and, in the absence of plaintiff 1, his sister's son Gorachand Roy, under plaintiff 1's order, had performed the autumnal puja. That in 1328 B. S., with the evil intention of excluding the plaintiffs from the puja, the defendants in collusion with one another, set up defendant 1 as the karta (manager) and excluded the plaintiffs from the puja and had prevented the plaintiffs from supervising the said puja, from preparing the Ulatkhansa and had obstructed the plaintiffs in offering Purnapatra, Pancha Gabya and Pancha Pataka and had prevented the ladies of the plaintiffs' house from performing the Olata (farewell) ceremony of the goddess on the Bijoya day, and that at the time of the Sandhi puja, the plaintiffs having taken a naibedya for offering, the defendants prevented the priest from accepting the same, and defendant 1 had kicked out the said naibedya with his feet.

The defendants in their defence alleged in para. 6 of the written statement that the puja has never been performed under the supervision and orders of his son, after the death of Nanda Kumar Sarkar, the father of plaintiff 3, and after his death plaintiff 1 and in the absence of plaintiff 1 of his sister's son Gora Chand till 1327 B. S.; nor is there or was any reason for their so doing and that the allegations in para. 4 of the plaint are false. There was no reason of the puja being performed under the management of the plaintiffs or under that of any members of their family; nor has it been so done at any time.

The reason given by the lower appellate Court for holding that the suit is not maintainable has been stated as follows:

In the case *Narayan Vithe Parab* v. *Krishnaji Sadashiv* (1), it has been held that claims to precedence of worship, such as the claim to

(1) [1885] 10 Bom. 233,

the fact to worship the deity, cannot be entertained in the civil Court. Plaintiffs not only claim right of management, but they also claim to vindicate their dignity to have precedence in giving certain offerings to the exclusion of others who are also subscribers and with whose money the worship is performed. Plaintiffs claim personal rights in public worship, which cannot be recognized or declared by civil Courts. If the plaintiffs cannot agree with other villagers regarding the management and worship of the deities, plaintiffs can stop their subscription, but I do not think that plaintiffs' exclusive right to give offerings to the deity to the exclusion of other villagers can be declared in this suit. For the above reasons I am inclined to decide all these points against the plaintiffs.

It has been contended before us that the lower appellate Court is wrong in holding that the civil Courts have no jurisdiction to entertain such a suit and in relying on the Bombay decision. Our attention has been called by the learned advocate for the appellant to three cases, viz.: *Mamat Ram Bayan* v. *Bapu Ram Atai* (2), *Dino Nath* v. *Pratap Chandra* (3), and *Gournoni Debi* v. *Chairman of Panihati Municipality* (4), in support of the contention that such a suit is maintainable in the civil Courts, although no emoluments are attached to the office. The appellants contend that the suit is really one for the establishment by the plaintiffs of their possession as sebaits for the time being for carrying on the worship of the goddess Durga every year and that the suit is really for the office of a sebait although no emoluments are attached to the said office. We think that this argument is well founded and must prevail. The allegations in the plaint make it clear that the plaintiffs base the right as heirs to the founder of the worship and on the fact that their ancestor established the worship and the services were performed by their ancestor ever since the dedication in the year 1850. They say their right of management has been interfered with by the defendants and claim relief. There can be no doubt that the right of management has been infringed and consequently there must be a remedy. It has been held in this Court that a suit by a person claiming to be entitled to a religious office against a usurper for a declaration of the plaintiff's right to the office is a suit of a civil nature and will therefore be entertained by a civil Court though no emoluments were attached to the office at all: see *Mamat Ram Bayan* v. *Bapu Ram Atai Bura Bhakat* (1), in which case the office was that of a musician who chanted songs in a jatra at a certain village. In the case of *Dino Nath Chuckerbutty* v. *Pratap Chandra Goswami* (2), the office was that of a sebait and the suit was by one member of a family against another for a declaration of a hereditary right to officiate as sebait at the worship performed by votaries at the foot of a certain tree. It was held that the suit was maintainable although no fees were attached to the office, but voluntary offerings were made by the votaries. In the case before us the office was one attached to a place as distinguished from an absolutely personal office. Following these decisions, we hold that plaintiffs have a right to get the declaration which they seek for in the suit. The learned advocate for the respondents contends that the suit is really for vindication of a mere dignity attached to an office and as such cannot be regarded as one for an office and consequently cannot be regarded as a suit of a civil nature within the meaning of S. 9, Civil P. C. We are unable to accept this contention. It is not a question of precedence in worship or precedence in receiving gifts in public religious ceremonies. We are not unmindful of the fact that in Madras it has been held that a suit does not lie for a religious office to which no fees are attached. According to that Court a religious office in which no fees are attached is not an office within the meaning of S. 9, Civil P. C., *Tholappala Charlu* v. *Venkata Charlu* (5), and *Subbaraya Mudaliar* v. *Vedantachariar* (6). The Bombay decisions may be divided into two classes, viz., first those in which religious office is attached to a temple, shrine, a sacred spot, and, secondly, those in which office is entirely personal in its character. In the former class of cases, a suit has been held to lie: *Limba* v. *Rama* (7) and *Gursangaya* v. *Tamana* (8). In the latter class, a suit has been held not to lie: *Shankara* v. *Hanma* (9). We prefer to follow the decisions of our own Court

(2) [1887] 15 Cal. 159.
(3) [1899] 27 Cal. 30=4 C. W. N, 79.
(4) [1910] 12 C.L J. 74=3 I.C. 864=14C.W.N. 1057.
(5) [1895] 19 Mad. 62=5 M.L.J. 209.
(6) [1904] 28 Mad. 23=14 M.L.J. 171.
(7) [1888] 13 Bom. 548.
(8) [1891] 16 Bom. 281.
(9) [1877] 2 Bom. 470.

and the Bombay decisions which fall in the first class and hold that a suit such as the present lies. We think the other reliefs claimed follow as a necessary consequence of the plaintiffs' right of management. In this view we think the civil Court has jurisdiction to entertain the suit. The result is that the decreee of the lower appellate Court must be set aside and the case be remanded to it for re-trial of the appeal on the merits. The respondents are to pay the costs of this appeal.

**Duval, J.**—I agree.

R.K. *Case remanded.*

---

## A. I. R. 1927 Calcutta 786

B. B. GHOSE, AND ROY, JJ.

*Secretary, Cantonment Committee, Barrackpore*—Defendant—Appellant.

v.

*Satish Chandra Sen*—Plaintiff—Respondent.

Appeal No. 190 of 1925, Decided on 20th June 1927, from the original decree of the Spl. Land Acquisition Judge, 24 Perganas, D/- 9th July 1925.

*Cantonment lands—Mere declaration of lands to be within cantonment area does not vest their ownership in Government.*

The mere fact that certain lands are declared by the Government to be within a Cantonment area does not vest their ownership in the Government unless it is shown that the lands were acquired by the government for that purpose. [P 787 C 1]

*Dwarka Nath Chakrabutty* and *Surendra Nath Guha*—for Appellant.

*P. C. Mitter, Surendra M. Mullick, S. C. Bose, Susil Sen* and *Santimoy Majumdar*—for Respondent.

**B. B. Ghose, J.**—This appeal seems to me to raise a very simple point. A certain quantity of land was acquired under the Land Acquisition Act with a house standing on it. The land and the house were separately valued. The compensation allowed for the land was Rs. 9,510-10. It is needless to refer to the previous proceedings before the land was valued. The Land Acquisition Collector was of opinion that the claimant Satish Chandra Sen was not entitled to any compensation for the land which belonged exclusively to Government. There was a reference under S. 18, Land Acquisition Act, at the instance of that claimant to the Court. The learned district judge was of opinion that the claimant Satish Sen was the owner of the land and was entitled to the compensation awarded for it. From that judgment of the learned judge the Secretary of State has preferred this appeal.

The argument on behalf of the Secretary of State advanced by the Government pleader is that the whole of the cantonment area was acquired for the Government some time or other from the end of the 18th century. It should, therefore, be presumed that this particular land had also been acquired and that the Secretary of State should be considered to be the owner of the land unless the respondent can show that he has some other title. The respondent has shown that he has been in possession by purchase of the entire land from the year 1900. The declaration was made in 1918. The respondent was in possession without payment of any rent and it may also be presumed that his predecessor-in-interest was in possession without payment of any rent to any one. The learned judge has held that the respondent Satish Sen has been able to establish his lakheraj right to the land. The question is whether his decision is right.

The learned Government pleader relies upon the fact that this land is within the cantonment area. But it appears from the documents which have been placed before us that all the land within the cantonment area does not necessarily belong to Government. For military purposes, the authorities may declare that certain lands are within a cantonment area, so that the owners of lands within that area should be bound to conform to the rules of the cantonment in the exercise of their right of ownership of the lands or houses situate within that area. For example, the owners would be bound to take such steps for the purpose of sanitary arrangements or to use their property in such a way as might be conducive to the health or morals of the soldiers who would be quartered in the cantonment.

The further argument on behalf of the appellant is that the papers show that it was the intention of the Government

to acquire lands on which the cantonment was established. It appears that considerable quantities of land had actually been acquired: But, as the learned judge says, there is nothing to prove that this particular land was acquired or that this disputed land is within the boundary of the area which had been acquired. The disputed land is said to be situated on the bank of the river Hooghly. No document has been shown that lands had been acquired down to the river bank. The only thing that has been put in evidence is the revenue survey map which shows the cantonment area down to the river bank. That, as I have already said, does not show that the ownership of all the lands was in the Secretary of State. On the other hand, it appears that under the rules of the cantonment an owner was bound to obtain the leave of the authorities for erecting structures on any land belonging to the cantonment. If the land in question was ever considered to be the property of the Government, one would have expected that there was some paper in the offices of the Government which would show that the claimant Satish Sen or his predecessor-in-interest had obtained any permission from the authorities in question for erecting structures on the land. But no such paper has been forthcoming. That itself, to my mind, shows that apart from the fact that the land is within the cantonment area, the Government had no concern with the ownership of the land in question. The presumption is that Satish Chandra Sen is the rightful owner of the land from the fact of his long undisturbed possession without payment of any rent. In that view I do not think it necessary to discuss any of the questions which have been elaborately dealt with by the Court below. I do not, of course, mean to say that these questions are not deserving of consideration. In my view, the appellant has not been able to satisfy us that the judgment of the learned judge below is erroneous. The appeal, accordingly, fails and is dismissed with costs.

**Roy, J.**—I agree.

G.B. *Appeal dismissed.*

---

## * * A. I. R. 1927 Calcutta 787

C. C. GHOSE AND GREGORY, JJ.

*Rosonali* and *others*—Appellants.

v.

*Emperor*—Opposite Party.

Criminal Appeal No. 111 of 1927, Decided on 18th August 1927, from the order of the Addl. Sessions Judge, Bakarganj, D/- 6th January 1927.

* * *Criminal P. C., Ss.* 276-279—"*Required*" *in S.* 276, *Prov.* 2, *refers to* "*persons summoned*"—"*Chosen*" *means* "*chosen by lot.*"

The object of Ss. 276-279 is to secure an impartial trial by rendering impossible any intentional selection of jurors to try a particular case. An accused person has a right to claim to be tried by a jury chosen with strict regard to all the safeguards provided in the code to secure perfect impartiality. The central idea is to have a jury chosen by lot from the persons summoned to act as jurors. In other words, in ordinary cases, five persons are to be chosen by lot for the purpose of acting as a jury out of ten persons summoned to act as jurors. In murder trials seven or nine persons, as the case may be, are to be chosen by lot for the purpose of acting as a jury out of 14 or 18 persons summoned to act as jurors. In case, however, of a deficiency of persons summoned, i. e., where the persons attending in obedience to the summonses, are less than the number summoned, the number of jurors required may with the leave of the Court be chosen from such other persons as may be present. Proviso 2 to S. 276 has been introduced to meet a case where there is a deficiency of persons summoned, and the word "required" in the proviso must refer and is relative to the words immediately preceding, namely, "in case of a deficiency of persons summoned." Therefore, if there is a deficiency of persons summoned to act as jurors it is this deficiency that under the proviso may be made good from such other persons as might be present in Court, and the meaning of the word "chosen" in the proviso must mean "chosen by lot." In so far as S. 279 (2) permits a person not chosen by lot to be empanelled, it certainly introduces an exception to the general rule, but this is only in the exceptional condition stated and in emergent circumstances: *A. I. R.* 1927 *Cal.* 242, *Appr*; *A. I. R.* 1927 *Cal.* 593, *Expl.* and *Dist.* [P 790 C 1, 2, P 791 C 1]

*Suresh Chandra Talukdar, Jatindra Nath Sanyal, Camell, Hira Lal Ganguly, A. K. Fazlul Huq, Debendra Narain Bhattacharjee, Haridas Gupta, Girja Prosanna Sanyal, Bijali Bhusun Sanyal, Dinesh Chandra Roy, Haridas Gupta, Chandra Sekhar Sen* and *Profulla Chandra Nag*—for Appellants.

*Khundkar*—for the Crown.

**C. C. Ghose, J.**—In all these seven appeals the point has been taken that the trials in the sessions Courts, out of which these appeals have arisen, have

been bad inasmuch as the provisions of S. 276, Criminal P. C., and of the other relative sections were not complied with. In other words, it is contended in these appeals that the constitution of the Courts for the trial of the accused in these cases has not been in accordance with law.

Before we deal with this point it may be desirable to set out briefly the facts involved in each of these appeals. In appeal 111 of 1927, the accused were charged under S. 148, I. P. C. There was also a charge against accused 1 and 4 under S. 324, I. P. C. Accused 2 was further charged with an offence under S. 304, I. P. C. It is pointed out in the affidavit of Meserali which has been filed before us, that out of the number of persons summoned under S. 326, Criminal P. C., only five persons attended at the time of the commencement of the trial. The five persons who attended were asked by the learned Additional Sessions Judge to act as a jury. It is, therefore, contended that the jury in this appeal were not chosen by lot in manner required by S. 276, Criminal P. C., and that, therefore, there was no properly constituted Court consisting of judge and jury for the trial of the accused. In the order sheet it is stated that after the charges were read and explained to the accused and after their pleas were taken the persons, whose names are mentioned in the affidavit of Meserali were chosen by lot without any objection and duly sworn. On behalf of the Crown, however, it has not been challenged that as a matter of fact only five persons out of the number of persons summoned were present at the time of the commencement of the trial, who could be empanelled to act as a jury.

In appeal 117 of 1927 the accused were charged with having committed offences punishable under Ss. 366 and 368, I. P. C. It is stated in the affidavit of Ghulam Makdum Mia which has been filed before us, that out of ten jurors summoned under S. 326, only seven attended at the time of the commencement of the trial and that out of the said seven persons two were excused on personal grounds by the Sessions Judge and that out of the remaining five persons the accused objected to one juror when his name was called out and that the said objection was allowed by the Sessions Judge. There remained, therefore, four persons who could be asked to act as jurors and the deficit in this case was made good by calling one Babu Motilal Banerjee to take his seat on the jury as the fifth juror. It is, therefore, contended that the jury were not chosen by lot in manner required by S. 276, Criminal P. C. In this case we sent down the affidavit of Ghulam Makdum to the learned Sessions Judge for a report and the facts according to him are as follows :

Ten jurors were summoned to attend Court on 29th November 1926. Out of the ten summoned only seven appeared. From the seven it was necessary to select five by lot to serve on the jury. Seven tickets bearing the names of the seven jurors were put in the ballot bag and were drawn out one by one by me personally. As each ticket was drawn out of the bag, the name on it was read out to the Court, and the defence asked if they objected to the juror. If no objection was raised then the juror immediately took his seat in the jury box. Two jurors, when the tickets bearing their names were drawn out, asked to be excused on personal grounds and were excused. The defence objected to one juror and the objection was allowed. The result was that when the last ticket had been drawn out of the bag, there were only four jurors in the jury box. To make up the deficiency I sent out notices to several persons whose names are on the jury list and who reside near the Court, to attend. So far as my recollection goes four or five such urgent notices were sent out. Two of the new jurors so summoned attended. Their names were written on tickets and the tickets put in the ballot bag. I drew out one ticket and on the name being read out asked if the defence objected to the juror. No objection was raised. This juror then took his seat, joining the other four in the jury box. The one remaining juror was discharged and the trial commenced.

In appeal 185 of 1927 the accused were charged under Ss. 325/34 and 323/24. It appears that out of 12 jurors summoned under S. 326, only eight persons were present at the time of the commencement of the trial. One juryman was excused on personal grounds. Out of the remaining seven, five jurors were chosen by lot as stated in the order sheet without objection.

In appeal 266 of 1927 the accused were charged under Ss. 325 and 325/34. It appears that out of ten jurors summoned under S. 326 only five persons attended before the commencement of the trial. Two persons from among those present in the Court compound were added to the five mentioned above. Thereafter five persons were chosen by

lot as stated in the order sheet from among the seven.

In appeal 297 the accused was charged under Ss. 467/109, I. P. C. It is said that out of the number of jurors summoned under S. 326 only four jurors were present in Court before the commencement of the trial and that the learned Sessions Judge sent for one juror and he thereupon asked the five to serve on the jury and that thereafter the trial commenced. It is not stated in the order sheet that the jurors were chosen by lot, nor is it clear how there was or could have been a lottery.

In appeal 307, it appears that ten persons were summoned under S. 326. In the order sheet it is stated by the Sessions Judge in an addendum that

> more than five persons were present so that a selection was possible, and as far as I know all those summoned were present.

The trial commenced on 14th March 1927, but later on it stood adjourned to 7th April 1927. On 16th March one of the jurors asked to be excused from further serving on the jury as he wanted to go on pilgrimage. His prayer was granted. The Sessions Judge then proceeded to summon two jurors from the special jurors' list, but on 7th April only one such juror attended and he was substituted in place of the juror who had gone on pilgrimage and who had been excused. The accused in this case were charged under Ss. 436 and 436/109 I. P. C.

In appeal 366 the accused was charged with an offence punishable under S. 302, I. P. C. It was, therefore, necessary in a case like this to have, a jury of at least seven persons. It is said in the affidavit of Afsaruddin, which has been filed before us, that out of 14 jurors summoned under S. 326, Criminal P. C. only seven appeared in Court before commencement of the trial, and that the learned Sessions Judge did not take any steps to have the jury chosen by lot.

Under S. 274, Criminal P. C., it is provided that in trials by jury before the Court of Session, the jury shall consist of such uneven number, not being less than nine as the local Government, by order applicable to any particular class of offences in that district, may direct. It is further provided that where any accused person is charged with an offence punishable with death the jury shall consist of not less than seven persons and, if practicable, of seven persons. In Bengal, where the accused is not a European or American, it has been laid down by Government that the jury should consist of five persons. Ss. 319 to 332 deal, among other matters, with questions relating to lists of jurors and assessors for that Court. Under S. 326, Criminal P. C., the Sessions Judge shall ordinarily, seven days at least before the day which he may from time to time fix for holding the Sessions, send a letter to the district magistrate requesting him to summon as many persons named in the said revised list or the said special list as seem to the sessions judge to be needed for trials by jury and trials with the aid of assessors at the said Sessions, the number to be summoned not being less than double the number required for any such trial, and including, where any accused person is a European or an American, as many Europeans or Americans as may be required for the purpose of choosing jurors or assessors for the trial. The names of the persons to be summoned shall be drawn by lot in open Court excluding those who have served within six months unless the number cannot be made up without them; and the names so drawn shall be specified in the said letter. Where the accused requires and is entitled to be tried under the provisions of S. 275, there shall be chosen by lot, in the manner prescribed by or under S. 276, from the whole number of persons returned, the jurors who are to constitute the jury until a jury containing the proper number of Europeans or Europeans and Americans or of Indians, as the case may be, has been obtained. Provided that in any case in which the proper number of Europeans or Americans cannot otherwise be obtained, the Court may, in its discretion for the purpose of constituting the jury summon any person excluded from the list on the ground of his being exempted under S. 320.

It is, therefore, clear that the minimum number of persons to be summoned ordinarily is ten and that in case where the accused is charged with an offence punishable with death, the minimum number of persons to be summoned is 14 and that the number may be as many as 18. The form of precept to district

magistrates to summon jurors and assessors, is set out in Sch. V, Form No. 32. We then come to Ss. 276-279. Under S. 276 the jurors shall be chosen by lot from the persons summoned to act as such, in such manner as the High Court may from time to time by rule direct, provided that in case of a deficiency of persons summoned, the number of jurors required may, with the leave of the Court, be chosen from such other persons as may be present. Under S. 277 provision is made for objections to jurors whose names are called out and S. 278 sets out the grounds of objection which may be urged by the accused or by the prosecutor. Then comes S. 279 which runs as follows:

> Every objection taken to a juror shall be decided by the Court, and such decision shall be recorded and be final. If the objection is allowed, the place of such juror shall be supplied by any other juror attending in obedience to a summons and chosen in manner provided by S. 276, or if there is no such other person present, then by any other person present in the Court whose name is on the list of jurors, or whom the Court considers a proper person to serve on the jury, provided that no objection to such juror or other person is taken under S. 278 and allowed.

It is apparent that the object of the provisions in the code to which we have just referred is to secure an impartial trial by rendering impossible any intentional selection of jurors to try a particular case and that an accused person has a right to claim to be tried by a jury chosen with strict regard to all the safeguards provided in the code to secure perfect impartiality. These being the guiding principles underlying these sections, we have to ascertain the true meaning of S. 276. In our view there can be no doubt that the central idea is to have a jury chosen by lot from the persons summoned to act as jurors. In other words, in ordinary cases, five persons are to be chosen by lot for the purpose of acting as a jury out of ten persons summoned to act as jurors. In murder trials, as already noticed, seven or nine persons, as the case may be, are to be chosen by lot for the purpose of acting as a jury out of 14 or 18 persons summoned to act as jurors. In case, however, of a deficiency of persons summoned, i. e., where the persons attending in obedience to the summonses are less than the numbers summoned, the number of jurors required may with the leave of the Court be chosen from such other persons as may be present. It is this last clause which is the subject of controversy in these appeals. What is the true meaning of the words "required" and "chosen" in the Proviso 2, S. 276? Does the word "required" mean "required to constitute the quorum for a jury," or does it mean "required to make up the minimum number of jurors which will render a choice of jurors by lot possible," or lastly, does it mean "required to make up the minimum number of jurors summoned under S. 326 to attend?" S. 326 requires a definite minimum of jurors to be summoned for a particular case and it is important to bear this in mind considering the sense of proviso 2, S. 276. This proviso has been introduced to meet a case where there is a deficiency of persons summoned, and it seems to us that the word "required" in the proviso must refer and is relative to the words immediately preceding, namely "in case of a deficiency of persons summoned." To hold otherwise, it would not be possible to give effect to the section itself which requires the jury to be drawn by lot. Under the first and second of the three possible constructions noticed before, a choice by lot of the required number of jurors would not be possible; indeed, if it so happened that only one summoned juror attended, no member of the jury could be chosen by lot. It is only under the third and last suggested construction that the proviso to S. 276 can be read so as to allow the terms of the section to receive their natural interpretation. In other words, in our view, if there is a deficiency of persons summoned to act as jurors, it is this deficiency that under the proviso may be made good from such other persons as might be present in Court, and the meaning of the world "chosen" in the proviso must mean chosen by lot.

We do not agree with the contention that if there is a deficiency of persons summoned, the number of persons required to complete the panel may be supplemented otherwise than by lottery from those persons present in Court. It seems to us that if the proviso be so read and a full jury always so obtained, the occasion to utilize the provisions of S. 279 (2) under which the Court may allow some not-summoned persons present in Court to serve on the jury, could

hardly arise. With regard to S. 279, we consider it contemplates an ordinarily normal case of the jurors summoned attending, but by reason of challenges or other causes such as, for some of them being excused no summoned juror is left to take the place of the last challenged juror. In such an eventuality some other persons present in Court may be empanelled. In so far as S. 279 (2) permits a person not chosen by lot to be empanelled, it certainly introduces an exception to the general rule, but this is only in the exceptional condition stated and in emergent circumstances.

The matter raised on these appeals is of very great importance and the view we have taken is in accordance with the opinion expressed in the case reported in *Bhola Nath Hazra* v. *Emperor* (1). We are aware that a different view has been taken in *Rahamat Sheikh* v. *Emperor* (2), but the learned judges in that case held that the facts of that particular case warranted them from departing from the view taken in *Bhola Nath Hazra* v. *Emperor*.

In view of what has been said above by us we are constrained to hold that there has been no proper trial in each of these cases and there is no other alternative left open to us, but to order trials of the accused in all the seven appeals before us in accordance with law and we accordingly do so.

The accused or such of them as are on bail in the appeals other than appeals Nos. 185 and 366 of 1927 will be allowed to remain on the same bail, pending further orders of the learned Sessions Judge who will hold the retrials.

D.D. *Retrial ordered.*

(1) A. I. R. 1927 Cal. 242.
(2) A. I. R. 1927 Cal. 593.

## A. I. R. 1927 Calcutta 791

PEARSON, J.

*Brojo Gopal Naik*—Plaintiff.

v.

*Lakshmoni Dassi* and *others* — Defendants.

Civil application for transfer of a suit; Decided on 29th November 1926.

*Letters Patent (Calcutta), Cl. 13—Balance of convenience must be considered.*

**The question of a transfer of a suit from a sub-judge's Court to High Court "for purposes of justice" within the meaning of Cl. 13, Letters Patent, is to be determined by reference to the circumstances of each case, and the balance of convenience, having regard to those circumstances, is one of the matters for consideration.** [P 792 C 2]

*N. N. Sircar, B. K. Ghose, Binod Mitter, S. C. Mitter, B. L. Mitter, A. P. Basu, S. N. Banerjee* and *S. M. Bose*—for Applicants.

*Langford James* and *S. C. Bose*—for Opposite Party.

**Pearson, J.**—This is an application for transfer to this Court of a suit pending in the Court of the Subordinate Judge at Hooghly. The application is on the part of defendant 4 in that suit, one Rash Behary Mondal, and is supported by all the appearing defendants, but opposed by the plaintiff.

Ramdhone Khan and Rameswar Khan were two brothers possessed of considerable joint properties moveable and immovable; the pedigree which is exhibited shows their descendants and their relationship. It appears that there was certain litigation in this Court concerning the joint estate. In 1914 Ramdhone's widow Lakshimoni filed a suit for partition in this Court, as a result of which certain properties were allotted to her, the rest remaining joint. In 1919 a suit was instituted against Lakshimoni, also in this Court, for a declaration that certain transfers by her of Government securities were invalid, and for other reliefs. That suit never came to a hearing.

In June 1920, a suit (1172 of 1920) was filed in this Court by Narottam Mondal (defendant 5 in this suit) against Lakshimoni Dassi, Haridasi and other members of the family to set aside a certain deed of relinquishment executed by Haridasi Dassi. Ultimately that suit was settled upon certain terms, which were gone into at some length before Mr. Justice Page, to satisfy the Court that they were for the benefit of the infant parties, after which a decree was passed in accordance with them. The terms embodied inter alia a relinquishment by Lakshimoni Dassi of her rights as a Hindu grandmother in the estate of Shamadas Khan, deceased. The decree was passed on the 26th February 1923, and the deed of relinquishment was executed by Lakshimoni on the following day, the 27th. The present suit is brought by an infant member of the

family, born on the 21st June 1926, to set aside those terms of settlement, the decree based upon them, and the deed of relinquishment by Lakshimoni. The grounds set out in para. 17 of the plaint are her infirmity, want of mental capacity, the absence of independent legal advice and undue influence on the part of Haridas Mondal. Lakshimoni has filed an affidavit on the present application to the effect that she knew quite well what she was doing.

It is to be noted that all the negotiations from which the settlement resulted, and the settlement itself, took place in Calcutta. All the parties concerned, including Lakshimoni, were represented by attorneys of this Court in those negotiations, and they lasted from early in February onwards. Lakshimoni herself was in Calcutta and gave her assent to the terms in Calcutta and apparently the only thing she did at Mankundu, the family residence, was the actual signing of the deed of relinquishment. So that whether there may be witnesses of the locality (the plaintiff has not named one) who can give evidence in the plaintiff's favour as regards Lakshimoni's capacity about that time, the kernel of the case would appear to lie in the negotiations and circumstances surrounding the settlement, and the part taken by Lakshimoni and her advisers. It seems undoubted that the attorneys will have to be called, and be employed not merely in giving evidence, but to watch and advise in the case having regard to their knowledge. The attorney's day-book is a familiar enough production in these Courts, though not outside Calcutta. There is also the question of what took place in Court when the terms of settlement were placed before the Court by counsel.

As regards the properties belonging to the estate, the suit is valued at some 26½ lakhs. Mohipal Naik's affidavit says that the value of the properties in Calcutta is about 4 lakhs and of those outside Calcutta more than 2½ lakhs. At the time of the partition suit in 1914, when the properties were valued by the commissioner, the Calcutta properties were estimated at Rs. 4,59,000, at Chandanagor Rs. 66,000, at Hooghly Rs. 12,000. There were zemindaris in the districts of Hooghly, Murshidabad, Nuddea and Bhagalpore valued at Rs. 5,50,000. And there were Government securities in Calcutta of about Rs. 5½ lakhs, and another 4 to 5 lakhs of outstandings on mortgages in Calcutta and the family business in Calcutta.

I do not think that the fact that previous litigation had already taken place in this Court is really material to the present application, except that if it is necessary to refer to the records they had better be referred to in this Court than be taken up-country. Whichever Court heard the case, I take it the parties would have to take certified copies of such proceedings as they required. As regards expense, it would be surprising if counsel were not engaged where the estate is so large, and it is common knowledge that the fees would be much higher than if the suit were tried here. The expense of getting the witnesses to Calcutta is not disproportionately large as compared with Hooghly.

One point made in opposition is that Lakshimoni herself is not in a state to be examined except on commission at Mankundu, but as against that I have applicant's undertaking through his counsel that she will be brought to Calcutta for such examination. Another objection is made that the translation of account books would be expensive if the suit is heard here, but the applicant has similarly undertaken to bear the expense of that in regard to relevant entries should it become necessary. And as regards the expense of conducting a suit here, he has similarly agreed that in the event of the plaintiff succeeding he may tax his costs against the applicant, irrespective of the restrictions of Ch. 24, R. 34, of the rules, I think, further, that if the suit is transferred here, the delay in the hearing may be considerably minimized, at any rate, if the parties are diligent.

It has been argued that no transfer should be made unless it is "for purposes of justice" within the meaning of Cl. 13, Letters Patent, that is, it must at least be shown that the trial will be unsatisfactory, if it is conducted at Hooghly: see *Rajah Ojooderam* v. *S. M. Nobinmoney Dossee* (1). But I take it that the question is to be determined by reference to the circumstances of each case, and that the balance of convenience, having regard to those circumstances, is

(1) [1886] 1 Ind. Jur. 396.

one of the matters for consideration. Upon the whole, I think, that this is a case where the order ought to be made. Costs in the cause.

R.K. *Order accordingly.*

---

## A. I. R. 1927 Calcutta 793

(*Vide A. I. R.* 1927 *Cal.* 432, *F. B.*)

RANKIN, C. J., AND MAJUMDAR, J.

*Emperor*

v.

*Probhat Chandra Barua*—Assessee.

Civil Reference No. 1 of 1926, Decided on 11th May 1927, made by the Commissioner of Income-tax, Assam, D/- 12th March 1926.

*Income-tax Act* (1922), *S.* 2—*Agricultural produce—Meaning illustrated.*

Fees received from land used for storing purchases of crops (paiati) do not come within the definition of "agricultural income" as given in S. 2, nor does punyaha nazar or nazar paid by tenants of agricultural holdings at the beginning of the zamindari year, nor does nazar paid for petitions presented by the zamindar dealing with questions of succession. But nazar paid for recognition of succession or partition or for settlement is an income derived from land.

[P. 793, C. 1, 2; P. 794, C. 1]

*B. C. Mitter* and *Surendra Nath Guha*—for the Crown.

*N. Sircar* and *Jatindara Mohan Chaudhury*—for Assessee.

**Majumdar, J.**—In the present reference, the learned vakil who appears for the assessee confines himself to three items included in the first question, namely: item (v), item (vii) and item (viii).

With reference to item (v), namely, fees received from land used for storing purchases of crops (paiati); what is actually meant by this is given in the petition of the assessee which he presented to the assistant commissioner of income-tax at Goalpara. He means the income which is derived for the use of land for storing purchases of food-crops, etc., by merchants. Evidently this does not come within the definition of "agricultural income" as given in S. 2, Indian Income-tax Act. The income, as derived, is not derived from land used for agricultural purposes and, as such, such income cannot be claimed to be exempt from assessment.

With reference to item (vii), i. e., punyaha nazar or nazar paid by tenants of agricultural holdings at the beginning of the zamindari year, I am of opinion that this also does not come within the definition of "agricultural income" as given in the Act. This nazar is generally paid by tenants who are actually present on the occasion of the punyaha to the landlord. There is no uniformity in the payment of such nazar, nor is there any compulsory method for realizing such nazar. The tenants, if they choose, might not pay any nazar whatsoever on that occasion and the landlord cannot under any law at present in force enforce his supposed right, nor can the landlord demand nazar at a certain uniform rate. It is purely a voluntary payment by tenants, who take part in the ceremony and who usually are present on the occasion. It is not, therefore, an income which is derived from land used for agricultural purposes.

The learned vakil draws our attention to the full bench case of *Meher Bano Khanum* v. *Secretary of State* (1) and particularly to a passage in the judgment delivered by Mr. Justice Greaves where the learned judge says, referring to the salami paid to a landlord for recognition of the transfer of a non-transferable holding that

> it is a money which comes to the landlord by virtue of the fact that he is the owner of the land,

and that that being so it would be an agricultural income and so exempt from the operation of the income-tax.

Now, in the Full Bench case the reference was in connexion with nazar paid by a tenant for recognition of transfer of a non-transferable occupancy holding. With reference to such a holding the position stands thus in law: that when such a transfer takes place the landlord is not bound to recognize such a transfer and that in case the landlord does not recognize such a transfer the landlord is free to take khas possession of the holding. When he does recognize such a transfer, that practically amounts to a sort of new settlement with the transferee and the nazar which is actually paid on the transfer by the transferee really amounts to the capitalized value of a part of the rent. Under such circumstances such nazar would be an income derived from land, and, as such, would come within the definition of

(1) A. I. R. 1925 Cal. 929=53 Cal. 34 (F. B.).

"agricultural income." Though this fact was not referred to permanently in the judgment, still the effect of such a transfer and of such a recognition amounts in law to a sort of new settlement by the landlord with the transferee. That being so, the case covered by the Full Bench decision altogether stands on a different basis from the present case and can hardly be used in support of the argument advanced by the learned vakil in connexion with punyaha nazar.

Then with reference to item (viii), i. e., nazar paid for petitions presented to the zamindar dealing with questions of succession, settlement and partition, this stands on a worse ground. This has absolutely nothing to do whatsoever with lands used for agricultural purposes unless in a most indirect and remote way. The landlord is not entitled to exact from a tenant nazar for such petitions, nor is a tenant liable to pay it under any provision of law. When the question of succession opens up with regard to a holding no such petition is necessary under the law. If the holding be an occupancy holding the landlord is bound to recognize the succession, petition or no petition. It is only in certain cases that certain steps have got to be taken in connexion with succession of tenures and those have been provided for in the Bengal Tenancy Act. But that has got nothing whatsoever to do with the nazar which is referred to in item (viii).

Then, the item (viii) refers to nazar for petitions dealing with questions of succession, settlement and partition. It is not "nazar paid for recognition of succession or partition or for settlement". Certainly the landlord may be entitled to something for recognizing succession or partition or for settlement. That would be an income derived from land. In cases of partition the landlord may rightfully demand certain fees. In cases of holdings and tenures, if the tenants choose to partition the same, they can do it with the consent of the landlord, and the consent of the landlord may have to be purchased, and in those cases the fee which the landlord would get may come under the definition of "agricultural income" as given in the Act. But in this reference we are concerned with the nazar for petitions dealing with the questions of succession, etc., and not with nazar paid to the landlord referred to above, for obtaining the recognition of the landlord in matters of succession or partition or for settlement. Such being the case, such nazar for petitions would not come within the definition of "agricultural income" as given in the Act, so this item could also be assessable to income-tax and would not be exempt from the operation of the Income-tax Act.

**Rankin, C. J.**—I agree entirely in the judgment which has been delivered.

With reference to the first question put by the commissioner of income-tax the answers to all the items are in the negative. The answer is in the negative with reference to items (v), (vii) and (viii) for the reasons which have been given by my learned brother and with which I entirely agree.

We make no order as to costs.

The judgments now given (together with the judgment given by the Full Bench ont he second and third questions, if those have not already been sent to the commissioner) will be forwarded to him under the seal of the Court and the signature of the registrar as provided by S. 66 of this Act (11 of 1922).

R.K. *Order accordingly.*

---

## A. I. R. 1927 Calcutta 794

CUMING AND MALLIK, JJ.

*Jadu Nath Mandal*—Plaintiff—Appellant.

v.

*Amulya Krishna Kundu* and *others*—Defendants—Respondents.

Appals Nos. 1616-1619 of 1924, Decided on 13th May 1927, from the appellate decrees of the Sub-Judge, Nadia, D/- 31st March 1924.

(a) *Civil P. C., S.* 11—*Heard and finally decided—Prior suit dismissed on the ground of nonjoinder of parties—Subsequent suit on the same cause of action is not barred.*

To constitute a matter res judicata, it is necessary that the matter must have been heard and finally decided in the former suit. But where the former suit is dismissed only on the ground of non joinder of parties the matter cannot be said to have been heard and finally decided and a subsequent suit based on the same cause of action is not barred ; 24 *Cal.* 616 (*P.C.*) *Foll.* [P. 795, C. 2]

(b) *Limitation—Party, against whom no relief claimed, brought on record out of time—No question of limitation arises.*

When a party is brought on the record out of time, the question of limitation does not arise when there is no relief claimed against that party : 6 *C. L. J.* 558, *Foll.* [P 796, C 2]

*Atul Chandra Gupta* and *Radhikaranjan Guha*—for Appellant.

*Radha Binode Pal*, *Jitendra Mohan Banerjee*, *Bhupendra Krishna Bose*, *Rupendra Kumar Mitter* and *Hariprasanna Mukerjee* and *Biraj Mohan Mojumdar*—for Respondents.

**Mallik, J.**—This appeal arises out of a suit for contribution brought by the plaintiff for recovery of Rs. 542-8-3 from the defendants. The allegations on which the suit was brought were that one Malati Manjari Dasi had obtained a decree for maintenance against defendants 1 and 2 in 1916 with a charge on properties 1 to 3 in the suit, that the plaintiff subsequently purchased property 1 at an auction sale held in execution of a rent decree in 1917 and took possession thereof. But Malati Manjari executed her decree and put up that property to auction sale, that the said property was purchased at the sale by defendant 7 for Rs. 530 and by that sale the dues of Malati Manjari were satisfied and the charges on the other two properties were removed benefiting the other defendants who purchased them subsequently and making them liable to contribute. The defence was a denial of liability to pay any contribution and that the suit was barred by res judicata as well as limitation. The Court of first instance found all these points in favour of the plaintiff and decreed the suit. On appeal to the district Court, the learned subordinate judge raised three points for determination. These three points were : (1) Is the claim barred by the principle of res judicata ? (2) Is it barred by limitation ? (3) Were the defendants or any of them benefited as alleged by the plaintiff ? If so, to what extent they or any of them are liable to the plaintiff ? The learned subordinate judge found the points of res judicata and limitation against the plaintiff and on that finding he allowed the appeal and set aside the decree of the first Court without determining the third point raised by him. The plaintiff has appealed to this Court.

It was contended before us that the lower appellate Court was wrong on both the points of res judicata, and limitation. As regards res judicata it appears that the plaintiff had instituted a previous suit against the defendants for recovery from them of the amount that has been claimed in the present case, and it appears that that suit was dismissed on the ground of defect of parties. The learned subordinate judge held that this was sufficient for bringing in the operation of res judicata and for holding that the present suit was barred on that ground. I am of opinion that this was an erroneous view of the law. To constitute a matter res judicata it is necessary that the matter must have been heard and finally decided in the former suit. But the former suit in the present case was dismissed only on the ground of nonjoinder of parties ; and that being so, the matter cannot be said to have been heard and finally decided. This view would find support from the Privy Council decision in the case of *Sheosagar Singh* v. *Sitaram Singh* (1). An attempt was made to distinguish this Privy Council case from the present one. It was said that in the case of *Sheosagar Singh* v. *Sitaram Singh* (1) the suit had been dismissed on a preliminary point only and no issue had been tried and decided, whereas in the present case there were other issues also which had been decided though in the plaintiff's favour. But this in my opinion would make no difference. The other issues might have been heard and decided, but they cannot be said to have been heard and finally decided as the finding on them was not necessary for the determination of the suit.

As regards limitation : it appears that though the suit was instituted against defendants 1 to 6 within time, defendant 7 was not brought on the record until after the limitation period had expired. The lower appellate Court on this ground held that the suit was barred by limitation. I am of opinion that herein also the learned subordinate judge fell into an error. The question of limitation could not arise : firstly because defendant 7 was not a necessary party and it was immatarial whether he was brought on the record or not ; secondly because there was no relief claimed

(1) [1897] 24 Cal. 616=24 I. A. 50=1 C. W. N. 297=7 Sar. 124 (P. C.).

against him. On behalf of the respondent Dr. Pal tried to show that defendant 7 was a necessary party in a suit for contribution. I do not see how he was. For the purpose of assessing contribution all that was necessary was to determine the value of the three properties and to hold them liable in proportion of their value. That being so the presence of defendant 7, who was the purchaser of property 1 at the sale in execution of the maintenance decree, was not necessary. Even if it be conceded for the sake of argument that defendant 7 was a necessary party, there is no escape from the fact that no relief was claimed against him; and it has been held in the case of *Mohamed Ishag* v. *Sheikh Akramul Huq* (2) that when a party is brought on the record out of time the question of limitation does not arise when there is no relief claimed against that party. I am, therefore, of opinion that the view taken by the learned subordinate judge on both the points of res judicata and limitation is erroneous; and as the lower appellate Court has dismissed the suit on these points only, without determining the other points, the decree passed by it must be set aside. It is accordingly set aside and case is sent back to the lower appellate Court for determination of the third point raised by it in accordance with law. The appellant is entitled to his costs in this Court. The cost of the other Courts will abide the result.

This judgment will govern the other three appeals.

**Cuming, J.**—I agree.

R.D. *Cases sent back.*

(2) [1907] 12 C. W. N. 84=6 C. L. J. 558.

## A. I. R. 1927 Calcutta 796

B. B. GHOSE AND G. N. ROY, JJ.

*Suresh Chandra Saha Chowdhury*—Plaintiff—Appellant.

v.

*Gobind Nath Saha Chowdhury* and *others*—Defendants—Respondents.

Appeal No. 52 of 1925, Decided on 18th May 1927.

(a) *Civil P. C., O. 32, R. 7—Compromise by guardian—Order must show that leave was obtained and compromise was for minor's benefit.*

The provision making it necessary to obtain the leave of the Court to a compromise on behalf of a minor is of great importance to protect the interests of a minor: *A.I.R.* 1915 *P.C.* 33, *Foll.* [P 798 C 2]

[It is not sufficient that the terms of a compromise are before the Court. There ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise, and it ought to be shown by an order on petition, or in some way not open to doubt, that the leave of the Court was obtained. 39 *Mad.* 115, *Foll.*

In sanctioning a compromise on behalf of an infant the order granting the sanction should in terms state that the question whether the compromise was for the benefit of the infant was considered. The Court should also ascertain and record that in the opinion of the pleaders, if any, representing the infant, the compromise was one entered into in the interests of the minor and fit and proper to be sanctioned: 29 *Mad.* 104, *Foll.*; 36 *Bom.* 53 and 13 *C. W. N.* 163. *Rel. on.* [P 799 C 2]

Before accepting a compromise, affecting rights in immovable property, filed by a guardian appointed under a certificate, on behalf of a minor, the Court should require the guardian to produce the consent of the Court, by which he was appointed, to the filing of the compromise; 6 *N. W. P.* 179, *Foll.* [P 799 C 1]

(b) *Contract Act, S. 196—Agent to collect rent cannot ratify the lease unless he is authorized to ratify the contracts.*

In order to ratify the transaction of a lease by guardian, it would not be enough to show that the rent was received by the am-mukhtear unless it was further shown that that am-mukhtear was given the power not only to collect rent from tenants but also for ratifying contracts which his master could avoid. [P 800 C 2]

(c) *Compromise—Unenforceable against minor—Hardship on the other party or impossibility to put parties in original position cannot make it binding.*

A compromise, unenforceable against a minor, cannot be treated as binding upon him on the ground that its being set aside would work hardship on the other party. It is also no ground for not setting it aside that it is impossible to place the parties in the position in which they were when the compromise was effected: 34 *Mad.* 314, *Foll.* [P 800 C 1]

(d) *Civil P. C., O. 32, R. 7 (2)—Setting aside compromise—Fact of benefit cannot be considered.*

Where a minor after attaining majority seeks to set aside a compromise under sub-R. (2), R. 7, O. 32, the question whether the minor derived any benefit from the compromise or not is foreign to the enquiry: 35 *Bom.* 322, *Foll.* [P 801 C 2]

*R. M. Chatterjee*—for Appellant.

*Basak, Prokash Chandra Majumdar* and *N. C. Kar*—for Respondents.

**B. B. Ghose, J.**—The relevant facts may be shortly stated thus:

There were two brothers Haranath Saha and Sambhunath Saha. Haranath had two sons, Govinda and Prosanna, and Sambhunath had one son, Sarat Chandra. The plaintiff is one of the three sons of Sarat Chandra described as Chhota Taraf in the proceedings. The descendants of Govinda are the principal defendants 1,

2 and 3, called the Bara Taraf. The sons of Prosanna are pro forma defendants 4, 5 and 6 in suit. These pro forma defendants have no connexion with the matter in controversy in this litigation. The plaintiff has one surviving brother Bhabesh, who is pro forma defendant 8 and is described as a minor in the plaint, represented by his certificated guardian and mother Ambica Sundari Choudhurani. There was a partition suit between the ancestors of the parties in 1907. A decree was made but it is unnecessary to state anything in detail about it. The plaintiff and his brother were minors when their father died and their mother Ambica Sundari Choudhurani obtained a certificate of guardianship under Act 8, 1890 for all of them. In the year 1914 Ambica Sundari, Choudhurani as guardian and next friend of her minor sons, brought a suit, 523 of 1914, for recovery of certain properties on the allegation that those properties were allotted to the share of the plaintiffs under the previous partition decree but from which they had been dispossessed. The suit was contested by the principal defendants in the case and the suit dragged on for some time. There were other litigations between the parties which it is unnecessary to state in detail. It appears that the guardian of the infant plaintiffs in the suit of 1914 entered into a negotiation for the compromise of that suit along with other disputes between the plaintiffs and the defendants. As for the purpose of compromise it was necessary to make a transfer by way of lease of the property of the infants, the mother of the plaintiffs, as certificated guardian, made an application to the district judge under S. 29, Guardians and Wards Act, for permission to grant a lease of some of the properties which were the subject matter of suit No. 523 of 1914. With that object it appears that the plaintiffs' guardian, as well as the defendants in the suit, made an application before the subordinate judge for an adjournment of the case and for certain other orders on the ground that they would pray for permission to file a petition of compromise.

On the 10th February 1917, the subordinate judge recorded the order that "the parties do file a petition of compromise on or before the fixed date." On the 16th February 1917, there was another order from which it appears that both the parties filed a joint petition for time for filing a petition of compromise. It was ordered that "15 days' time be allowed." The next important order is dated the 3rd March 1917, when the Court ordered an adjournment for 14 days to file the petition of compromise, and it was further directed that the parties must understand that "no further time will be allowed in future." On the 17th March 1917, an order was recorded, which is somewhat important in connexion with the controversy before us. It runs thus :

> Parties again pray for time to file the petition of compromise on the ground that the permission for compromising the suit on behalf of the minor plaintiffs has not yet been granted to the certificated guardian by the District Judge of Pabna. The case is more than two years old and it is desirable that it should be disposed of as early as possible. Time was granted twice previously to the parties for the purpose and it is difficult to grant time repeatedly. However, in the interest of justice, I allow the parties an opportunity once again and adjourn the case to 28th April 1917, for final disposal.

The District Judge, however, did not grant any permission for compromising that suit or for granting any lease of the property of the minors during the period, On the other hand, he asked for certain accounts and information which the guardian apparently did not supply to the District Judge. The next thing that the guardian did was to file a petition on the 28th April 1917, stating that the suit had been compromised in terms of the solenamah filed therewith. It was stated in it :

> As this compromise is very beneficial to the interests of the minor plaintiffs in this suit it is humbly and respectfully prayed thar Your Honour will be pleased to grant permission for the filing of the solenamah on behalf of the minor plaintiff.

Upon this an order was made in the order sheet :

> On plaintiff No. 3's petition it is ordered that she be permitted to file petition of compromise on behalf of the minor plaintiffs 1 and 2.

It is only necessary to mention one fact with regard to the compromise in order to refer to certain arguments addressed before us. It is to this effect : that the plaintiffs' title to the land in suit was established; but the property was granted in perpetual lease in two shares—8 annas were given to the principal defendant 1, and 8 annas to defendants 2, and 3. It was also provided that the plaintiffs should execute separate

pottas in favour of the said defendants within a certain period and that the defendants would execute kabuliyats with regard to those lands. It should be observed that plaintiff 3 was Ambica Sundari, the mother and certificated guardian of plaintiffs 1 and 2, who, it is stated, also inherited a share of one of her sons who had died in the meantime. The present suit of the plaintiffs, shorn of all unnecessary statements of facts, is for the purpose of setting aside the decree that was made upon the compromise on the main ground that it was in contravention of O. 32, R. 7, Civil P. C., and also because the guardian did not obtain the permission of the District Judge under S. 29, Guardians and Wards Act. It is urged that the Court did not sanction the proposed compromise of the suit brought on behalf of the plaintiff and his brother by their next friend.

Various questions were raised in defence before the Subordinate Judge and a large number of issues were framed which were decided by him and he dismissed the suit of the plaintiff. The plaintiff is the appellant before us. It appears to us that the real question to be tried in this case was whether the compromise made in suit No. 523 of 1914 was in contravention of O. 32, R. 7 Civil P. C., and was as such voidable at the instance of the plaintiff, who was then a minor and has since attained majority; and secondly, whether on attaining majority, the plaintiff has ratified the compromise. The learned advocates on both sides agreed that those were real points for decision in the appeal. The learned subordinate judge seems to have travelled beyond the main question to be tried in such a case as this and entered into the question whether the original compromise was for the benefit of the minor or not. Certain matters of fraud also were alleged by the plaintiff by various persons concerned, but that question has not been argued before us. We have, therefore, simply to see whether the plaintiff is entitled to succeed in the appeal on these two questions. The law with regard to the subject has been laid down by the Privy Council in a series of cases: see *Subramanian Chetttar* v. *Rajeswara Dorai* (1) and the cases there referred to. That case was decided with reference to S. 462 of the code of 1882. It should be mentioned here that there has been some alteration in R. 7, O. 32 of the present code by the insertion of the words "expressly recorded in the proceedings" in sub-R. (1) and the words "so recorded" in sub-R. (2). By this alteration the legislature had adopted the principle which was laid down by the Judicial Committee that the leave required should be expressly given.

The position, therefore, to my mind is this: that the rule by the new code has been made more stringent than what was laid down in S. 462 of the old code and in some cases before the passing of the code of 1908. In the case of *Subramaniam Chettiar* v. *Rajeswara Dorai* (1) their Lordships observed, after referring to S. 462 of the old Code, as follows:

> Their lordships regard the provision making it necessary to obtain the leave of the Court as of great importance to protect the interests of a minor. It clearly applies to the compromise in question in the present appeal. It may be well to quote the language used by Lord Macnaghten in *Manohar Lal* v. *Jadu Nath Singh* (2): "It is not sufficient that the terms of a compromise are before the Court. There ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise, and it ought to be shown by an order on petition, or in some way not open to doubt, that the leave of the Court was obtained." Reference may also be made to the more recent case of *Ganesha Row* v. *Tulja Ram Row* (3).

It is contended on behalf of the appellant that the order that was recorded in the present case is not a sufficient compliance with the provisions of the law as laid down by the Privy Council and it does not show that the interest of the minor was considered by the subordinate judge by the order that he had made. On the other hand, it is contended by the respondents that the words

> she be permitted to file petition of compromise on behalf of the minor plaintiffs 1 and 2

satisfy the rule as laid down by their Lordships of the Privy Council. It is contended that it was brought to the notice of the judge that minors were concerned. It was also brought to his notice that the compromise was beneficial to the minor plaintiffs in the suit and he granted permission to file the

(1) A. I. R. 1915 P. C. 33=39 Mad. 115 (P. C.).

(2) [1906] 28 All. 585=33 I. A. 123=9 C. C. 219=3 A. L. J. 710 (P. C.).

(3) [1913] 36 Mad. 295=19 I. C. 515=40 I. A. 132 (P. C.).

petition of compromise. From this it is quite apparent that the subordinate judge had in his mind and had taken into consideration the fact whether it was for the benefit of the minors. In my judgment it does not appear to have been so. It is quite clear that the subordinate judge knew that in this case an application had been made to the district judge for permission to compromise the suit by the next friend, who was also the certificated guardian. The district judge made no order granting such permission and it was on that account that the subordinate judge was adjourning the case from time to time; and from the orders I have already quoted it appears that he was anxious to finish the case whether there was any sanction of the district judge or not. I do not mean to say that the subordinate judge could not grant his sanction to the compromise of the suit in the absence of any sanction by the district judge. There is, however, authority that before accepting a compromise affecting rights in immovable property filed by a guardian appointed under a certificate on behalf of a minor, the Court would require the guardian to produce the consent of the Court, by which he was appointed, to the filing of the the compromise: *Sheonundun* v. *Kahsa Kooer* (4). In this case the sanction of the district judge was applied for and it was brought to the notice of the subordinate judge that no sanction from the district judge was obtained. Under this circumstance the subordinate judge should have carefully considered the question whether the proposed compromise was for the benefit of the infants. There is no indication anywhere on the record that this was done. It is argued by Dr. Basak on behalf of the respondents that it was not necessary for the judge to say that it was for the benefit of the infants as there is no such provision in the code or any such direction expressed in any of the several judgments of the Judicial Committee. But it is well known that this had been the practice even under the old code for the Court to record the fact that it took into consideration all the circumstances and having done so it considered that the compromise was for the benefit of the infant. I may refer to the case of *Kalabati* v. *Chedilal* (5) in which Sir John Edge, Chief Justice and Mr. Justice Banerjee made the following observations:

> In order to make an agreement or compromise to which S. 462, Civil P. C. applies a lawful agreement or compromise it is necessary that the next friend or guardian should ask the Court to consider the perposed terms of the agreement or compromise, and before making the agreement or entering into the compromise should obtain permission from the Court to enter into the agreement or compromise proposed. Further, the Court should record the fact that such application was made to it; that the terms of the proposed agreement or compromise were considered by the Court; and that having regard to the interests of the minor the Court granted leave to the making of the agreement or compromise.

I would also refere to the case of *Govindasami* v. *Alagirisami Naidu* (6) where Sir Subramania Ayyar, Offg. Chief Justice and Mr. Justice Sankaran Nair made the following observation:

> We wish to point out that in sanctioning a compromise on behalf of an infant the order granting the sanction should in terms state that the question whether the compromise was for the benefit of the infant was considered. The Court should also ascertain and record that in the opinion of the pleaders if any, representing the infant, the compromise was one entered into in the interests of the minor and fit and proper to be sanctioned.

In *Pirojshah* v. *Manibhai* (7) an endorsment was made by the Court on the application for compromise, that

> the application has been allowed and filed in the suit.

This was held to be no sanction according to the provisions of the code: see also *Lala Majlis Sahai* v. *Narain Bibi* (8). I shall refer to one other case, *Krishun Prosad* v. *Romesh Chunder* (9).

The Judge in that case permitted the guardian ad litem

> to file petition admitting the plaintiff's claim on behalf of the minor

and again

> on application (the guardian) is permitted to file solenamah on behalf of the minor defendant.

This was not considered to be a sanction to compromise as required by the code. The orders in that case have a strong resemblance with the order under consideration here. I may also state that it is the practice of this Court when a compromise is proposed to be entered into by a guardian of an infant litigant, to hear the facts of the case and to deter-

(4) 6 N. W. P. 179.

(5) [1895] 17 All. 531=(1895) A. W. N. 126.
(6) [1906] 29 Mad. 104.
(7) [1912] 36 Bom. 53=12 I. C. 543=13 Bom. L. R. 963.
(8) [1903] 7 C. W. N. 90.
(9) [1909] 13 C. W. N. 163=4 I. C. 467=8 C. L. J. 274.

mine judicially on the materials placed before the Court whether the compromise would be for the benefit of the infant and to make the order with reference to the sanction for the compromise distinctly stating that it is for the benefit of the infant where the Court is so satisfied. If the procedure which the learned advocate for the respondents contends for is to be adopted, there would be no guarantee that the interest of the minor was properly considered while sanctioning the compromise. The spirit of the rule should be observed and not the mere form. In my opinion, therefore the provision of O. 32, R. 7, sub-R (1) were not properly complied with in this case. The appellants have, therefore, succeeded in establishing the first point that was raised on their behalf.

The next question is with regard to the ratification by the plaintiff on his attaining majority and this question of ratification is based upon the fact that rent was received by or on behalf of the plaintiff after the attainment of his majority. The plaintiff attained majority some time in July 1918. Two sets of rent receipts have been produced in this case. One is series (m) and the other is series (n). The (m) series of receipts are four in number beginning from December 1919, to January 1920. The rent was paid by a lessee of the defendant with regard to the property in question. The receipts were granted on behalf of Ambica Sundari Choudhurani for self and as certificated guardian and mother of the minors—Surehe, that is the plaintiff, and Bhabesh, that is, his brother pro forma defendant 8.

There is nothing to show that this receipt, although the plaintiff had then attained the age of majority, was signed by the plaintiff himself, but evidence is given on behalf of the defendants that these receipts were given under the direct order of the plaintiff and this evidence is given by two witnesses for the defendant, witness 5 and witness 6. Great reliance has been placed on behalf of the respondent on the evidence of these two witnesses while the appellant says that these two persons should not be believed, because although they were servants of the plaintiff at the time when the plaintiff attained majority, shortly after that they left the plaintiff's service and took service under the defendants and were in their service when they gave evidence on behalf of the defendants. It was also alleged that these persons brought about the compromise that is now in question. One of these persons, Pran Gopal Roy, had been playing fast and loose, because this gentleman has verified the plaintiffs' plaint and has given evidence on behalf of the defendant. What he says is this : that the (m) series of receipts were given under the direct orders of the plaintiff. This was done because there were various old forms in their sherista which had not been exhausted during the time of the minority of the plaintiff and his brother, and these old forms were used even afterwards for the purpose of granting rent receipts. Their evidence is very difficult to accept having regard to the conduct of these two persons. Kristo Gopal Roy has not only changed his side but he has borrowed Rs. 2,000 from one of the defendants and Pran Gopal also, as I have stated, has transferred his allegiance from the plaintiff to the defendants. In order to ratify the transaction it would not be enough to show that the rent was received by the am-mukhtear, unless it was further shown that that am-mukhtear was given the power not only to collect rent from tenants, but also for ratifying contracts which his master could avoid. The act of ratification must be clear and distinct in order to bind an infant after he has attained majority and it is difficult to say that either the (m) series receipts or (n) series receipts granted through the post office for money sent by postal money order, amount to such a ratification. It need only be mentioned that when the plaintiff gave his evidence no question was put to him as to whether he had actually ordered receipt of the rent with regard to this property in dispute. On the other hand, he swears that he had always been trying to avoid the transaction. The subordinate judge has mixed up the question of ratification with the question whether the compromise was in the interest of both parties. This is a question which is foreign to the present enquiry. In my opinion the plaintiff cannot be said to have ratified the compromise so as to disentitle him from asking for the avoidance of the compromise as provided by O. 32. R. 7, sub-R (2)

One thing further should be mentioned. In the solenamah there was a provision that separate pottah and kabuliyats should be executed on account of the properties which were granted in perpetual lease to the two sets of defendants. The defendants' witness Behari Lal Bose gives evidence that no attempt was made on the part of the defendants to get the pottas from the plaintiff or to execute kabuliyats in his favour. That further shows that there was no attempt to get any proper ratification of the compromise from the plaintiff after he had attained majority. Taking all these circumstances into consideration it seems to me that the plaintiff is not precluded from bringing this suit on the ground of ratification.

One other point has been mentioned by the learned advocate for the respondents and it is this : In the petition of compromise there is nothing stated about any other transaction between the parties. But there is an ekrarnam which is referred to in the petition of compromise filed in the suit in which the defendants compromised certain other suits against the plaintiff and his brother and gave up certain other properties and the contention on behalf of the respondent is that in making a decree in favour of the plaintiff we should give a direction that the compromise with regard to those other suits and the making over of all these properties should be annulled. The difficulty in giving effect to the prayer is that we are not in seisin of these suits nor have we got anything to say with regard to the properties mentioned, which were neither the subject-matter of the previous suit of 1914 nor of the present suit. The contention that the plaintiff cannot get any relief under the circumstances is to my mind answered by the observation in the case of *Sethuram Sahib* v. *Vasanta Rao* (10) :

> A compromise unenforceable against a minor cannot be treated as binding upon him on the ground that its being set aside would work hardship on the other party. It is also no ground for not setting it aside that it is impossible to place the parties in the position in which they were when the compromise was effected.

It should, however, be observed that the plaintiff himself presented an application in Court on 21st June, 1924 in which he repudiated any benefit that he had obtained under the ekrarnama. But this is a matter which, as I have already stated, is beyond the scope of the present appeal.

It need only be further observed that where a minor after attaining majority seeks to set aside a compromise under sub- R. (2) of R. 7, of O. 32 the question whether the minor derived any benefit from the compromise or not is foreign to the enquiry : see the case of *Bhiva Jotiba* v. *Devchand Bechar* (11).

On these grounds this appeal must be allowed. The judgment and decree of the Subordinate Judge are set aside and the proper order to make under such circumstances is that the compromise decree in suit No. 523 of 1914 is set aside so far as the plaintiff is concerned. The parties will be relegated to the position in which they were before the 20th April, 1917 in the suit No. 523 of 1914. They will be allowed to make such amendments in their pleadings or with reference to the parties as has become necessary on account of subsequent events, and the case will be tried on its merits.

The prayer for khas possession must be dismissed.

Having regard to the fact that the plaintiff claimed too much and also to the manner in which he fought out the suit he is only allowed half his costs in the trial Court. He will get the full costs in this appeal. Hearing fee five gold mohurs.

**Roy, J.**—I agree.

R.K. *Appeal allowed.*

(10) [1911] 34 Mad. 314=12 I.C. 499.

(11) [1911] 35 Bom. 322=10 I. C. 909=13 Bom. L. R. 280.

1927 C/101 & 102

---

## A. I. R. 1927 Calcutta 801

SUHRAWARDY AND CAMMIADE, JJ.

*Gour Mohan Gossain* and *another*—Petitioners.

v.

*Emperor*—Opposite Party.

Criml, Rev. No. 1157 of 1926, Decided on 10th January 1927, from the order of the Addl. Chief Presy. Magistrate, N. D. Calcutta, D/- 4th October 1926.

*(a) Calcutta Police Act (4 of 1866) S. 46 and 47—Warrant under S. 46 defective—Presumption under S. 47 should not be raised.*

Where a search warrant purported to have been issued under S. 46 of the Act was defective :

*Held* : that no presumption under S. 47 that the house in question was a common gaming-house should be raised : *A. I. R.* 1926 *Cal.* 966, *Appl.* [P 802 C 1]

*Probodh Chandra Chatterjee*—for Petitioner.

**Judgment.**—In this case the accused has been convicted under S. 44 Calcutta Police Act, for owning and keeping a common gaming, house, and fined Rs. 50 each. This rule has been issued on the first four grounds mentioned in the petition of which two are of much importance. The first is that the search warrant purported to have been issued under S. 46 of the Act is defective and therefore no persumption should have been raised by the Magistrate under S. 47 of the Act. The second is that the learned Magistrate should not have used the admission made by the accused's brother in another case, to the effect that the house was a common gaming-house. We think that both these objections should prevail.

As to the first objection it is unfortunate that since the ruling in *Walvekar* v. *Emperor* (1), the form of the warrant has not been changed. In the one issued in the present case the words "there is cause to suspect" still exist. According to the authority cited the words "has reason to believe" should have been substituted in their place. The result is that, leaving out of consideration the finding of the articles in the house and the consequent presumption under S. 47, there is no legal evidence that the house was a common gaming-house. With regard to the second ground of objection; there can be no question that the admission of the accused's brother in another case should not have been used against accused. The result therefore is that the foundation of the finding of the Magistrate is removed and we have to consider whether on the evidence in the case the conviction can be sustained. There were two witnesses examined in the case. The first witness is the Inspector who raided the house on the strengh of the warrant and arrested 22 people who were gambling in the house. The two accused managed to escape. The second witness is the informant who deposes to have visited the accused's den and played there with dice. This evidence is not sufficient to establish what according to S. 3, Calcutta Police Act (4 of 1866), must be found to constitute a common gaming-house. A 'common gaming house' is defined to mean any house .... in which cards etc. are kept for the gain or profit of the persons owning or keeping such a house whether by way of charge for the use of the instruments of gaming or of the house or otherwise. In this case there is no evidence that this house was kept for the purpose of profit or gain by the persons owing or keeping the house The evidence therefore falls short of proving that the house was common gaming house and that the accused were the owners or keepers of the house. Though the matter is a serious one and we have strong suspicion that the accused are guilty of the offence charged, we do not think that this is a case in which we should order a retrial and give an opportunity to the prosecution to adduce further evidence.

The result is that this rule is made absolute and the conviction and the sentence passed upon the petitioners are set aside. The fine if paid will be refunded.

J.V. *Conviction set aside.*

(1) A. I. R. 1926 Cal. 966=53 Cal. 718.

---

## A. I. R. 1927 Calcutta 802

PAGE AND GRAHAM, JJ.

*Corporation of Calcutta*—Appellant.

v.

*Sheikh Keamuddin*—Respondent.

Appeal No. 101 of 1926, Decided on 20th June 1927, from the order of the Presy. Small Cause Court Chief Judge., Calcutta, D/- 7th December 1925.

(a) *Calcutta Municipal Act, S.* 142—*Appeal to High Court under S.* 142 *is not a second appeal within Civil P. C., S.* 100.

An appeal to the High Court under S. 142 (3) Calcutta Municipal Act, is not a second appeal within the ambit of S. 100, Civil P. C., and in such an appeal it is open to the High Court to reconsider the findings of fact arrived at by the Court of small causes.

*Page, J.*—The appeal to the High Court under S. 142 is not preferred under the Code of Civil procedure but pursuant to the special jurisdiction conferred upon the Court of small causes and the High Court under the Calcutta Municipal Act. [P 804 C 2]

(b) *Calcutta Municipal Act, Ss.* 127 *to* 140—*Functions of executive officer under those section are administrative.*

In performing the functions prescribed under Ss. 127 to 140, the executive officer is acting in an administrative and not in a judicial capacity. [P 803 C 2]

(c) *Calcutta Municipal Act, S.* 141—*Appeal to small causes Court—Onus is on assessee to prove executive officer's valuation to be either excessive or wrong.*

In an appeal under S. 141 from the decision of the executive officer to the Small Cause Court, the assessee has to satisfy the Court that the valuation at which the executive officer has arrived was either excessive or wrong.

[P 805 C 1]

*Krishna Lal Banerji*—for Appellant.

*Sarat Chandra Basak* and *Jotis Chandra Guha*—for Respondent.

**Page, J.**—This is an appeal from an order of the learned Chief Judge of the Court of Small Causes passed under S. 141, Calcutta Municipal Act, 1923. It appears that on the 17th of January 1923 the executive officer of the corporation, pursuant to the power with which he was invested under Ss. 127 to 138, Municipal Act, assessed the property in suit, No. 6, Raj Mohan Street, Calcutta, for the consolidated rate of Calcutta at an annual value of Rs. 14, 310. Under S. 139 of the Act the assessee lodged an objection to the amount of the annual value which had been assessed upon his property. Under S. 140 the executive officer investigated the assesee's objection, and passed an order reducing the amount of the original assessment from Rs. 14,310 to Rs. 10, 278. The assessee, being dissatisfied with the order of the executive officer, appealed to the Court of Small Causes pursuant to S. 141 of the Act. The learned Chief Judge of the Court of Small Causes further reduced the assessment, and held that the annual value of the house at the time of the assessment was Rs. 5,508. The Corporation of Calcutta have preferred the present appeal under S. 142 of the Act from the decision of the learned Chief Judge of the Court of Small Causes. It was contended by the learned advocate who appeared for the assessee that this Court had no jurisdiction to entertain an objection to the amount of the valuation which had been assessed by the learned Chief Judge of the Court of Small Causes because the determination of the annual value of the premises was a finding of fact which this Court under S. 100, Civil P. C.. could not override in second appeal. In my opinion, there is no substance in this contention.

The appeal to the High Court under S. 142 is not preferred under the Civil P. C., but pursuant to the special jurisdiction conferred upon the Court of Small Causes and the High Court under the Calcutta Municipal Act. Further, even assuming that S. 100, Civil P. C. is applicable, in my opinion, this appeal is not an appeal within the ambit of S 100, Civil P. C., because the order passed by the learned Chief Judge of the Court of Small Causes was not an appeal from an order passed by a judicial officer The scheme of the Calcutta Municipal Act provides that in the first instance the executive officer should ascertain, by such means as are available to him, the annual value of the premises to be assessed, and such annual value

shall be deemed to be the gross annual rent at which the land or building might at the time of assessment reasonably be expected to let from year to year, less, in the case of a building, an allowance of ten per cent. for the cost of repairs and for all other expenses necessary to maintain the building in a state to command such gross rent.

Having estimated the annual value of the premises as best he could in the light of such information as was available to him it became the duty of the executive officer to give the notices provided in the Act in order that any person dissatisfied with the valuation might lodge an objection against it. An objection duly lodged is then to be investigated by the executive officer and after the investigation has been concluded, an order will be passed by the executive officer stating the amount which he holds to be the annual value, and this order is recorded in the official register. In my opinion in performing the functions prescribed under Ss. 127 to 140, Calcutta Municipal Act, the executive officer is acting in an administrative and not in a judicial capacity. That this is so, I think, is clear from a consideration of the relevant sections of the Act, but if the analogous functions of the collector under the Land Acquisition Act (Act I of 1894) are regarded, it will be observed that the powers of the collector are wider than those which the executive officer under the Municipal Act is invested, and yet it has been held that in performing his functions with respect to the valuation of land acquired under the Land Acquisition Act the collector is acting in an administrative and not in a judicial capacity : *Durga Das Rakhit* v. *Queen-*

*Empress* (1) and *Ezra* v. *Secy. of State* (2). The reasoning upon which those cases were based is appplicable in the present case, and, in my opinion, both upon principle and upon authority, the functions of the executive officer under Ss. 127 to 140, Calcutta Municipal Act, are those of an administrative and not of a judicial officer. Both in India and in England it is the policy of the legislature that in the preliminary stages of assessment for local and general taxes the assessing officer should endeavour amicably to settle assessments without the investigation being circumscribed by the restrictions of the law of evidence.

It is, to say the least, perfectly intelligible that the expert official charged with the duty of fixing a value should be possessed of all the information in the hands of the department, and should at the same time avail himself of all that is offered at the enquiry, his ultimate duty being not to conclude the owner by his so-called award, but to fix the sum which in his best judgment is the value and should be offered. It is not implied in this observation that the collector would be precluded by anything in the statute from inviting at the enquiry the criticizm of the owner on any information he had in his hands, if he thought that in the circumstances this would advance knowledge :

Per Lord Robertson in *Ezra* v. *Secy. of State* (2).

His Lordship further observed that

if a judicial ascertainment of value is desired by the owner, he can obtain it by requiring the matter to be referred by the collector to the Court.

These observations of the Judicial Committee are not only apposite in the present case, but, in my opinion, set out the general policy of the legislature in connexion with assessments for local or general taxation. The learned advocate for the assessee, however, endeavoured to distinguish the cases relating to land acquisition upon the ground that under the Land Acquisition Act a person dissatisfied with the valuation of the collector is entitled to call upon the collector to refer the question of the valuation to the Court, whereas under S. 141, Calcutta Municipal Act, it is provided that

any person dissatisfied with the order passed on his objection may appeal to the Court of Small Causes.

But the language in which the two enactments are couched does not connote any real difference in the jurisdiction which is exercised. In my opinion, the functions exercised by the collector and the executive officer respectively are substantially, if not identically, the same; in each case the officer acts in an administrative capacity, and if the party concerned is dissatisfied with the result of the officer's investigation into the assessee's objection to the valuation, it is open to the assessee to have the valuation adjusted in a judicial proceeding by the Court. From the order of the Court of Small Causes an appeal lies to the High Court under S. 142 (3), Calcutta Municipal Act, but, in my opinion, that is not a second appeal within the ambit of S. 100, Civil P. C., and in such an appeal it is open to the High Court to reconsider the findings of fact arrived at by the Court of Small Causes. In support of the appeal the corporation contended that the finding of fact arrived at by the learned Chief Judge of the Court of Small Causes ought not to be sustained for this reason : that under S. 142 of the Act an order passed by the executive officer subject to the decision of the Court of Small Causes is final and, the onus being upon the assessee to rebut the correctness of the valuation arrived at by the executive officer, that he had failed to make out his case. The corporation called no evidence before the Court of Small Causes. They contended upon the evidence adduced by the assessee that the order of the executive officer ought to be affirmed. The only evidence on behalf of the assessee was that of his gumastha, who stated that he let out certain rooms at a rental of Rs. 510 per month. It was upon that evidence that the learned Chief Judge of the Court of Small Causes based his decision, but, in my opinion, the evidence of Abdul Rahman, the assessee's gumastha, was wholly insufficient to justify the learned Chief Judge in disturbing the order of the executive officer. Abdul Rahman did not state for what period or in what year he collected Rs. 510 per month as rent for the premises. He did not state whether Rs. 510 represented the rent of the whole house or only of part of the house. He did not produce his master's account books showing the rental for that house. He did not produce any rent receipts to support his oral testimony. He did not state that Rs. 1,250 a month was not a proper and reasonable rent which a

(1) [1900] 27 Cal. 820.
(2) [1905] 32 Cal. 605=9 C. W. N. 454=1 C. L. J. 227 (P. C.).

landlord might have expected to realize for No. 6 Raj Mohan Street in January 1923, nor did he state what, in his opinion, was a proper sum to be taken as the annual value of the premises at the time of the assessment. On the contrary, the witness admitted that in February 1923, about the time when the assessment was made, the premises had been let at Rs. 1,250 a month; but the lease was not produced, and the witness added that the lease was cancelled in June 1923, and that the lessee absconded after having failed to pay four months rent. The best evidence of what reasonably might be expected to be obtained as rent for premises at any particular period is the rent what was actually paid or payable, although, of course, that evidence is not conclusive of the matter. Having regard to the evidence adduced before the learned Chief Judge of the Court of Small Causes, in my opinion, the order that the executive officer passed after investigation of the assessee's objection ought not to have been disturbed. The executive officer's assessment of Rs. 10,278 is equivalent to a rent of about Rs. 940 per month. That was considerably less than the Rs. 1,250 per month for which the premises were in fact let, at or about the time when the assessment was made. In my opinion, the assessee failed to sustain the burden which was upon him to satisfy the Court that the valuation at which the executive officer had arrived was either excessive or wrong.

In my opinion, this appeal ought to be allowed; the order of the learned Chief Judge of the Court of Small Causes is set aside, and the assessment of Rs. 10,278 by the executive officer restored and affirmed. The appellants will be entitled to their costs of this appeal, the hearing-fee being assessed at two gold mohurs.

**Graham, J.**—I agree. There are two preliminary matters which require decision before dealing with the merits of this appeal: firstly whether the appeal is in proper form, and whether it is a first or second appeal; and, secondly, there is the question of the burden of proof, and whether it lay upon the corporation, now the appellant, to justify the order of assessment, or upon the assessee, the present respondent, to show that the assessment was wrong. The decision on the first point is necessary in order to see what our powers are in dealing with the appeal. If the appeal is a second appeal and comes within the purview of S. 100, Civil P. C., then we are, in that case, precluded from going into the facts: and, as there is evidence, however meagre that evidence may be, to support the finding of the Court of appeal below, that finding must stand, and there is an end of the matter. If, on the other hand, it is a first appeal from an original order, then we can go into the evidence and deal with the appeal on its merits. In my judgment the appeal has been filed in proper form. It is clearly not a second appeal falling with S. 100, Civil P. C., as the appeal to the lower appellate Court was not against a decree, but was against an executive order.

Then as to the question of onus: it seems to me that it was clearly upon the assessee who was the appellant before the Small Cause Court. In this connexion a brief reference may be made to certain sections of the Calcutta Municipal Act (Act 3 of 1923, B. C.). Under S. 131 the assessment of the annual value is made by the executive officer of the corporation. Under S. 138 that officer is required to issue notice on the assessee when the valuation is made for the first time, or is increased. S. 139 provides for notice of objection to the valuation. Under S. 140 such objections are required to be investigated by the executive officer, or by the deputy executive officer. Against an order under S. 140 an appeal is provided for in S. 141 to the Small Cause Court, and under S. 142, sub-S. (3) there is a further appeal to this Court. It is important to note that under sub-S. (1), S. 142, every order passed by the executive officer under S. 131 is, subject to the provisions of Ss. 139, 140 and 141, final. Similarly, under sub-S. (2) of this section, every order passed by the executive officer or deputy executive officer under S. 140 is, subject to the provisions of S. 141, final. It is thus clear that the orders passed at the first two stages by the officers of the corporation are final subject to the right of appeal which is provided for in the Act. The appellant challenged the assessment or the value upon which that assessment was based. It was, therefore, incumbent upon him

to show that the order complained of was wrong. From a judicial point of view the matter is res integra when it comes before the Small Cause Court, and it then becomes the duty of the assessee, the appellant, to adduce necessary evidence in order to satisfy the Court that the assessment is erroneous.

The question then arises whether the respondent in the present case discharged the onus which was upon him. In my opinion, he signally failed to do so. My learned brother has dealt with the evidence adduced by him. The appellant did not himself go into the witness-box and give evidence in this case. He deputed his gumastha, who gave verbal evidence to the effect that the annual value was only Rs. 510. No document of any kind was produced before the Court; no receipt was forthcoming. In my opinion the evidence, such as it is, is wholly insufficient for the purpose of discharging the onus which was upon the assessee. The learned Chief Judge of the Small Cause Court has observed in his judgment as follows:

> The Corporation argues that because a lease was in force in April 1923 that is the correct basis of a valuation. But they do not contradict the appellant's evidence that the lessee had left and was paying no rent. It seems clear that this lease was taken during the boom and that the value of the house is Rs. 510 a month.

It seems to me that the learned Judge approached the case from a wrong standpoint, and that virtually the effect of his judgment is to place the onus upon the corporation, for he goes on to say that the corporation did not contradict the appellant's evidence. The real point, it seems to me, was whether the evidence adduced by the appellant was sufficient in itself to show that the assessment was wrong.

For these reasons I agree that the appeal must be allowed and with the order which my learned brother has made.

R.D. *Appeal allowed.*

---

## A. I. R. 1927 Calcutta 806

MITTER, J.

*Gangadayal Misir*—Plaintiff—Appellant.

v.

*Srimati Chhakina Bhanu* and *others*—Defendants—Respondents.

Appeal No. 2317 of 1924, Decided on 16th February 1927, from the appellate decree of the Addl. Sub-Judge Noakhali, D/- 8th August 1924.

(a) *Civil P. C., O. 7, R. 1—All necessary facts mentioned—Form may be disregarded.*

A Court is justified in disregarding the form of the plaint if it appears that in substance all the facts necessary to raise the point in controversy are mentioned in plaint. [P 807 C 2]

(b) *Hindu Law—Widow—Property purchased by the widow in execution of rent-decree obtained by her against tenants holding under her husband is an accretion.*

Property purchased by a Hindu widow in execution of a rent decree, obtained by her against tenants who held a subordinate interest under the raiyati which she inherited from her husband does not lose the character of its being property which she inherited from her husband. [P 808 C 1]

(c) *Stamp Act, Art. 55—Release though not stamped as such is not ineffective.*

A release is not ineffective though not stamped as a deed of relinquishment should be if the facts lead to the inference that there was a relinquishment: *A. I. R.* 1919 *P. C.* 75, *Relon.* [P 808 C 1]

*Atul Chandra Gupta* and *Nogendra Nath Chowdhury*—for Appellant.

*Romesh Chandra Sen* and *Jitendra Kumar Sen Gupta*—for Respondents.

**Judgment.**—This is an appeal on behalf of the plaintiff from a decision of the Additional Subordinate Judge of Noakhali, dated the 8th August 1924, which modified a decision of the Munsiff, 2nd Court, Lakhimpur, dated the 7th July 1922.

The plaintiff's case is that there was a raiyati holding of which three persons were the owners, that is, Ganga Dayal, the plaintiff, himself, Baldeo and one Ram Prosad who is cousin of the plaintiff. Principal defendants were sub-tenants under all the three persons whom I have named. In execution of a decree for rent this sub-tenancy which is also described as osat-raiyati was sold and was purchased by Baldeo and Subhadra, the widow of Ram Prosad, on the 9th January 1919. They took delivery of

symbolical possession on the 27th August 1919. On the 21st November 1919 Subhadra, the widow of Ram Prosad, executed a deed of relinquishment by which she gave up her interest in all the properties of her husband in favour of the plaintiff who was alleged to be Ram Prosad's next and sole reversionary heir. The deed only made certain provisions for maintenance in favour of the widow of Ram Prosad. The widow of Ram Prosad, Subhadra, is also a party to the suit. She is one of the defendants.

The Court of first instance granted a decree to the plaintiff declaring his title to the extent of one-third share in the holding but refused to grant the plaintiff joint possession by the demolition of the huts which were on the land. An appeal was carried to the subordinate judge by the plaintiff and in appeal the subordinate judge varied the decree of the munsiff by declaring plaintiff's title to two-thirds share in the land in suit. The subordinate judge also did not grant the prayer for khas possession and held that the defendants could not be turned out of the land at the instance of the plaintiff alone.

A second appeal has been preferred to this Court by the plaintiff and this appeal concerns only the one-third share which belonged originally to Ram Prosad and in respect of which there has been a surrender by his widow by a deed, dated 21st November 1919. Both the Courts below have dismissed the plaintiffs suit with regard to his one-third share, holding that the deed was a mere deed of release and as such could not pass title in favour of the plaintiff to the extent of one-third share which belonged to Ram Prosad. In this second appeal it has been contended before me that both the Courts below have taken an erroneous view with regard to the legal effect of the so-called deed of release dated the 21st November 1919 in holding that it was a mere deed of release. The Courts below have overlooked the provisions in the deed which suggest that it was a deed of relinquishment by Subhadra, a Hindu widow, of the entire interest in her husband's estate in favour of the next and the sole reversioner. I may mention that this deed was referred to in para. 2 of the plaint and that the defendants had full notice that in that deed it was alleged that it was a deed of relinquishment in favour of the plaintiff who was described as the next sole reversioner of Subhadra's husband. The learned subordinate judge in appeal assumes that the plaintiff was the next reversioner of Ram Prosad and was entitled to the property after the death of the widow, Subhadra. It has been argued that if the deed which has been placed before me was a deed of surrender, it was sufficient to pass title in favour of the plaintiff with respect to one-third share which belonged to Ram Prosad, and reliance has been placed on three decisions of the Judicial Committee of the Privy Council in support of this contention. The first case referred to is the case of *Rangasami Gounden* v. *Nachiappa Gounden* (1). The second case referred to is another decision of the Judicial Committee in the case of *Bhagwat Koer* v. *Dhanukhdhari Prashad Singh* (2). The third decision referred to is the case of *Sureshwar Misser* v. *Maheshrani Misrain* (3). I have read the deed of release in the present case and to me it seems that it amounts to a complete relinquishment by Subhadra of her husband's estate in favour of Gangadayal the present plaintiff.

It is necessary to notice the arguments which have been raised by Mr. Sen on behalf of the respondents in support of the judgment of the lower appellate Court. It is contended that this point about the deed of release being deed of surrender by a Hindu widow should not be allowed to be raised here for the first time as it was not raised in either of the Courts below. The answer to this contention is that although the plaint was not artistically drawn inasmuch as it did not state the precise case in a precise form the facts were alleged in the plaint which would lead the Court to infer that the case of relinquishment was set up in the plaint as reference was made to the document in para. 2 of the plaint. The plaint might have been more artistically drawn, but the Court would be justified in disregarding the form of the plaint if it appears that in substance all the facts necessary to raise the point now in controversy were

(1) A. I. R. 1918 P. C. 196=42 Mad. 523=46 I. A. 72 (P.C.).
(2) A. I. R. 1919 P. C. 75=47 Cal. 466=46 I. A. 259 (P.C.).
(3) A. I. R. 1921 P. C. 107=48 Cal. 100=47 I. A. 233 (P.C.).

mentioned in plaint. I think by giving notice of this document in the plaint the defendants had been given notice of the contents of the deed which showed that it was a deed by which the lady Subhadra relinquished all interests of her husband's property in favour of the next reversioner.

It is also necessary to notice another argument of Mr. Sen. The property in dispute, it is said, did not belong to Subhadra's husband. This argument is based on the fact that this osat-raiyati interest was purchased by Subhadra after the death of her husband. But it is to be remembered that the purchase was in execution of a decree, obtained by Subhadra for rent against tenants who held a subordinate interest under the raiyati which she inherited from her husband. It was really a case of the reversion falling in; Subhadra's husband was all along entitled to sell the property in execution of the decree for rent and if the property is now made khas in execution of the said decree the property does not lose the character of its being property which she inherited from her husband. These are the two substantial contentions which have been raised on behalf of the respondents. It is also necessary to notice another minor contention, namely that the release is ineffective as it was not stamped as a deed of relinquishment should have been. But it has been pointed out by the Judicial Committee in several cases that what is to be looked up is whether the facts lead to the inference that there was a relinquishment. In the case of *Bhagwat* v. *Dhanukhdhari* (2) there was no deed and the Judicial Committee held that the fact that the lady parted with possession in respect of the property was sufficient to justify the Court to infer surrender. So I think there is no substance in this contention of the respondents.

The result is that the decree of the lower appellate Court, so far as it dismisses the suit of the plaintiff to the extent of one-third share which originally belonged to Subhadra, is set aside. The consequence is that the plaintiff's suit is decreed in its entirety and he will be entitled to recover possession of the property in dispute from the defendants. In the circumstances of the present case, the plaintiff will not be entitled to costs of this appeal. The order of the lower Court with regard to costs will be affirmed.

R.K. *Appeal allowed.*

---

## * * A. I. R. 1927 Calcutta 808

B. B. GHOSE AND PAGE, JJ.

*Sarifuddin Muhammad* — Defendant —Appellant.

v.

*Mohiuddin Mohammad* and *others*— Plaintiffs—Respondents.

Reg. A. No. 72 of 1925, Decided on 6th June 1927, from the decree of the Sub-Judge, Midnapur, D/- 24th January 1925.

* (*a*) *Mahomedan Law—Succession—Rule of propinquity does not apply as between classes.*

The rule of propinquity may apply as between the members of a class, but it does not apply as between classes. Where therefore a person is a residuary of the propositus he does not lose his rights as such residuary merely because he also possessed relationship with the propositus through another person. [P 809 C 2]

* * (*b*) *Mahomedan Law— Gift — Heba, Heba-bil-ewaz—Incidents fully discussed.*

It is of the essence of a gift under Mahomedan law (1) that the donor should intend to transfer in presenti to the donee the subject-matter of the gift; (2) that there should be acceptance of the gift by the donee; or (3) that the donee should have obtained delivery of seisin. Acceptance and seisin may be actual or constructive according to the circumstances of the case, but no transaction, of which the above are not ingredients, is or is, to be treated, as a gift under Mahomedan law. A gift may be a heba simple or a heba-bil-ewaz (gift for an exchange or a return gift) or a heba-ba-shurt-ul-ewaz (a gift with a stipulation for an exchange or a return gift) but in each and every variation of gift the transaction is a heba and must contain the essential elements that constitute a heba according to the Mahomedan law. A heba simple means "a transfer of property made immediately and without any exchange." The fundamental conception of a heba-bil-ewaz is that it is a transaction made of two separate acts of doration, that is, it is a transaction made up of mutual or reciprocal gifts between two persons, each of whom is alternately the donor of one gift and the donee of the other. The ewaz or exchange in gift, is of two kinds, one subsequent to the contract, the other stipulated for in it. When the exchanging takes place subsequent to the gift, the ewaz is a gift ab initio. So that it is valid where gift is valid and void where gift is void, there being no difference between them except as to the dropping of the power of revocation in the case of the ewaz while it is established in that of the gift. And after possession has been taken of the ewaz, the power to revoke

drops also with respect to the gift. So that neither party can reclaim from his fellow what he has become possessed of whether the ewaz were given by the donee or by a stranger, with or without his direction. All the conditions of gift are applicable to the ewaz. If a person gives something to another on condition of that other giving something to him in exchange for it, the mutual seisin of the respective returns is regarded; that is to say, the contract is nothing until the two seisins take place, and is made null, by the subject of it on either side being mixed with other property. Giving an ewaz or exchange for the gift may be entirely an afterthought or may have been stipulated for in the first transaction, which in that case is termed heba-ba-shurt-ul-ewaz or a gift with a condition for an ewaz or exchange. In both cases the ewaz is itself a gift, and is valid only when it is something that can lawfully be made the subject of gift. Up to possession too, the ewaz may be revoked, but after that, neither the original gift nor the ewaz or exchange for it is resumable. [P 811 C 2; P 812 C 1, 2]

To every heba the doctrine of musha applies, except in so far as it must be taken that the creators of the doctrine could not have contemplated that it should be applied to the subject-matter of any particular gift. To the true heba-bil-ewaz the doctrine of seisin and musha apply alike to the original gift and the gift in return, but neither seisin nor musha apply to the heba-bil-ewaz falsely so called in India because such a transaction is not a heba at all, and nothing more or less than a sale. The transaction, falsely termed in India heba-bil-ewaz, is not governed by the Mahomedan law of heba, but is amenable to the general law in India relating to contracts and the transfer of property: 11 *M. I. A.* 517 (*P. C.*), *Dist.*; (*Case law discussed.*) [P 814 C 1]

*S. C. Bose* and *Santimoy Majumdar*— for Appellant.

*Satcouripati Roy*, *S. C. Bysak* and *Bhupendra Kumar Ghose* — for Respondents.

**Page, J.**—This case raises questions of general interest to the Mahomedan community relating to the Mahomedan law of gift.

The suit out of which this appeal arises was brought to recover possession of certain immovable properties after the plaintiff had established his title thereto for partition and other incidental relief. The following geneological tree will show the relationship of the parties to the suit: (*See page* 810)

The plaintiff claimed title to the property in suit partly as the heir of Yusuf, and partly as the heir of Lajman. He also claimed to have purchased the interest of his sisters defendants 9 and 10 in some of the properties.

Defendant 1 claimed a share in some of the properties as the widow and heir of Yusuf. Defendants 2 and 3 claimed the property under an oral gift and a deed of gift from Lajman.

Defendant 4 was alleged to be another donee from Lajman of some of the properties.

Defendants 5—8 held usufructuary mortgages from defendant 1, and defendants 9 and 10 were joined as pro forma defendants. Defendants 2 and 3 alone contested the suit. The trial Court passed a decree in favour of the plaintiff. Defendants 2 and 3 have appealed. At the hearing of the appeal the defendants raised two main contentions: (1) that while it was conceded that the plaintiff was a residuary of Yusuf through a true grandfather (h h s), inasmuch as he was also related to Yusuf through Lajman as a distant kindred of Yusuf, and the latter relationship was nearer than the former, the plaintiff lost his rights as a residuary, for such rights were merged in the nearer relationship through Lajman; (2) that the properties in suit had been transferred to defendants 2 and 3 by Lajman, in part by a registered deed of gift, and in part by an oral gift.

In support of the first ground of appeal the learned advocate for the appellants was unable to cite any decision or authority, but he referred to a passage in Baillie's Digest of Mahomedan Law, (2nd Edn. p. 704), where the learned author observed that:

> where there are several residuaries of different kinds, one a residuary in himself, another a residuary by another, and the third a residuary with another, preference is given to propinquity to the deceased.

In my opinion the rule of propinquity may apply as between the members of a class, but it does not apply as between classes, and I am clearly of opinion that the plaintiff has not lost his admitted rights as a residuary of Yusuf merely because he also possessed a relationship to Yusuf through Lajman. The first contention of the appellants, therefore, fails.

The defendants also resisted the plaintiff's claim upon the scond ground, namely, that the property in suit had been transferred to them by Lajman in part by an oral gift, and in part by a registered deed of gift. In respect of the oral gift it is enough to say that the learned trial judge, upon a consideration

of the evidence has come to the conclusion that the factum of the gift has not been established, and that we are of opinion that the decision at which he arrived was correct. The registered deed of gift was executed on the 30th October 1917, and contained the following provisions :

I, the executant, execute this deed of gift or hebanama to the effect following :

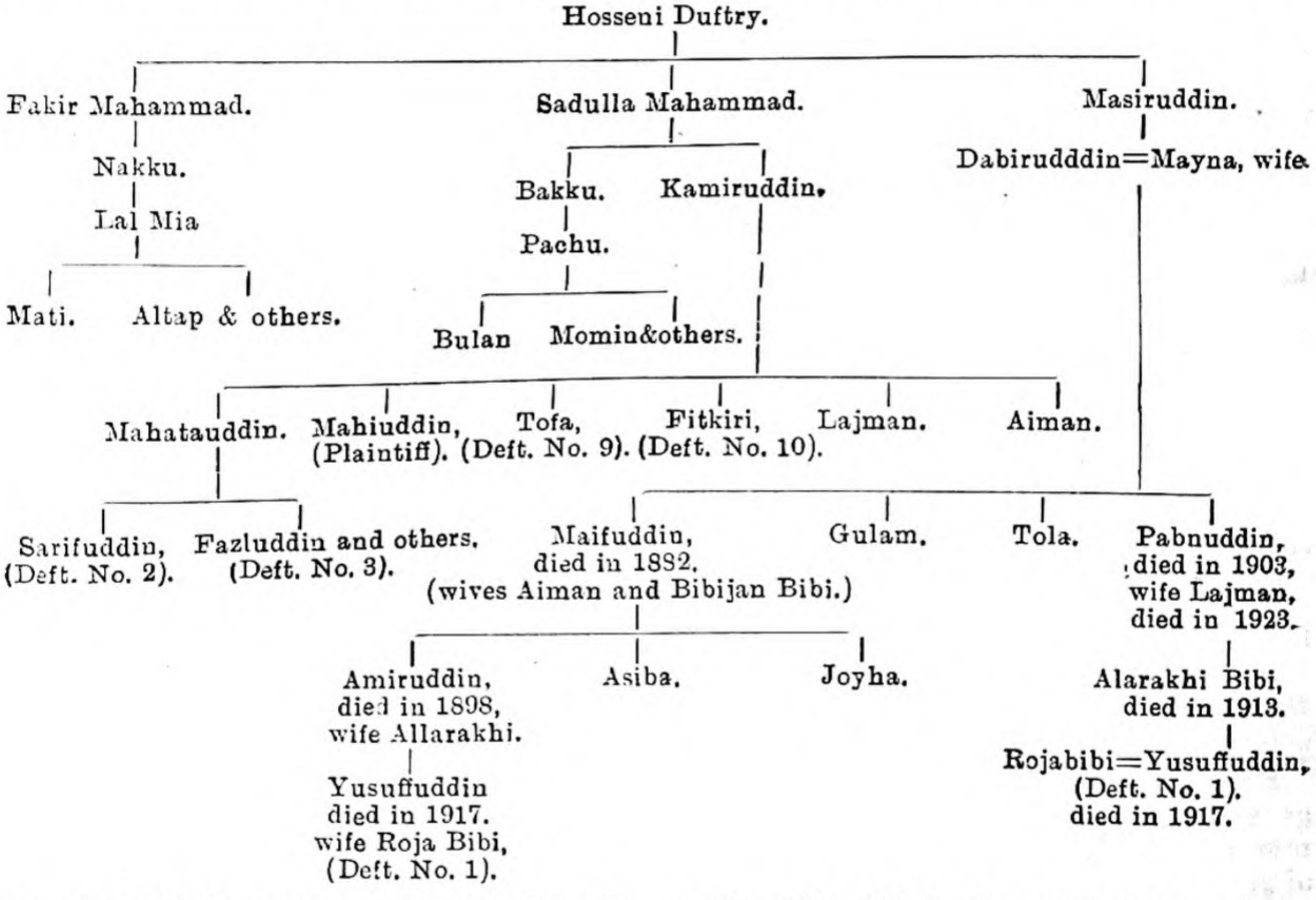
1. The properties mentioned in Schs. (*ka*), (*kha*) and (*ga*) situated in the undermentioned mouza within parganas Bahirimutha, Nayabad and Vaitgarh, under sub-registry Marisda, thana Bahiri, in the district of Midnapur, are in my possession and ownership. Some of these properties I obtained from my husband and some are my self-acquired properties obtained under patta and by right of purchase. I have been in undisputed possession of all those properties. Their approximate value will be Rs. 4,999.

2. The properties in Sch. (*kha*) were held in shebaitship by my husband and formed the rent-fee pirottar properties of Satyapir Saheb since my husband's death. I have been in possession and enjoyment of the same as shebait and have been rendering services to the Pir Saheb.

3. No son was born to me. I had an only daughter Allarakhi Bibi. She is dead. After the death of the said daughter her son Yusufuddin lived with me. Unfortunately he too died a few days ago at an early age of only 21 years, I am a woman and it is difficult for me to look after the properties. You are the sons of my youngest full brother. You respect me well and I bear affection towards you. Under this deed of gift I give you properties mentioned in Schs. (*ka*) and (*kha*), including the said Pir Saheb and his asthana. From this day all the rights I have therein vest in you, and you and your sons and your grandsons and heirs in succession shall remain in possession and enjoyment of the same. I hold no further interest or concern in the said properties and I shall not be able to lay any claim in future. You will be fully vested with my absolute right.

4. From this day I leave all the above properties to your possession. As regards the rent-paying lands you will have the mutation effected in the office of the landlord, and as regards the rent-free lands you will have the mutation effected in the collectorate if necessary. You will enjoy the properties in all the schedules according to your wish and remaining a shebait of Sri.Sri Satyapir Saheb in respect of the properties of Sch. (*kha*). You will continue to be in possession and enjoyment of the same as such and will perform the specified services, such as lighting of lamps, etc., and you will exercise all my rights. I shall have no objection thereto.

5. You will have to maintain me and pay Rs. 999 as the annual expense for my maintenance and in case of illness you will have to arrange for my nursing and proper treatment, and generally I shall live at your ancestral dwelling-house in village Darua, but, I shall, if I so choose, be at liberty to live in one room within the bastu covered by deed of gift. You will not be able to stand in my way and no right will thereby accrue to me, and as long as I live you shall help me according to my needs. If on any account you fail to pay me the said amount of the maintenance charge I will have the said amount realized from you or your heirs through Court.



6, Be it stated that before this, on the 28th Pous 1315 B. S., I, of my own accord executed two separate deeds of gift in favour of the aforesaid Yusufuddin and Allarakhi Bibi and I kept them with me after registration. The said two deeds have not been acted upon and no right has thereby accrued to Yusuf and Allarakhi nor have they taken possession. I did not myself speak to Yusufuddin or Allarakhi about the said deeds of gift, nor did I allow them to know of them, nor did they come to know of the same. Once, of my own accord, I executed and registered the deeds, but did not allow anybody to know of the deeds of gift. I did not make Yusuf and Allarakhi aware of this. The deeds of gift were and have been with me. I have been paying rent and have been in possession of the said property. You have got nothing to apprehend from the said deeds of gift. The said deeds of gift have been in a way void, and have become ineffectual. I kept them concealed after registration. Hence the said deeds of gift cannot be binding. They had not been legally accepted by the donees. I also did not speak of the gift before to anyone, nor did I mention the names Yusuf or Allarakhi. And they have not taken possession of any land under the said two deeds of gift, nor have I delivered them possession. Even after the execution of the deeds of gift I have been in possession as before and paying rents. To assure you I make over to you the said two deeds of gift in a torn condition, bringing them out from under the ground where they had been kept buried in a chest. You will keep them as they are.

7. As I am a pardanashin lady, my daughter's son Yusufuddin, at the time of the last settlement, used to look after the proceedings in the settlement office on my behalf in respect of my properties. The said Yusufuddin was entrusted with all settlement works. Now I have come to learn that the said Yusufuddin had a sinister motive and got some of my properties recorded in his own name. The said record is entirely incorrect. The said person never took possession of any of my properties. I have all along been in possession of all the properties. The said Yusuf never had nor has any interest in the said property. Vested with my rights in all the above properties by virtue of this deed of gift you will have the said incorrect record corrected. To this effect,-having gone through the deed of gift in the presence of witnesses and understanding fully the purport thereof, I execute it in sound health of my own accord, in good faith and without any request. Finis. Dated the 14th Kartik 1325 (Amli year)=30th October 1917.

At the hearing of the appeal it was common ground that the deed of 30th October 1917 was duly executed and registered. The learned advocate for the respondent, however, contended, and the learned trial judge has found, that if this transaction is to be treated as a simple heba, it is amenable to the doctrine of musha (confusion) because : (1) Lajman possessed only an undivided share in the subject-matter of the gift which was capable of partition ; (2) the gift was to two persons jointly without specifying the share given to each ; (3) the gift was of lands with crops standing thereon without a gift of the crops and that as the defendants have not proved that they obtained delivery of possession of the property under the deed, the gift is invalid in law. The respondents further contended, and the trial Court has held, that if the transaction is a heba-bil-ewaz it is essential to the validity of such a transaction that the stated consideration should have been paid, and that the defendants had failed to prove the payment of such consideration. On the other hand the appellants urged that the transaction was neither a heba nor a heba-bil-ewaz but that the registered deed embodied the terms of an agreement under which Lajman undertook to transfer the proprietary title to the property to defendants 2 and 3 in consideration of a promise on their part to carry out the terms of Cl. (5) of the deed ; that the defendants accepted the offer therein made by Lajman, and that the transaction was a valid contract of sale to which the provisions of the Contract Act and the Transfer of Property Act apply.

As the rights of the parties under the deed of the 30th October 1917 are to be determined by Mahomedan law, and the appellants do not dispute that if the transaction is affected by the doctrine of musha it cannct stand, it is incumbent upon the Court to ascertain the nature of the transactions to which the doctrine of musha applies.

I have made an examination of the decisions upon the subject, and of such texts and commentaries on the Mahommedan law of heba as are available to one unversed in the language in which the early texts and commentaries were written ; but I have found consistency neither in the texts nor among the commentators, and I must needs endeavour to ascertain and to state what I conceive to be the law on the subject in my own way, although the task is one of which I feign would be relieved lest perchace in so doing I "make confusion worse confounded."

Now, it is of the essence of a gift under Mahomedan law : (1) that the donor should intend to transfer in pre-

senti to the donee the subject-matter of the gift; (2) that there should be acceptance of the gift by the donee; or (3) that the donee should have obtained delivery of seisin. Acceptance and seisin may be actual or constructive according to the circumstances of the case, but no transaction of which the above are not ingredients, is, or is to be treated as, a gift under Mahomedan law.

A gift may be a heba simple or a heba-bil-ewaz (gift for an exchange or a return gift), or a heba-ba-shurt-ul-ewaz (a gift with a stipulation for an exchange or a return gift), but in each and every variation of gift the transaction is a heba and must contain the essential elements that constituted a heba according to the Mahomedan law.

Now, a heba simple

means a transfer of property made immediately and without any exchange:

Hedays (Hamition Grady's Edition, Book 30.)

Gift, as it is defined in law; is the conferring of a right of property without an exchange:

(Baillie, 2nd Edition, 515)

The fundamental conception of a heba-bil ewaz, in Mahomedan law is that it is a transaction made of two separate acts of donation, that is, it is a transaction made up of mutual or reciprocal gifts between two persons, each of whom is alternately the donor of one gift and the donee of the other:

[*Rahim Bukhsh v. Muhammed Hassan* (1)]

The ewaz, or exchange in gift, is of two kinds: one subsequent to the contract, the other stipulated for in it:

(Baillie. 2nd Edition P. 541).

When the exchanging takes place subsequent to the gift, the ewaz is, without any difference of opinion between our masters, a gift ab initio. So that it is valid where gift is valid, and void where gift is void, there being no difference between them except as to the dropping of the power of revocation in the case of the ewaz while it is established in that of the gift. And after possession has been taken of the ewaz, the power to revoke drops also with respect to the gift. So that neither party can reclaim from his fellow what he has become possessed of whether the ewaz were given by the donee or by a stranger, with or without his direction. All the conditions of gift are applicable to the ewaz.

*Rahim Bukhsh v. Muhammad Hassan* (1).

If a person give some-thing to another on condition of that other giving something to him in exchange for it, the mutual seisin of the respective returns is regarded; that is to say, the contract is nothing until the two seisins take place, and is made null by the subject of it, on either side, being mixed with other property. The reason of this is that a deed of this nature is in its original a gift but whenever the seisins take place, it becomes in effect a sale; and, as such, return may be made on account of a defect or from an option of inspection; and, the right of shaffa is also connected with it (Hamilton's Hedaya, p. 483). Giving an ewaz or exchange for the gift may be entirely an after-thought, or may have been stipulated for in the first transaction, which in that case is termed heba-ba-shurt-ul-ewaz, or a gift with a condition for an ewaz or exchange. In both cases the ewaz is itself a gift, and is valid only when it is something that can lawfully be made the subject of gift. Up to possession, too, the ewaz may be revoked, but, after that, neither the original gift nor the ewaz or exchange for it is resumable. . . . . A gift cannot be contingent or suspended on a condition, but it may be made subject to a condition. The original word "shurt." which is the same in both cases, is thus employed in two distinct senses in the Mahomedan law. In the one it corresponds to the condition; in the other to the modus of the civil law. The distinction between them is, that in the first case the condition being essentially future, as already observed, the act, which is made dependent on it, is necessarily suspended until the occurrence of the condition, while in the second case the act, which is made subject to the condition, takes effect immediately, with an obligation on the person benefited by it to fulfil the condition.

A condition in this sense may be *fasid*, that is, invalid or illegal, or it may not be so. Any condition inconsistent with the nature of the transaction to which it is annexed is clearly invalid, so, for instance, a condition in sale or gift of any advantage to the subject of the contract when there is a person entitled to assert it. But the effect of the illegal condition on the two contracts is different. In the case of sale the contract is overpowered by the condition, and invalidated by it; while in the case of gift, the contract throws off the condition and remains unaffected by it, the condition itself being void (Bailie's Introduction, XXXV, XXXVI); see also MacNaghten's Principles of Mahommedan Law, 4th Edn., pp. 217 to 221.

(1) [1888] 11 All. 1=1888 A. W. N. 266.

To every heba the doctrine of musha applies, except in so far as it must be taken that the creators of the doctrine could not have contemplated that it should be applied to the subject-matter of any particular gift : *Mumtaz Ahmad* v. *Zubaida Jan* (2) and *Ibrahim Goolam Ariff* v. *Saiboo* (3) ; see also *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon* (4). Moreover,

> the doctrine relating to the invalidity of gifts of musha is wholly unadapted to a progressive state of society and ought to be confined within the strictest rules,

and it bas been held that even if a gift was invalid as offending against the doctrine of musha,

> possession given and taken under it transferred the property : *Mumtaz Ahmad* v. *Zubaida Jan* (2).

The docrine of musha is thus defined in the Hedaya :

> A gift of part of a thing which is capable of division is not valid unless the said part be divided off and separated from the property of the donor ; but a gift of part of an indivisible thing is valid. . . . The arguments of our doctors upon this point are two fold. First, seisin in cases of gift is expressly ordained, and consequently a complete seisin is a necessary condition ; but a complete seisin is impracticable with respect to an indefinite part of divisible things as it is impossible, in such, to make seisin of the thing given without its conjunction with something that is not given ; and that is a defective seisin. Secondly, if the gift of part of a divisible thing, without separation, were lawful it must necessarily follow that a thing is incumbent upon the giver which he has not engaged for, namely a division which may possibly be injurious to him (hence it is that a gift is not complete and valid until it be taken possession of ; since if it were valid before seisin, a thing would be incumbent upon the donor which he has not engaged for, namely, delivery); p. 483. The gift of milk in the udder, of wool upon the back of a goat of grain or trees upon the ground, or of fruit upon trees, is in the nature of the gift of an undefined part of a thing, because in these instances the cause of invalidity is the conjunction of the thing given with what is not given, which is a bar to the seisin, in the same manner as in the case of undivided things : p. 484.

Again.

> If one man makes a gift of a house to two men, the deed is invalid according to Haneefa. The two disciples hold it to be valid, because, as the donor gives the whole of the house to each of the two donees (inasmuch as there is only one conveyance) there is consequently no mixture of property p. 485 ; see also MacNanhten, p. 201.

(2) [1889] 11 All. 460=16 I. A. 205=5 Sar. 488 (P. C.).
(3) [1907] 35 Cal. 1= 34 I.A. 167=11 C.W.N. 973=6 C. L. J. 695 (P. C.).
(4) [1875] 2 I.A. 87=15 B. L. R. 67=23 W.R. 208=3 Sar. 428 (P. C.).

Now, the Mahomedan lawyers in India being desirous of evading the difficulties and inconvenience to which donors were exposed by reason inter alia of the doctrines of seisin and musha, with no little subtlety planned a contrivance by means of which a mahomedan could effect a gift without conforming either to the Mahomedan law of heba or the general law relating to the sale and transfer of property. They invented a form of so-called heba whereby the gift in its inception is made for a consideration present or future which may be either in kind ar a promise to do or omit to do something in the future.

But if the exchange is in the original transaction, as when one thing is given in exchange for another, there is a sale from the beginning as sale may be contracted by the word "give" as well as by the word "sell" And the transaction which is termed heba-bil-ewaz, has thus become a device in India for giving effect to the gift of musha in a thing susceptible of partition which may be lawfully sold, though it cannot ba made the subject of gift : Baillie's Digest, Introduction XXXVI.

Mahmood, J., made some partinent observations upon this subject in *Rahim Bukhsh* v. *Muhammad Hasan* (1) :

> There is, however, another aspect of this point to which I should like to refer, because it may have led to misapprehension of the Mahomedan law by the learned subordinate judge. The term heba-bil-ewaz is o ten misused by Indian Mahomedans in respect of transactions which either amount to exchange or sale.

Mr. Baillie has explained the matter at p. 122 of his Digest in the following terms :

> "Heba-bil-ewaz" means, literally a gift for an exchange ; and it is of two kinds, according as the ewaz, or exchange, is or is not stipulated for at the time of the gift. In both kinds there are two distinct acts : first, the original gift ; and second, the ewaz, or exchange. But in the heba-bil-ewaz of India there is only one act ; the ewaz, or exchange, being involved in the contract of gift as its direct consideration. And all are agreed that if a person should say, I have given this to thee for so much, it would be a sale ; for the definition of sale is an exchange of property for property, and theexchange may be affected by the word "give" as well as by the word "sell." The transaction which goes by the name of heba-bil-ewaz in India is, therefore, in reality not a proper heba-bil-ewaz of either kind, but a sale ; and has all the incidents of the latter contract. Accordingly, possession is not required to complete the transfer of it, though absolutely necessary in gift. and, what is of great importance in India, an undivided share in property capable of division may be lawfully transferred by it, though that cannot be done by either of the forms of the true heba-bil-ewaz ; see also Wilson's Digest of Anglo-Mahomedan Law, 4th Edn., p. 338.

In order to obtain a clear understanding of the Mahomedan law relating to gift it is essential to bear in mind the distinction between the true heba-bil-ewaz and the transaction that I have described and which in India is falsely called heba-bil-rwaz. To attribute to both the name heba-bil-ewaz is not to make them heba-bil-ewaz and to define both as a gift for consideration is to confuse two wholly distinct transactions. To the true heba-bil-ewaz the doctrine of seisin and musha apply alike to the original gift and the gift in return, but neither seisin nor musha apply to the false heba-bil-ewaz, because such a transaction is not a heba at all, and " nothing more or less than a sale." per Kemp and Seton Karr JJ., in *Khujoorroonissa* v. *Roushan Jehan* : vide 3 *I. A.* 296.

Such a transaction would be governed by the genaral contract law of India, including those chapters of the Transfer of Property Act which treat of sales and exchanges, and which, like the Indian Contract Act, contain no saving clause exempting Mahomedans. The Mahomedan law of sale having confessedly ceased to be administered *co nomine* since 1872 (except in the matter of pre-emption) one would hardly expect it to be revived merely by attaching the name of gift to a transaction which is said to resemble sale in all its incidents ; Wilson's Digest of Anglo-Mahomedan Law, p. 338.

The observations of Sir Robert Collier in *Khujoorroonissa* v. *Roushan Jehan* (5) and of Sir Ford North in *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (6), must be read bearing in mind the distinction that is to be drawn between the true and the false heba-bil-ewaz. In my opinion the trasaction falsely termed in India heba-bil-ewaz is not governed by the Mahomedan law of heba, but is amenable to the general law in India relating to contracts and the transfer of property.

Tested by the principles of law that I have endeavoured to enunciate the deed of the 30th October 1917, in my opinion, embodies a transaction of sale and not of gift. It is lacking in at least two of the essential elements of a heba, for the donor obviously intended to transfer the property in consideration of the donee's promising to carry out the terms of Cl. (5), and it was neither possible nor contemplated that seisin of the consideration for the transfer should be given or taken. The ruling in *Nawab Umjad Ally* v. *Mohumdee Begam* (7) is not *ad rem*. This is not a case where the donor, while transferring the dominion over the corpus to the donees, reserved to herself the right to the produce of the corpus during her life time, for under Cl. (5) of the deed in suit the obligations of the donees are not made dependent upon the profits of the corpus being sufficient to meet the payments to be made under Cl. (5), the consideration for the transfer being the promise to perform the acts set out in Cl. (5) in any event, and the parties agreeing that legal proceedings might be taken by Lajman to enforce the performance by the donees of their obligations under the deed.

Now, it was the common case of both parties at the hearing of the appeal that if the transaction set out in the deed of the 30th October 1917 was one of sale and not of gift, no exception could be taken to the validity of the transaction ; and the appeal must be determined upon the footing that the sale conformed to all the requirements of the law. It follows, therefore, that the right and interest of Lajman in the properties set out in the schedule to the deed passed under the transaction to defendants 2 and 3.

In order to ascertain the extent of Lajman's interest in the properties transferred under the deed it is necessary for the Court to determine certain subsidiary issues.

I am of opinion that the properties in Schs. *gha* and *una* of the plaint were not given by Lajman to her daughter, Allarakhi or her grandson Yusuf as alleged by the plaintiff. Lajman, an old lady possessed of considerable strength of character, in my opinion, never intended to make a gift of these properties during her life time, although she was minded to provide that if she died during her *haj* to Mecca they should pass to her daughter and her grandson. She did not die on the *haj*, however, but returned to India, and resumed possession and control of these properties. In my opinion the plaintiff failed to establish that these properties were given to the alleged donees, or that the donees accepted the gift or obtained seisin of the property as required by law. Another matter

(5) [1876] 2 Cal. 184=3 I. A. 296 (P. C.)
(6) [1906] 28 All. 439=33 I. A. 68=9 O. C. 196=3 A. L. J. 405 (P. C.)
(7) [1867] 11 M. I. A. 517 (519)=10 W. R. P. C. 25 (P. C.)

in issue is whether Lajman obtained a transfer of certain of the properties in suit by way of dower from her husband Pabnuddin. The learned trial judge has held that the gift of the properties alleged to have been made by way of dower was not proved. In my opinion the evidence adduced by the defendant upon this issue was vague and unreliable, and I am disposed to accept the decision of the learned trial judge upon this matter. As regards the properties in Sch. *ka* I agree with the conclusion of the trial judge upon the evidence that these properties belonged to Pabnuddin, and passed upon his death by way of inheritance to Lajman, Allarakhi and Yusuf and that the defendants failed to prove the alleged gift of these properties to Lajman. I also agree with the finding of the learned trial judge with respect to Sch. *ga*, plots, 1—3, and I am of opinion that inasmuch as plot 2 was claimed by the defendants under the alleged oral gift which the defendants have failed to establish the plaintiff upon the evidence is entitled also to plot 2. Plots 2 and 3 of Sch. *cha* were claimed by the defendants under the oral gift which has not been proved and I agree with the learned trial judge that the defence that plots 1 and 4 were purchased by Lajman in the benami of Yusuf was not established, and I am of opinion that his decision in respect of the property in Sch. *cha* also is correct.

In the result the appeal will be allowed in part, and a decree will be passed varying the decree of the trial Judge in the sense that I have indicated. The cross-objection, not being pressed, is dismissed.

**B. B. Ghose, J.**—I quite agree in the opinion of my learned brother with regard to the application of the doctrine of musha which has been carefully and exhaustively set forth in the judgment just now delivered and there is nothing which I can usefully add. I also agree that the transaction in question under Ex. K does not fall under and is not governed by the Mahomedan law, but is one which must be dealt with according to the statute law of india. The appeal must, therefore, be decreed in part with regard to the interest of Lajman and the properties included in Ex. K.

**Order of the court.**

The appeal is decreed with regard to—

(1) 49/144th share of the lands in Sch. *ka* of the plaint.

(2) 53/288th share of the lands in Sch. *kha* of the plaint.

(3) 11/36th share of plots 1 and 3 in Sch. *ga* of the plaint,

(4) the whole of the lands in Schs. *gha* and *una*

(5) 1/6th share of plots 1 and 4 in Sch. *cha* of the plaint.

The decree of the subordinate judge will be varied by dismissing the plaintiff's claim to the extent of the properties stated above.

The appellants will get half their costs against the plaintiffs-respondents in this Court and againt the plaintiffs in the lower Court.

APPEAL NO. 1302 OF 1923.

This is an appeal with a cross-objection from a decree of the learned District Judge of Midnapur reversing a decree of the learned Subordinate Judge of Midnapur.

This appeal was heard by consent with appeal from original decree No. 72 of 1925, and in respect of the present appeal we refer to the judgments which have been delivered in appeal from original decree No. 72 of 1925. For the reasons to be found in those judgments we agree with the learned district judge's decision that the plaintiffs are entitled to Lajman's interest in the properties transferred to them under the deed of 30th October 1917, although we do not agree with the reasons upon which the learned judge based his decision. In other respects we agree with the decree passed by the learned district judge and both the appeal and the cross-objection will be dismissed. Respondents 1 and 2 will have their costs of the appeal.

D.D. *Appeal decreed in part.*

## ✻ A. I. R. 1927 Calcutta 816

C. C. GHOSE AND GREGORY, JJ.

*Ananta Lal Sinha*—Complainant—Petitioner.

v.

*Jahiruddin Biswas* and *others*—Accused—Opposite Party.

Crl. Rev. No. 526 of 1927, Decided on 3rd August 1927, from the order of the S. J., Murshidabad, D/- 16th March 1927.

✻ *Criminal P. C., S. 494—Accused convicted by first Court—Appeal by accused—Petition for withdrawal cannot be put in, in appellate stage.*

It is only in cases indicated in S. 494, that is to say in cases to be tried by jury, before the return of the verdict and in other cases in the Court of first instance before the judgment is pronounced, that the public prosecutor may with the consent of the Court withdraw from the prosecution of any person. It does not contemplate the case of withdrawal by the public prosecutor after the conviction of the accused by the first Court and in the appellate stage of a case. [P 816 C 2]

The public prosecutor has no right at the appellate stage of the case to present any petition for withdrawal under S. 494, even though the petition is inspired by the district magistrate; nor is the sessions judge entitled to allow the public prosecutor to put in such an application and to proceed to acquit the accused before he even attempted to judicially determine the accused's appeal. [P 816 C 2; P 817 C 1]

*Dinesh Chanara Roy, Durga Charan Mitter* and *Hari Das Gupta*—for Petitioner.

*Anil Chandra Roy Chowdhury*—for the Crown.

*Bankim Chandra Mukerjee* and *A. S. M. Akram*—for Accused.

**C. C. Ghose, J.**—In this case we are of opinion that the rule must be made absolute. The facts are somewhat peculiar and it is necessary therefore to set out the same at some length. The accused in this case were convicted by the Sub-Divisional Officer of Jangipur under Ss. 143, 150, 153, 506 and 298, I. P. C., and were sentenced to various terms of imprisonment by his judgment dated the 29th September 1926. Jangipur is a sub-division in the district of Murshidabad, and the accused, after conviction, preferred an appeal to the Sessions Judge of Murshidabad. When the appeal came on for hearing on the 4th March 1927, it appears that the public prosecutor was instructed by the then magistrate of the district, Mr. M. S. Adie, to inform the Court that the Crown had decided to withdraw from the prosecution of the accused who, as stated above, had already been convicted by the Sub-Divisional Officer of Jangipur, and he prayed for the Court's sanction under S. 494, Criminal P. C. The Sessions Judge of Murshidabad allowed the application of the public prosecutor, although the complainant objected to the same, (it was not a Crown prosecution), and he forthwith proceeded to acquit the accused under S. 494 (b), Criminal P. C. Against the order of the Sessions Judge the present rule is directed.

Now reading the words of S. 494, it is reasonably clear that it contemplates the case of withdrawal of a prosecution by the public prosecutor, in cases tried by jury before the return of the verdict and in other cases before the judgment is pronounced and that it does not contemplate the case of withdrawal, by the pulic prosecutor after the conviction of the accused by the first Court and in the appellate stage of a case. It is, however, argued on behalf of the Crown as also on behalf of the accused that the last words "before judgment is pronounced" may be held applicable to the pronouncement of the judgment by the appellate Court. That argument has no substance whatsoever as is apparent from the concluding words of S. 494. Therefore it seems to us that reading S. 494 as a whole it is only in cases indicated therein, that is to say, in cases to be tried by jury before the return of the verdict and in other cases in the Court of first instance before the judgment is pronounced that the public prosecutor may with the consent of the Court withdraw from the prosecution of any person. To say that the public prosecutor is authorized under the terms of this section to withdraw from the prosecution after the accused had been convicted is to state something which is not only on the face of it startling but absurd, having regard to the words of S. 494, Criminal P. C.

We are, therefore, constrained to hold that the entire proceedings before the Sessions Judge relating to the withdrawal of the prosecution were misconceived and illegal from start to finish. The public prosecutor had no right at the appellate stage of the case to present any petition for withdrawal under S. 494, Criminal P. C., even though

the petition was inspired by the District Magistrate ; nor was the Sessions Judge entitled to stretch the words of S. 494 beyond their legitimate meaning and to allow the Public Prosecutor to put in such an application and to proceed to acquit the accused before he even attempted to judicially determine their appeal.

The result therefore, is that the order of the Sessions Judge, dated 16th March 1927, must be set aside and the matter must go back in order that the appeal of the accused may be judicially determined. The appeal will be heard by the Additional Sessions Judge of Murshidabad.

R.D. *Rule made absolute.*

---

## A. I. R. 1927 Calcutta 817

RANKIN, C. J., AND COSTELLO, J.

*Re Fazoo Mia*—Petitioner.

v.

*Sultan Ahmed Choudhury*—Opposite Party.

Civ. Rev. No. 474 of 1927, Decided on 22nd June 1927, from an order of the Dist. Judge, Chittagong, D/- 11th November 1926.

*Civil P. C., O. 21, R. 89—Purchaser of a portion of non-transferable occupancy holding can apply.*

A purchaser of a portion of a non-transferable occupancy holding has the right to have a sale of the whole property set aside on making a deposit under R. 89. The fact of the landlord himself being the auction-purchaser will make no difference : 7 *C. L. J.* 282, *Foll.* [P 817, C 2]

*Dhirendra Lal Kastigir* and *Phanindra Nath De*—for Petitioner.

*M. A. K. Fazlul Huq* and *Jahnavi Charan Das Gupta*—for Opposite Party.

**Rankin, C. J.**—This is an application by a decree-holder who is at the same time the auction-purchaser of a non-transferable occupancy holding and the landlord. The landlord obtained a rent decree and has purchased the holding at the execution sale. Thereupon the opposite party, who claimed to have purchased the entire holding from the tenant, but who has been found by both the Courts below to have purchased a part only of the holding from the tenant, seeks to exercise the right given by R. 89, O. 21, Civil P. C. The Courts below have both held that he is entitled to exercise that right and the landlord applies in revision to us to hold that the purchase of a part of a non-transferable occupancy holding is not within the language of R. 89. The matter is a very important one and it is difficult not to have recourse to a comparison with S. 170, Bengal Tenancy Act.

At first the course of decisions under S. 170 appears to have tended in favour of a purchaser of the non-transferable jote, but it is now settled by decisions that such a purchaser does not come within the description in sub-S. (3), S. 170. of

> any person having in the tenure or holding any interest voidable on the sale.

Now the language of that section is different from the language of R. 89, which speaks of a person

> either owning such property or holding an interest therein by virtue of a title acquired before such sale.

It is now settled, as I have said, that such a person as the opposite party before us does not hold an interest voidable on the sale. That seems to be reasonably clear upon the wording of sub-S. (3), because if the sale is to stand at all it is quite clear that the transfer to the previous purchaser cannot subsist with it. An interest voidable on the sale means an interest the existence of which is compatible with the auction purchase, though a qulification of it, as for example, an encumbrance.

We have, however, to apply R. 89 and we find that both the Courts below have proceeded upon the decision in the case of *Omar Ali Majhi* v. *Moonshi Basiruddeen Ahmad* (1), where it was definitely laid down under S. 310-A, Civil P. C., 1882 that such a person as the opposite party before us, has the right to have a sale set aside on paying the money prescribed as a deposit under S. 103-A of the previous Code. I am far from saying that the question is an easy one. To my mind there are three governing principles. In the first place it does not seem to me to matter for purposes of R. 89, whether the purchaser is a purchaser of a part or of the whole of a non-transferable occupancy jote. In the second place, it seems to me unreasonable that any difference should be operated by the fact that the landlord happens to be the auction-purchaser

(1) [1908] 7 C. L. J. 282.

himself. It is anomalous that the landlord, by using the machinery of the Code should be able to give a better title to himself as an auction-purchaser than he could have given in the same way to a third party auction-purchaser.

The other matter that seems to me to govern the consideration of this question is this: If the withdrawal of the deposit made under R. 89 is to mean that the landlord has recognized the depositor as tenant of this non-transferable occupancy jote then it does seem anomalous that such a person as the opposite party here should have the right to make the deposit. It clearly cannot be the law that the landlord by the machinery of R. 89, can be obliged either to go without his rent or to recognize the transferee whom he does not wish to recognize in the case of a non-transferable jote.

There are other difficulties and serious difficulties in the question before us and when I find that as far back as 1908 this question was decided by a Division Bench in favour of a purchaser of a portion of a non-transferable occupancy holding, I am obliged to follow that ruling unless I can be persuaded that it is a ruling from which this Court ought to differ. In that case it would be our duty to refer the matter—and a very important matter—to a Full Bench for decision. On the whole I am not prepared to say that I differ from the ruling laid down in *Omar Ali Majhi* v. *Moonshi Basiruddeen Ahmad* (1). I doubt extremely whether it is true that a mere acceptance or withdrawal of this deposit would operate to oblige the landlord to recognize this tenant but whether it be true or not it is perhaps somewhat late in the day to abridge still further the rights of a transferee of a non-transferable occupancy jote in Bengal. It would be putting back the clock to overrule the decision which is more than 20 years old and to hold that the interest which such a person as the opposite party before us has obtained from the tenant is no interest at all or that merely because the landlord is the auction-purchaser he cannot exercise the right under R. 89. On the whole I think this is a case where we ought to obey the principle of stare decisis.

In my judgment this rule should be discharged with costs: hearing-fee two gold mohurs.

**Costello, J.**—I agree and for the same reasons.

J.V. *Rule discharged.*

---

## A. I. R. 1927 Calcutta 818

RANKIN, C. J., AND C. C. GHOSE, JJ.

*Satindra Narain Sinha*—Appellant.

v.

*Chunilal Jamadar* and *others*—Respondents.

Appeal No. 127 of 1926, Decided on 4th January 1927, from the order of Greaves, J., in Original Civil Suit No. 2376 of 1922.

*Limitation Act, Art.* 166—*Sale by Registrar on original side—Art.* 166 *does not apply.*

An application to set aside a sale held by the Registrar of the original side under mortgage decree under the rules of the High Court in Chap. 27 under certain conditions which prescribe certain conditions as to the title which the purchaser should be entitled to require before he is compelled to complete is neither governed by Art. 166 nor by the rule which requires that the sale should be excepted to within 14 days.

[P 818, C 2; P 819, C 1]

*N. N. Sircar* and *S. N. Banerjee*—for Appellant.

*B. L. Mitter* and *M. N. Basu*—for Respondents.

**Rankin, C. J.**—This is appeal from an order made by Mr. Justice Greaves upon the application of an auction-purchaser at a sale held by the registrar of the original side under a mortgage decree.

The sale was held on the 20th of March 1926 and the question before us concerns lot 3. Now lot 3 is described in the notification of sale as a

parcel of land containing by measurement an area of 8 cottahs 1 chittack and 32 square feet, be the same a title more or less, within the municipal limits of the town of Calcutta, being premises No. 5 Ahiripukur 1st Lane, and situate in (a certain district) and being a portion of holding No. 164 (formerly holding No. 43) in Subdivision A, Division V, within the district of the 24-Parganas and paying an annual rent of Rs. 2-13-9 in respect of the entire holding.

It is further described as bounded on the north by a certain land and on the east

by No. 6 Ahiripukur 1st Lane (formerly by old holdings Nos. 44 and 45).

The sale was held under the rules of the High Court contained in Chap. 27 and the property was put up to auction under certain conditions of sale which

do not merely provide that the highest bid should be accepted and the amount of the deposit or other matters of ordinary auctioneering, but prescribe certain conditions as to the title which the purchaser should be entitled to require before he is compelled to complete. Provision is made for requisitions and answers. Provision is made with regard to compensation for misdescription. Provision is made that the title of the lot shall be taken to commence with the kobala, dated the 5th March 1899, and that the purchaser shall admit the identity of the property purchased by him with that comprised in the muniments abstracted as containing the title thereto and so forth.

Now, the auction-purchaser says that he bid for by his brother and had perfectly correctly knocked down to him this lot No. 3 on the 20th March 1926, but he says that when the abstract of title came to be put before him he found two things: first of all, that nobody could tell him what the eastern boundary of the property sold was, and there was nothing in the abstract to show what it was. He says that this is more unfortunate, to say the least of it, because the only entrance from the lane into this piece of land is in the south-west corner and that it makes all the difference to him whether or not the boundary is to be in one way or to be in another on the eastern side. He was referred to the surveyor who had measured the property for the purpose of sale as eight cottahs and so forth, and he enquired from him what he took as the eastern boundary of the land, and he discovered that the surveyor had apparently measured the land without taking any particular eastern boundary that he was able to assign. He was referred to the corporation as to whether there was any information there as to the boundary of what is now called No. 5 and what is now called No. 6, and he failed entirely to get anything from the corporation. He was referred to a map prepared by a gentleman called Mr. Smart which throws no light whatever upon the question what the position of this boundary was.

What he does discover and lay before the Court is that this: according to the map made by Mr. Billon in 1870 there were three holdings, now Nos. 43, 44 and 45, that in 1879 the mortgagor's father Kashi Jamadar bought No. 5 and No. 6 and proceeded to occupy two of them together if, indeed, he may be said to have occupied them at all, the land being apparently open land with busti dwellings scattered over. At a much later time there was a partition between the sons of Kashi Jamadar and No. 5 was allotted to the present mortgagor. There is no map in those partition proceedings, so far as can be seen, which throws any light at all as to what was considered to be No. 5 and where it was considered to march with No. 6; and whether or not at the time of that partition the parties or the commissioner of partition accurately stated in dividing No. 5 from No. 6 the precise boundaries which formerly were thought before 1879 to divide No. 43 from the other two holdings cannot be stated at all. In these circumstances the auction-purchaser says:

> You have not made out a title in conformity with the contract which I entered into.

He says, therefore, that, he is entitled to rescind the sale, not as a sale which never ought to have been made or as tainted by fraud on the 20th March or as irregular in some other manner.

The learned Judge, in my judgment, dealt with this matter exactly in the correct way.

The arguments that have been laid before us are really two. One is that the application is out of time, either because the sale report was not excepted to within 14 days as required by the High Court rules or else because of Art. 166, Sch. 1, Limitation Act.

Now, in my judgment, neither of those provisions applies here. In the mofussil an auction-purchaser purchases the right, title and interest of a judgment-debtor or of a mortgagor whatever it may be, and if the contract of sale is a good contract of sale there is only one way in which under the law that contract can fail to take effect by reason of non-performance. I refer to the provisions which allow a purchaser, when the title or the interest of the judgment-debtor is nothing, to get his money back. Consequently in the mofussil you do not get the question of title with which we are here concerned. There it is a case of setting aside a sale because of some reason which makes the auction-purchase void or voidable. But we are at

present dealing with a case which arises under a rule by which a purchaser is entitled to refuse the title if it is not in accordance with the conditions of sale and the Court in execution has to decide upon the question whether title in conformity with those conditions has been shown or not. In my judgment, to that question neither of the provisions referred to has any application. Indeed, as was pointed out by the learned Judge, the whole scheme of this contract of purchase is contrary to such provisions. There is a time for the abstract being delivered, further time for requisitions and so forth, all of which will be entirely nullified by the application of Art. 166. In my judgment, therefore, that argument was rightly rejected by the learned Judge.

Then comes the question: Is this a title which the Court will force upon a purchaser or is it a case in which, before deciding in one way or the other, we ought to direct a reference by the Registrar as to title under the rules. I am of opinion that there is no good purpose to be served, now that this matter has been fully thrashed out in two Courts, by ordering any such reference, and it appears to me that it would be entirely wrong to thrust this title upon the present respondent.

If was contended by Mr. Sircar that the brother of the mortgagor and another member of the family were parties to the application before the learned Judge, They were apparently joined because in the mortgage it was necessary to make them parties for the purpose of making sure that they should not set up any right or interest against the mortgage and adversely to the mortgagee; but they are not before the Court as owners of No. 6, nor, as at present advised, do I think it would be correct or reasonable in the course of an execution proceeding under a mortgage decree for No. 5 to put them to proof of their title and their boundary in respect of another piece of land as owners of which they are perfect strangers to this suit. It is not possible, therefore, to commence proceedings for the purpose of coming to an accommodation between No. 6 on the one hand and No. 5 on the other so as to define the boundary. It seems to me that this is a case where the stipulations in the conditions of sale did not enable the mortgagee to make out the title which they were obliged to make out to lot 3 and that the auction-purchaser is not under any obligation to accept the title. That being so, I am of opinion that this appeal should be dismissed with costs.

**Ghose, J.**—I agree.

D.D. *Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 820

SUHRAWARDY AND CAMMIADE, JJ.

*Emperor*—Applicant.

v.

*Irjan* and *others*—Opposite Party.

Crl. Ref. No. 72 of 1926, Decided on 14th March 1927, made by the Additional Sessions Judge, Sylhet, D/- 7th December 1926.

*(a) Criminal P. C., S. 276—One of the jurymen not entitled to sit on the jury—Verdict is nullity.*

Where one of the jurymen is a person who was not entitled to sit on the jury, having not been summoned, the Court is not properly constituted and the verdict of the jury counts for nothing.

But where the verdict was in accordance with the facts of the case, the High Court did not order a retrial. [P 820, C2 P 821, C 1]

*(b) Criminal Trial—Identifications.*

Identifications made at night during the occurrence, such as dacoity, when blows are struck and the people are terrorized, are generally of very little value. [P 821, C 2]

*M. S. Nasim Ali* and *Anil Chandra Roy Chowdhury*—for Accused.

*Sures Chandra Talukdar*—for the Crown.

**Judgment.**—This is a reference under S. 307, Criminal P. C., against the divided verdict of the jury in a case under S. 395, I. P. C. The jury were divided in the proportion of 3: 2. It happened that one of the jurymen who gave the verdict of not guilty was a person who was not entitled to sit on the jury. He had not been summoned. The reference has been made on the ground that the Court was not properly constituted and that, therefore, the verdict of the jury should be treated as a nullity. The reference has also been made on the ground that the verdict of the jury is against the weight of evidence. We entirely agree that as the Court was not properly constituted, the verdict of the jury counts for nothing.

We have, however, been taken through the record of the case, and we find that

although the verdict cannot be sustained on one ground under the law, still it is in accordance with the facts of the case, and we should not be justified in ordering a retrial. The dacoity took place in the middle of the night on the 15th May 1926. The son of the owner of the house named Gopesh is said to have recognized five of the accused persons among the dacoits and his mother is said to have recognized one of the dacoits. The sixth accused is a person who was identified by the mother at a test identification held by the Court before the trial. All the accused persons are local men known to the complainant and his family. It is very unlikely that men known to the people of the house would commit a dacoity without taking precaution to disguise themselves. The inference arising from the fact that the dacoits are said not to have been disguised is further strengthened, as far as the present accused are concerned, by the fact that when the police arrived in the village on receiving information, they found all these men at their houses. There is the further corroboration in the fact that although the police arrived within a few hours of the dacoity, nothing was found in the house of any of these men.

The complainant Gopesh seems to have been of a suspicious nature. He says that a few days before the occurrence he returned from Karimganj with Rs. 60 which his brother had given him to carry home, and that he spoke of it to two of the accused on the way and that in answer to this question he told them that he had this money with him. He further said that a day or two later the accused Kantai was moving about near his house and that this roused suspicions in his mind and that he questioned him asking him what he was doing near his house, and Kantai told him that he was looking for his pony. Gopesh says that he told Kantai that it was not likely that his pony had strayed near his house. He apparently showed considerable annoyance at Kantai being near his house because he says that Kantai asked him what right he had to be annoyed at his presence near his house. We find, therefore, that Gopeswar had suspicions before the occurrence at his house and, therefore, it was quite likely that he would name the persons against whom he had formed suspicions.

Identifications made at night during the occurrence, such as dacoity when blows are struck and the people are terrorized, are generally of very little value. Taking this along with the other circumstances, we think that any jury would be right in refusing to believe such identification. As regards the identification of the six accused persons by Gopesh's mother outside the Court-house, that matter is very easily explained. The six accused persons were lined up outside the Court with other persons found there. It does not appear that any of the other persons belonged to the neighbourhood of the complainant and therefore the complainant's mother could have no difficulty in pointing out these men who belonged to her own neighbourhood as she must have known them at least by sight. In all these circumstances, we do not think that there should be retrial. The reference is rejected. The accused are acquitted and will be set at liberty.

R.D. *Reference rejected.*

---

## A. I. R. 1927 Calcutta 821

MUKERJI AND MALLIK, JJ.

*Mt. Tamijannessa Khatun*—Defendant—Petitioner.

v.

*Purna Chandra Chakravarti* and *others*—Plaintiff—Opposite Party.

Civil Rules Nos. 841 and 842 of 1926, Decided on 1st June 1927, from an order of the 4th Sub-Judge, Dacca, D/- 22nd April 1926, in Rent Suits Nos. 2 and 3 of 1924.

(a) *Interpretation of Statutes—Construction.*

To construe the provisions of a section it is hardly permissible to refer to the report of the Select Committee. [P 822 C 1]

(b) *Bengal Tenancy Act, S. 153A—Intention is that the Court should regulate the amount of deposit—In all cases reasons for the order passed should be recorded.*

Section 153A does not say that it is only in a case where there has been an admission of any amount due that such a deposit has to be made, or that the deposit must be in respect of the admitted amount only and not of any amount in excess thereof. The obvious intention of the Legislature is that the Court should regulate the amount of the deposit, and in all cases it should record its reasons for the order it passes, whether it requires or excuses a deposit : 19 *C. W. N.* 970, *Dist.*; *A. I. R.* 1921, *Pat.* 284, *Diss. from.* [P 822 C 2]

*Rajendra Chandra Guha* and *Bipin Chandra Basu*—for Petitioner.

*Jatindra Nath Sanyalal* and *Biraj Mohan Majumdar* for *Deputy Registrar*—for Opposite Party.

**Mukerji, J.**—These two rules relate to two suits for rent which were decreed ex parte on the 24th March 1926. The defendant applied under O. 9, R. 13 for setting aside the said ex-parte decrees and prayed for exemption from making the deposit necessary to be made under S. 153A, Bengal Tenancy Act. The Subordinate Judge refused to grant the exemption and ordered the decretal amounts to be deposited within seven days, and on the defendant failing to comply with the order rejected his petitions. The defendants thereupon moved this Court and obtained these rules.

The petitioner's contention in these rules is to the effect that as she had never admitted that any amount is due from her to the decree-holder no deposit is necessary. In support of this contention reference has been made to the observations of the Select Committee which considered the bill which was eventually embodied in S. 153A, Bengal Tenancy Act (S. 47, Act 1, B. C., 1907 and Act 1, E. B. C. 1908) and reliance has also been placed on certain decisions to some of which I shall presently refer.

To construe the provisions of the section it is hardly permissible to refer to the report of the Select Committee, but if it is, I may point out that while the report refers to Ss. 149 and 150, Bengal Tenancy Act, which provides for payment in cases of amounts which are admitted, it also refers to S. 17, Provincial Small Cause Courts Act, 1887, which provides for the deposit of the amount due under the decree, irrespective of any such admission. The observations of the Select Committee taken as a whole do not support the petitioner's contention.

On the plain reading of the section it is clear to my mind that it contemplates a deposit to be made in all normal cases, where a decree has been passed for any amount in a suit between the landlord and tenant as such. That the application to set aside the ex-parte decree under O. 9, R. 13, or for a review of judgment under S. 114 and O. 43, R. 1, Civil P. C., must contain a statement of the injury sustained by the applicant by reason of the decree or judgment is clear from the first paragraph of the section. Clause (a) provides that the application shall not be admitted unless the applicant has deposited the amount admitted by him as due to the decree holder, or such amount as the Court may, for reasons to be recorded by it in writing, direct. Clause (b) confers upon the Court a discretion to exempt the applicant from making the deposit, if, after considering the statement of injury, the Court is satisfied that no such deposit is necessary, but the reasons for the exemption have to be recorded by it in writing. Unless, therefore, the Court grants an exemption under Cl. (b) the deposit must be made. If there is an admitted amount the deposit may be of the admitted amount, but in all cases the Court has powers to make an order for the deposit of any amount, whether there has been an admission or not. The section does not say that it is only in a case where there has been an admission of any amount due, that such a deposit has to be made, or that the deposit must be in respect of the admitted amount only and not of any amount in excess thereof. The obvious intention of the Legislature is that the Court should regulate the amount of the deposit, and in all cases it should record its reasons for the order it passes, whether it requires or excuses a deposit.

One of the cases relied upon on behalf of the petitioner is *Tara Shankar Ghose* v. *Nasaruddi* (1). At p. 971 of the report there is a passage which runs thus:

> In our opinion, it is plain that the requirements of S. 153A have been fulfilled; the defendant was not bound to make any deposit, because he did not admit that any money was due from him to the plaintiff in respect of the holding for which rent was claimed.

This passage taken by itself, no doubt, supports the petitioner's contention. The question whether the Court can require a deposit to be made when there is no admission, however, did not arise in that case, and the only ground upon which it was contended that the deposit was necessary was that there was an admission. I am not, therefore, pressed by the authority of this decision. The only other case cited on behalf of the petitioner to which reference need be made

(1) [1915] 19 C. W. N. 970=29 I. C. 476=22 C. L. J. 589.

is that of *Chandra Dhur Dev* v. *Bhola Rai* (2), the decision of a learned Judge sitting singly from which I feel I must dissent with all respect. It may be mentioned that Beachcroft, J., in Civil Rule No. 541 of 1920, decided on the 18th November 1920, [see *Amanullah Manjhi* v. *Ayfar Jan Bibi* (3)] held that where an application is made to set aside an ex-parte decree for rent and the tenant denies that any rent is due and consequently no deposit is made under S. 153-A, Cl. (*a*), Bengal Tenancy Act, the Court is not justified in admitting the application without recording in writing, under Cl. (*b*) of the section that it is satisfied that a deposit is not necessary.

The learned Judge in these cases appears to have given sufficient reasons as to why the entire decretal amounts should be deposited, and on failure of the petitioner to comply with the order requiring such deposits has dismissed the application for setting aside the ex-parte decrees. In my opinion his orders are right.

The rules must accordingly be discharged with costs, hearing fee two gold mohurs in the case in which the opposite party have appeared.

**Mallik, J.**—I agree.

R.D. *Rules discharged.*

(2) A. I. R 1921 Patna 284.
(3) [1920] 62 I. C. 444.

---

## A. I. R. 1927 Calcutta 823

C. C. GHOSE AND CAMMIADE, JJ.

*M. Banerjee*—Accused—Petitioner.

v.

*Emperor*—Opposite Party.

Crl. Rev. No. 260 of 1927, Decided on 6th May 1927, in the matter of a proceeding before the Sub-Divl. Magistrate, Diamond Harbour.

* (*a*) *Penal Code, S. 499—Privilege—Advocates in India have not absolute privilege to ask questions in cross-examination as in England.*

Under the English law, advocates have absolute and unqualified privilege in respect of questions asked in cross-examination. Advocates in India have not such unqualified and absolute privilege. [P 824 C 2]

(*b*) *Penal Code, S. 499, Excep. 9—Imputation on character of witness made for protection of client—Presumption that question is asked on instructions should be drawn—Opportunity should be given to explain.*

It is not defamatory to make an imputation on the character and position in life of a witness, provided that the imputation is made in good faith and for the protection of the client who has engaged the advocate. The presumption therefore is that a question asked in cross-examination making an imputation as regards a witness affords no ground ordinarily for a criminal prosecution and that it is the duty of a Court when a complaint is made against an advocate for having used defamatory words that it should ordinarily be presumed that the remark in question objected to was made on instructions and in entire good faith. No doubt there may be circumstances which may show that the question or remark objected to was made wantonly or from malice or from private motive, but the greatest care ought to be taken to enquire into the circumstances and an opportunity should be given to the party accused of such offence to offer explanations before summons is issued. [P 824 C 2, P 825 C 1]

(*c*) *Legal Practitioner—Rights and responsibilities—He should use discretion before asking any question.*

While counsel have their privileges they have also their responsibilities and ought never to abuse their position or their privileges and therefore though an advocate may act from a sense of duty towards his client and in entire good faith, he must exercise his own discretion before he puts the question to the witness. [P 825 C 1]

*Langford James, S. K. Sen, Mrityunjoy Chhattopadhyay, Sachindra Nath Bannerjee* and *Manindra Nath Banerjee No. II*—for Petitioner.

*Kanaidhun Dutt* and *Phanindra Nath De*—for the Crown.

**C. C. Ghose, J.**—This rule was issued by my learned brothers Mr. Justice Cuming and Mr. Justice Mallik, calling upon the District Magistrate of the 24 Parganas and also on the complainant Babu Anukul Chandra Mitter to show cause why the proceedings against the petitioner, who is a barrister-at-law and an advocate of this Court, now pending in the Court of the Sub-Divisional Magistrate in Diamond Harbour, should not be quashed on these grounds namely: first, that the petition of complaint did not disclose any offence committed by the petitioner, secondly, that on the allegations made by the complainant in his petition of complaint, no prima facie case has been made out against the petitioner; and thirdly, that in view of the admission of the complainant that the alleged defamatory question was put by the petitioner in cross-examination on instructions from the mukhtear, no charge could in law be sustained.

In order to understand the precise significance of the three grounds upon which the present rule was issued, it is necessary to state shortly the circumstances giving rise to the present application. The petitioner before us was engaged to defend one Heramat Ali, who was charged with having committed an offence punishable under S. 504, I. P. C., i. e. with having intentionally insulted a certain person with intent to provoke a breach of the peace before the Deputy Magistrate, Diamond Harbour. It appears from the record that the case against the said Heramat Ali ended in his conviction. At the trial of Heramat Ali, a person of the name of Satish Chandra Bose, who is a mukhtear practising in the Court at Diamond Harbour instructed the present petitioner on behalf of Heramat Ali. One of the witnesses for the prosecution was the present opposite party Babu Anukul Chandra Mitter. After he had been examined-in-chief, he was cross-examined by the present petitioner, who asked him whether it was not a fact that he was low born and untrustworthy, and that his mother had led a life of shame in Calcutta. It is admitted by the opposite party that the question referred to was asked on the express instructions of the mukhtear and the petitioner's contention is that the question was asked in entire good faith and with the bona fide object of shaking the credit of the witness Anukul Chandra Mitter and to discover his position in life, and that he honestly believed that the imputation involved in the said question was well founded. . The offensive question was asked in cross-examination on the 5th February 1927. On the 8th February 1927 the witness Anukul preferred a complaint against the present petitioner and two others under S. 500, I. P. C, with having defamed him. The learned Magistrate issued process against Mr. Banerjee.

Mr. Langford James, who appears on behalf of the petitioner, has contended before us that on the grounds on which the present rule has been issued, it should be made absolute and that it is right and proper that the proceedings against the petitioner should be quashed. While insisting that the proceedings should be quashed, Mr. James, on the instruction of his client, has expressed his clients' deep regret that he should have asked a question, even in good faith which has given pain to the opposite party and has apologized on behalf of Mr. Banerjee. In view of what has taken place in Court, it is unnecessary for us to refer in detail to the state of the law in this matter in England or in India. So far as the English law is concerned, it is settled that advocates have absolute and unqualified privilege in respect of questions asked in cross-examination. So far as advocates in this country are concerned—by which expression I include vakils as well as pleaders—they have not such unqualified and absolute privilege as is accorded to their brethern in England : see in this connexion *Sullivan* v. *Norton* (1), *In re Venkata Reddy* (2), *In re Nagarki Trikamji* (3); *Bhaishankar* v. *L. M. Wadia* (4), *Emperor* v. *Purshottamdas* (5); *Upendra Nath* v. *Emperor* (6); *Nikunja Bhan* v. *Harendra Chandra* (7), *McDonnell* v. *Emperor* (8). It is not defamatory to make imputation on the character and position in life of a witness, provided that the imputation is made in good faith and for the protection of the client who has engaged the advocate: see Excep. 9 S. 499, I. P. C. The presumption, therefore, is that a question asked in cross-examination making an imputation as regards a witness affords no ground ordinarily for a criminal prosecution and that it is the duty of a Court when complaint is made against an advocate for having used defamatory words that it should ordinarily be presumed that the remark on question objected to was made on instructions and in entire good faith. No doubt there may be circumstances which may show that the question or remark objected to was made wantonly, or from malice or from private motive, but the greatest care ought to be taken to enquire into the circumstances and, as stated in the *Rangoon* case (8), an opportunity should be given

(1) [1886] 10 Mad. 28 (F.B.).
(2) [1912] 36 Mad. 216=23 M.L.J. 39=14 I.C. 659=1912 M.W.N. 476 (F.B.).
(3) [1895] 19 Bom. 340.
(4) [1900] 2 Bom. L. R. 3.
(5) [1907] 9 Bom. L. R. 1287.
(6) [1909] 36 Cal. 375=13 C.W.N. 340=1 I.C. 147=9 C.L.J. 259.
(7) [1914] 41 Cal. 514=20 I. C. 1008=18 C.W.N. 424.
(8) A.I.R. 1925 Rang. 345=3 Rang. 524.

to the party accused of such offence to offer explanations before summons is issued. In this view of the matter, and having regard to the state of the record before us, we accept the statement that the offensive question in this case was asked in entire good faith and on instructions from the muktear instructing the learned advocate. At the same time there cannot be any doubt that while Mr. Banerjee may have acted from a sense of duty towards his client and in entire good faith, he certainly failed to exercise his own discretion before he put the question to Babu Anukul Chandra Mitter. It cannot be too strongly insisted upon that while counsel have their privileges they have also their responsibilities and they ought never to abuse their position or their privileges. We are glad that Mr. Banerjee has expressed his deep regret that he should have caused any pain to the witness Anukul Babu, and we are equally glad that Anukul Babu, who has been present in Court before us, has through his learned vakil accepted Mr. Banerjee's apology. In this view of the matter we think the proceedings against Mr. Banerjee should be quashed, and we accordingly make the rule absolute.

R.K. *Rule made absolute.*

---

## A. I. R. 1927 Calcutta 825

PANTON AND MITTER, JJ.

*Ambika Charan Roy Barman* and *another*—Appellants.

v,

*Har Kishore Chakravarti* and *others*—Respondents.

Appeal No. 2386 of 1924, Decided on 2nd May 1927, from a decree of the 3rd Sub-J., Tipperah, D/- 28th August 1924.

(a) *Bengal Tenancy Act, S. 15—No notice of succession by heirs—Decree in rent suit against some heirs—Decree is not rent decree.*

Even where no notice is given, of succession of an heir to the tenure, to the landlord under S. 15, Bengal Tenancy Act, the decree in the rent suit against one of the heirs of the tenant cannot be regarded as a rent decree: *A. I. R. 1921 Cal. 434, Foll.* [P 826 C 2]

(b) *Bengal Tenancy Act, Ss. 158B to 177—Chap. 14—Judgment-debtor not raising objection to execution proceedings under the chapter that decree is not a rent decree—He cannot subsequently raise the plea.*

Where a person against whom a decree purporting to be a rent decree is passed has not taken exception to the execution proceedings under Chap. 14, Bengal Tenancy Act, on the ground that the decree is not a rent decree, he is precluded from doing so at a subsequent stage. [P 826 C 2]

*Brojo Lal Chakravarti* and *Upendra Kumar Roy*—for Appellants.

*Sasadhar Roy* and *Birendra Chandra Das*—for Respondents.

**Mitter, J.**—This is an appeal from a decree of the Subordinate Judge of Tipperah, dated the 28th August 1924, which affirmed a decree of the Munsif of Nabinagore, dated the 3rd July 1923.

The suit to which this second appeal relates was brought by the plaintiff for recovery of Rs. 361-8-0 due on the mortgage bond which was executed by Kshiroda Sundari Devi (who is now represented by defendants 1 and 2) on the 21st Aghrayan 1316 B. S. Defendants 3 to 5 were made parties to the suit as subsequent purchasers of the equity of redemption in execution of a decree for money; defendants 6 and 7 were impleaded as they were purchasers of the taluk in question at a sale at the instance of the landlord in execution of a decree for rent; plaintiff asked for the usual mortgage decree for sale and made an alternative prayer that in the event of the sale in favour of defendants 6 and 7 being held to be a sale in execution of a rent decree he may be allowed to get the decretal amount from the surplus sale-proceeds; several defences were taken by defendants 6 and 7 of which it is only necessary to mention two. The first plea is that as defendants 6 and 7 are purchasers of the taluk in a rent sale free from all incumbrances plaintiffs can get their claim satisfied out of their susplus sale-proceeds. The second plea is that it is not open to the plaintiff to raise the contention that the decree in execution of which the taluk in question was sold is not a rent decree. The Court of first instance held that the decree was not a rent-decree and that the plaintiff was not estopped from showing that the decree was not a rent-decree. The Munsif accordingly passed a preliminary mortgage decree for sale of the mortgaged property on contest against defendants 3 to 7 and ex parte against defendants 1 and 2. An appeal was carried to the Subordinate Judge by defendants 6 and 7 and the decision of the Munsif was affirmed. A second appeal has been

preferred to this Court by defendants 6 and 7 and it has been contended before us (i) that the Subordinate Judge has erred in holding that the decree was not a rent decree and (ii) that the lower appellate Court has committed an error of law in coming to the conclusion that plaintiff is not estopped from showing that the decree was a rent decree and that the sale was not a rent sale.

In order to examine the soundness or otherwise of the two contentions raised by the learned vakil for the appellants it is necessary to state the following facts which have been found in this case. The Maharaja of Tipperah is the proprietor of an estate under which there is a taluk known as taluk Indra Narain Bhattacharjee. In this taluk the plaintiff Kshiroda Sundari the predecessor-in-interest of defendants 1 and 2 and the Maharaja himself are co-sharers. Kshiroda Sundari died leaving behind her a son Haribole Chakravarti and two daughters Labanya and Mono Mohini; the Maharaja brought a rent suit for the entire rent against Haribole and the plaintiff but did not make Kshiroda Sundari's daughter Mono Mohini a party to the rent suit; the Maharaja obtained a decree for the entire rent less his 8 annas share which was payable to himself and proceeded to execute the decree as a decree for rent under Chap. 14, Bengal Tenancy Act; during the execution proceedings Haribole died and his father defendant 1 was substituted in his place as his heir and legal representative and execution proceeded against the plaintiff and defendant 1 and the entire tenure including the Maharaja's share in it which carried a rental of Rs. 15 was sold and was purchased by defendants 6 and 7, now appellants, with power to annul all incumbrances. The purchasers, i, e., defendants 6 and 7 served notice under S. 167, Bengal Tenancy Act, on the plaintiff for annulling the incumbrances. In these proceedings the plaintiff who was one of the judgment-debtors did not object to the execution proceedings on the ground that the procedure under Chap. 14, Bengal Tenancy Act, could not be availed of by the Maharaja as the decree was not a rent-decree and the property was accordingly sold free from incumbrances.

On these facts it is clear that the decree could not be regarded as a rent-decree as Kshiroda Sundari's interest in the taluk in question was her stridhan property and under the Hindu law devolved after her death on her son Haribole and her two daughters Labanya and Mono Mohini. At the date of the rent suit Labanya was dead but Mono Mohini was alive and she was a necessary party to the rent suit. Mr. Brojo Lal Chakravarti has argued that she was fully represented by her brother Haribole who was himself an infant at the time; both the Courts have overruled the argument based on this doctrine of representation rightly. Although the taluk was a tenure and no notice was given of the succession of Mono Mohini to the tenure to the Maharaja under S. 15, Bengal Tenancy Act, the decree in the rent suit against one of the two heirs of Kshiroda cannot be regarded as a rent decree. If any authority is needed for this proposition we may refer to the case of *Faizannessa* v. *Gaganeswari* (1). The first ground of appeal, therefore, fails. The second ground of appeal which relates to estoppel is one of considerable difficulty. It is argued for the appellant that the plaintiff not having taken exception to the execution proceedings under Chap. 14, Bengal Tenancy Act, on the ground that the decree was not a rent decree is now precluded from doing so. It is said that he could not raise this plea as against the Maharaja by reason of the proceedings between him and the Maharaja, and consequently he cannot take this plea as against the purchaser at a sale at the instance of Maharaja. And in support of this contension reliance has been placed upon an unreported decision of this Court in the case of *Profulla Nath Tagore* v. *Satya Bhusan Das*: Review Ruls Nos. 21-F and 22-F of 1923 in appeal from original decree No. 64 of 1920 to which my learned brother was a party. I think this decision supports the contention of the appellant. In that case Mr. Justice Chatterjea and my learned brother made the following pertinent observations:

> As stated above, the plaint in the rent suit was framed, and the decree was passed, on the footing that there was only one tenure. It purported, therefore, to be a decree under the Bengal Tenancy Act and when the decree-holder adopted the procedure under Chap. 14, and got the processes of attachment and sale proclamation issued simultaneously, and the sale

(1) A. I. R. 1921 Cal. 434.

proclamation published under S. 163 of the Act (i. e., with power to annul all incumbrances), there could be no doubt that he meant "to sell the defaulting tenures with power to annul all incumbrances." So far as persons holding incumbrances who were strangers to the decree and sale were concerned they would not be affected by the fact that the judgment-debtor had not taken any exception to the procedure adopted under Chap. 14, though the judgment-debtors' interest in the tenure passed at the sale, but if the judgment-debtors themselves claim to have incumbrances under the tenure (i. e., under-tenures) it becomes material to consider what the effect is of their not taking any objection to the sale being held under Chap. 14, on the ground that the decree was really in respect of six different tenures. It is argued on behalf of the respondent that the landlord or a third party purchasing the defaulting tenure at the sale might not have taken steps to annuel the undertenures held by the judgment-debtors, and that, therefore, the judgment debtors might wait until notices under S. 167 were served for annulment of the incumbrances. But we do not see how the judgment-debtors with the full knowledge of the fact that the decree purported to be one in respect of single tenure and that the procedure adopted for bringing it to sale was that under the special provisions of Chap 14 would be justified in not objecting to the sale with power to annul incumbrance, and in waiting till the notices of annulment of incumbrances were served upon them under S. 167. The order for sale under Chap. 14 and the order confirming it having been passed in the presence of the judgment-debtors, were binding upon them not only in respect of their superior interest (i. e. the taluki interest), but also in respect of the power to annul the under-tenures. There could be no doubt that the zamindar proceeded to sell the tenure of the judgment-debtors with power to annul incumbrances. It was incumbent, therefore, upon the judgment-debtors to raise the objection that the sale could not be held with power to annul incumbrances. Not having done so and having allowed the sale to take place with power to annul all incumbrances and the sale to be confirmed without objection, they (or the plaintiff claiming through them) cannot now raise the objection that the sale could not be held with power to annul incumbrances in so far as the under-tenures which were held by the judgment debtors themselves were concerned.

We think, therefore, that the decree of the Courts below should be discharged, and in lieu thereof it is ordered and decreed that the plaintiff will realize their claim from the surplus sale-proceeds which represent Kshiroda Sundari's share. The defendants 3, 4 and 5, who are respondents before us, wanted to be discharged from the suit. The appellant has no objection to the same. Defendants 3, 4 and 5 are accordingly dismissed from this suit and the suit will be regarded as between the plaintiff on the one hand and defendants 1 and 2 and 6 and 7 on the other.

There will be no order for costs in this appeal. Plaintiff will be entitled to his costs in the Court of first instance.

Plaintiff will pay the costs of defendants 3, 4 and 5 in this appeal.

The cross-objection is not pressed and is therefore dismissed.

**Panton, J.**—I agree.

R.K. *Decree modified.*

---

## A. I. R. 1927 Calcutta 827

B. B. GHOSE and ROY, JJ.

*Secretary of State*—Appellant.

v.

*Altaf Hossein*—Respondent.

Appeal No. 124 of 1925, Decided on 23rd May 1927, from the original decree of the Spl. Land Acquisition Judge, 24-Perganas, D/- 17th March 1925.

(a) *Land Acquisition—Evidence considered—Evidence relied not indicated—All round increase made being reasonable—Increase held not arbitrary.*

Where the Land Acquisition Judge considers the evidence produced, but without indicating the particular evidence relied on, comes to the conclusion that the award should be increased, and the increase made is not unreasonable, the increase cannot be said to be arbitrary, as it is not always easy to give precise reasonings: 26 *Bom.* 1 (*P. C.*), *Foll.* [P 828 C 1]

(b) *Land Acquisition Act, S. 23—Valuation.*

Rent of basti land is often no criterion for ascertaining the actual value of the land. [P 828 C 1]

*Dwarka Nath Chakravarty* and *Surendra Nath Guha*—for Appellant.

*Nasim Ali* and *Dipendra Mohan Ghose*—for Respondent.

**Roy, J.**—This appeal is by the Secretary of State for India in Council and against the decision of the Special Land Acquisition Judge, 24-Perganas. Lands were acquired for a new road between Paddapukur Road and Michael Dutt Street in Kidderpore. This was one of the references made under S. 18, Land Acquisition Act. It concerned two plots of land, viz., plot 111, with an area of 4 cottas 5 chattaks odd. The Collector's award was at the rate of Rs. 450 per cotta. The second plot is plot 6, with an area of 13 cottas 6 chattaks odd. This was divided by the collector in two sections and his award was at the rate of Rs. 400 per cotta for 2 Cottaks 10 chattaks and odd and at the rate of Rs. 300 for the rest

amounting to 4 cottas 2 chattaks. The owner who is a mutwalli asked for a reference and the Special Judge has increased the award by Rs. 100 per cotta in each case. It is contended by the Government pleader that the Judge having practically discarded the evidence of the sale adduced by the claimants should not have enhanced the Collector's award, that the increase is arbitrary and that, so far as plot 6 is concerned, there was the definite evidence that the plot was settled by the mutwalli to a tenant at an annual rent of Rs. 72, and this should have been the basis of the award.

The learned Judge seems to have considered the evidence produced, and although he does not indicate the particular evidence he relies on, he was apparently led to the conclusion that the award should be increased to some extent and he thereupon made this all round increase of Rs. 100 per cotta. As pointed out by their Lordships of the Privy Council it is not always easy to give the precise reasonings in cases of this kind : *Secretary of State for Foreign Affairs* v. *Charles Worth Pilling & Co.* (1).

The Collector made his valuation according to him on personal enquiry, regard being had to the nature of the land, its area, configuration and situation. It does not appear that he placed any reliance on the fact that plot 6 had been let at Rs. 72 per annum, for his award is much more than what the compensation would have been if he had followed this basis. It was a temporary arrangement made by the mutwalli in respect of basti land and the rent of such land is often no criterion for ascertaining the actual value of the land : *Harish Chunder Neogy* v. *Secretary of State* (2). On the other hand the mutwalli produced evidence of actual sales of adjoining lands, as for instance Ex. 2, where the mokurrari tenants' rights were sold at Rs. 515 per cotta in 1909. This refers to plot 4. The learned Judge has observed that this is a small plot and there is a road alongside eight to ten feet wide. The judge has not said anything, however, against Ex. 3 which concerns plot 5. This sale was in 1913 and works out at Rs. 542 per cotta Then there is the fact that the Collector made this award in plot 9 at the rate of Rs. 450 per cotta and in plot 8 at Rs. 500 per cotta and for the back lands of plot 11, immediately to the south, he gave at the rate of Rs. 750 per cotta. It is not necessary to refer to the evidence of the expert valuer examined by the mutwalli or to the sale-deed of premises 22/1, where the purchaser paid Rs. 1,158 per cotta in 1915 in order apparently to extend and improve his land. There is ample evidence to justify the conclusion of the learned Judge that the award of the Collector should be increased. The increase given by him does not appear to be unreasonable. We consider, therefore, that the Judge was right and that the appeal should be dismissed with costs, hearing-fee being assessed at ten gold mohurs.

The mutwalli has a cross-objection, and his claim is that the award should be increased still further. The learned vakil wished to refer us to the evidence of the expert valuer but this evidence had not been printed and we were unable to accede to his request that we should refer to it at this stage. We have listened to his argument that land value increased between the dates of the various sales put forward in the evidence and the date of the declaration which was the 16th July 1918. There was probably some increase, but the increase was not large, and regard being had to all the circumstances specially the awards in respect of plots 8 and 9 on which he himself relies for the first branch of the case, we do not think a sufficient case has been made out for raising the compensation any further. The result is that the cross-objections are dismissed, but without costs.

The appellant must pay ad valorem Court-fee on appeal. Let the deficit Court-fees be accepted.

**Ghose, J.**—I agree.

R.K. *Appeal dismissed.*

(1) [1902] 26 Bom. 1=28 I. A. 121=8 Sar. 1 (P.C.).

(2) [1907] 11 C. W. N. 875.

## A. I. R. 1927 Calcutta 829

CUMING AND CAMMIADE, JJ.

*Promatha Nath Mukherji*—Defendant—Appellant.

v.

*Bhabataran Ganguly*—Plaintiff—Respondent.

Appeal No. 185 of 1927, Civ. Rev. No. 1256 of 1926, Decided on 23rd June 1927, from the appellate decree of the Dist. Judge, Hooghly, D/- 4th October 1926.

*Limitation Act, S. 5 — Appeal filed beyond time—Pleader under a wrong impression as to its due date—Party accelerating filing — Time should be extended, delay being due to pleader's wrong advice.*

An appeal filed on 17th September 1926, was found to be one day beyond time. All the papers of this appeal had been made over to the pleader who thought that the appeal was not due till the 22nd, but at the instance of the appellant it was filed at an earlier date, viz., the 17th.

*Held*: that it was neither just nor proper that the plaintiff-appellant should suffer for his pleader's mistake and hence he was entitled to an extension of time under the provision of S. 5.

[P 829 C 2; P 830 C 1]

*Amarendra Nath Bose* and *Panna Lal Chatterjee*—for Appellant.

*Sarat Chandra Bose* and *Manmatha Nath Ganguly*—for Respondent.

**Cammiade, J.**—This is an appeal by the defendant in a suit on a handnote, dated the 15th March 1916. The suit was filed on the 14th March 1919, and it was dismissed by the trial Court on 10th August, 1920. The decree was signed on the 16th August 1920. The applications for copies of the decree and judgment were filed on 12th August and copies were delivered to the plaintiff on 17th August. The appeal was filed by the plaintiff against the decree on the 17th September 1920. The Seristadar reported to the learned Judge that the appeal was out of time and on 20th September the Judge recorded an order: "Heard pleaders; appeal admitted." When the appeal came on for hearing on the 9th March 1922, an objection was taken by the respondent that the appeal had been filed out of time but that objection was overruled and the learned Judge decided the appeal on the merits and decreed it and also decreed the suit. This was on the 21st March 1922. An appeal was filed in this Court against the learned Judge's decree and, on the 1st April 1925, this Court reversed the judgment of the learned District Judge and remanded the appeal to the lower appellate Court directing an enquiry into the propriety of the admission of the appeal and also directing that in case that inquiry should result in favour of the appellant in the lower appellate Court the appeal should be decided again on the merits. The learned Judge heard the parties on the question of the propriety of the admission of the appeal on the 30th July 1926, and he decided that the appeal should be admitted. On the 4th October 1926, he decided the appeal on the merits and decreed it.

In the appeal before us it is contended that the learned Judge was wrong in his finding that the appeal was within time and that the appellant was entitled to extension of time under the provision of S. 5, Limitation Act. As a matter of fact when the period for preparation of decree is excluded it is found that the appeal was filed one day beyond time and the only question that the learned Judge had to decide was whether or not the appellant had shown reasonable cause within the meaning of S. 5, Limitation Act, for his delay in filing the appeal. The pleader who had acted for the appellant died before the enquiry was held. Affidavits had been filed, one of them by the clerk of the pleader. It would appear that according to these affidavits the facts are that the papers including the stamp for memorandum of appeal had been made over to the pleader on the 9th September and that the pleader had been under the impression that the appeal was not due to be filed till the 22nd September, but that at the instance of the appellant the appeal was filed at an earlier date, that is to say, on the 17th September. It is not disputed that if the pleader had been under a wrong apprehension about the date on which the appeal had to be filed and had given mistaken advice to his client, this would amount to sufficient cause within the meaning of S. 5, Limitation Act. But what is contended on behalf of the appellant before us is that the plaintiff, who is respondent before us, did not act on the pleader's advice because, if he had left the matter in the pleader's hand the appeal would have been filed on the 22nd September and not on the 17th September. It does not seem reasonable to say that because the plaintiff accelerated the filing of the

appeal he is to be blamed. If the facts had been otherwise and the pleader had wished to file the appeal on the 17th September, and the party had asked that it be filed on the 22nd, the party would have been to blame for the delay. As matters stand now it is not just or proper that the respondent before us should suffer for the pleader's mistake.

That is as regards the matter of propriety of the admission of the appeal. As regards the merits of the decree passed by the learned Judge it is urged that the learned Judge was wrong in giving to the respondent interest at the rate stipulated in handnote up to the date of realization. The way in which this matter is sought to be made a question of law is this: it is said that the grounds on which the learned Judge has given interest at this rate for the whole period up to the realization are erroneous. But what the learned Judge had said is this that the present appellant who was the defendant in the suit has caused much harrassment to the plaintiff who is now the respondent. It is urged on behalf of the appellant before us that the whole of the delay was caused by the plaintiff's mistake in filing his appeal one day beyond the time allowed by law. But this was not the only cause of delay in the disposal of this matter which has been before the Court from March 1919. What the learned Judge appears to have meant is that except for the delay in filing the appeal which is not due to any fault on the part of the plaintiff the rest of the delay was caused by the defendant. In any case the matter was one entirely within the Judge's discretion. It is not a matter to be interfered with in second appeal. The appeal is, therefore, dismissed with costs. The rule is discharged.

**Cuming, J.**—I agree.

J.V. *Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 830

PAGE AND GRAHAM, JJ.

*Berhampur Oil Mills, Ltd.*—Plaintiffs—Appellants.

v.

*Firm of S. B. Lahiri*—Defendants—Respondents.

Appeal No. 193 of 1926, Decided on 26th May 1927.

*Practice—Appeal Court can consider matters before it de novo both as regards law and fact—It should not interfere unless lower Court's decision is wrong.*

It is the duty of the Court of appeal to consider the matter before it both as regards law and fact de novo, but where there is a decision upon facts depending upon the credibility of witnesses, the appeal Court ought not to interfere with the decision arrived at unless it is satisfied that the decision which was reached in the lower Court was wrong. [P 831 C 1]

*Sarat Chandra Roy Chowdhury* and *Kali Kinkar Chakravarti*—for Appellants.

*Gunada Charan Sen, Pannalal Chatterjee* and *Jahnavi Charan Das Gupta*—Respondents.

**Judgment.**—This is an appeal from an order of the Subordinate Judge of Murshidabad returning the plaint in the suit to the plaintiffs for presentation to the proper Court, upon the ground that no part of the cause of action arose within the jurisdiction of the Subordinate Judge of Murshidabad. The question depended upon the facts which were proved. There were two witnesses called on behalf of the plaintiffs and one witness on behalf of the defendants and there was an entry in the plaintiffs' book which was also before the Court. Upon the evidence adduced before the learned Subordinate Judge he came to the conclusion that there was no agreement for payment of the purchase price at Berhampur, or that delivery should be taken having regard to the contract between the parties at Berhampur. It is upon those two grounds, which depend upon the evidence before the Court upon which the learned advocate on behalf of the appellants has strenuously urged that the trial Court had jurisdiction to entertain the suit. The learned Subordinate Judge has taken a strong view of the value of the evidence on the one side and on the other, after hearing witnesses, examined and cross-examined at great length.

The case now comes in appeal before us. We must ourselves consider whether we think that the decision was right or not, be the question one of law or one of fact. But whether the appeal Court is balanced or even if it is inclined to the view that the decision arrived at was not the decision at which the Court might itself have arrived if it was trying the case as one of first impression,

I do not think that the Court of appeal ought to interfere. It is the duty of the Court of appeal, as I understand the law, to consider the matter both as regards law and fact de novo but where there is a decision upon facts depending upon the credibility of witnesses I do not think that the appeal Court ought to interfere with the decision arrived at unless it is satisfied that the decision which was reached in the lower Court was wrong and although we have given very careful consideration both to the facts and to the exhaustive argument which has been presented to us, I am not myself satisfied that the decision of the lower Court was wrong. I regret that I am not satisfied, because it means that those parties will probably have to litigate their grievance (if it is open to them to do so) in another place, whereas the tribunal before whom this suit was brought was a satisfactory Court in which to settle their dispute. But although I do so with regret I feel compelled to say, having regard to the evidence in this case that I am not satisfied that the decision arrived at by the learned Subordinate Judge is wrong and, in my opinion, the appeal should be dismissed with costs, the hearing fee being assessed at three gold mohurs.

Let the plaint be returned to the plaintiffs forthwith.

J.V. *Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 831

PANTON AND CHAKRAVARTI, JJ.

*Srimati Charu Bala Dasi* and *others*—Defendants—Appellants.

v.

*Srimati Nihar Kumari Dasi* and *others*—Plaintiffs—Respondents.

Appeal No. 1513 of 1924, Decided on 24th August 1926, from the appellate decree of the Addl. Dist. Judge, Midnapore, D/- 27th March 1924.

***(a) Civil P. C., O. 41, R. 33 — Alternative prayers—One relief denied — Alternative relief should be given if findings by appellate Court justify it—Suit for declaration and recovery of possession or compensation—Decree for recovery of possession passed—Mesne profits also should be given.***

Rule 33 is primarily intended for a contingency like this when there are two alternative prayers made by the plaintiff he may be well satisfied with one of the reliefs obtained by him. But if on appeal that relief is denied to him in justice the plaintiff ought to be given the other alternative relief if the findings arrived at by the appellate Court justify such a decree; 22 *C. L. J.* 390, *Ref.* If the plaintiff is entitled to the alternative relief as prayed for in the plaint when a decree is made under O. 41, R. 33, the plaintiff should get all that he is entitled to under the judgment arrived at by the Court of appeal; for example, in a suit for declaration of title and recovery of possession or for recovery of compensation if the plaintiff is given a decree for recovery of possession, he is also entitled to mesne profits. [P 832 C 2]

***(b) Bengal Tenancy Act, S. 184 — Landlord and tenant—Limitation.***

Where the dispossession is not made by landlord the special rule of limitation has no application. [P 832 C 2]

*Amirendra Nath Bose* and *Sures Chandra Mukerji*—for Appellants.

*Gopendra Nath Dass* — for Respondents.

**Chakravarti, J.**—This is an appeal by defendants 3 to 8 and arises out of a suit for declaration of the plaintiff's title and for recovery of possession of certain land described in the schedule to the plaint with mesne profits. The facts shortly stated are these: Defendant 10 and one Surja were the owners of a jote consisting of 2 bighas 16 cottas of land. They sold it to defendant 9 on the 6th May 1910. Defendant 9 in his turn sold the land on the 11th December 1916, to the plaintiff with a condition that if the purchaser was ousted or otherwise deprived of the land the purchaser would be entitled to recover the amount paid as consideration with interest.

Defendants 3 to 8 contended that they were tenants of the land in suit, which formed, according to them, part of a tenure of 22 bighas odd. They further alleged that defendant 10 and Surja held the land under them. It was further alleged that defendant 10 and Surja held the land through defendants 1 and 2. The Court of first instance came to the conclusion that the plaintiff had failed to show that the land in suit formed a holding belonging to defendant 10 and Surja. He held that the land was really part of the tenancy set up by defendants 3 to 8. In that view the learned Munsif gave a decree to the

plaintiff for the recovery of the money under the condition in the conveyance to which I have already referred. This decree for money was made against defendant 9.

There was an appeal against that decree by defendant 9. In that appeal the plaintiff, as also the other defendants, were impleaded as respondents. The learned Additional District Judge who heard the appeal came to the conclusion that the land in suit really formed part of the holding which belonged to defendant 10 and Surja, and that it was in fact the holding of 2 bighas 16 cottas which was sold by defendant 10 and Surja to defendant 9 who also in his turn sold it to the plaintiff. The points which were urged on behalf of the defendant-appellant in the Court of the learned Additional District Judge were whether the land in suit formed the jote of 2 bighas 16 cottas and as such belonged to the plaintiff, whether the plaintiff's suit was barred by general or special law of limitation and to what mesne profits, if any, the plaintiff was entitled.

On the first point the lower appellate Court came to the conclusion, as I have stated, that the land in suit was really the land of the jote of 2 bighas 16 cottas and, therefore, the plaintiff had acquired a good title under his conveyance. The learned Additional District Judge further held that the suit was not barred by limitation. On these findings he reversed the decree of the learned Munsif and gave a decree to the plaintiff for the recovery of possession of the land in suit with mesne profits which he assessed at Rs. 68-14-6.

In appeal before us the learned advocate for the appellant has urged, first, that the learned Additional District Judge had no authority under O. 41, R. 33 to make a decree in favour of a plaintiff who had preferred no appeal against the decree of the first Court; secondly, that the suit was barred by the special law of limitation; and lastly that, at any rate the learned Additional District Judge ought not to have given any decree for mesne profits. As to the first point, it appears to us that the learned Additional District Judge was authorised under the provisions of O. 41, R. 33 to pass a decree on the findings arrived at by him in favour of the plaintiff who brought the suit with alternative prayer either for recovery of possession of the land in suit with mesne profits or if that fails for recovery of the compensation due under the condition in the conveyance, when the learned Judge found that the plaintiff was not entitled to the alternative prayer which was granted by the Court of first instance it was his duty to grant, if the findings justify, the other relief in order to adjust the rights of the parties in accordance with justice, equity and good conscience as was pointed out in the case of *Gangadhar Muradi* v. *Banabashi Padihari* (1). It appears to me that R. 33, O. 41, Civil P. C., is primarily intended for a contingency like this: when there are two alternative prayers made by the plaintiff he may be well satisfied with one of the reliefs obtained by him. But if on appeal that relief is denied to him in justice the plaintiff ought to be given the other alternative relief if the findings arrived at by the lower appellate Court justify such a decree. I think, therefore, the first point fails.

As regards the second point: it appears that there is a clear finding by the learned Additional District Judge that the dispossession was practically made by defendants 1 and 2 and not by landlord. That being so the special rule of limitation has no application.

As to the last point: it appears to me that if the plaintiff is entitled to the alternative relief as prayed for in the plaint, there is no reason why, when a decree is made under O. 41, R. 33, Civil P. C., the plaintiff should not get all that he is entitled to under the judgment arrived at by the Court of appeal below.

The result is that this appeal fails and is dismissed with costs.

**Panton**, J.—I agree.

R.D. *Appeal dismissed.*

(1) [1914] 22 C. L. J. 390=24 I. C. 208.

## A. I. R. 1927 Calcutta 833

CHAKRAVARTI, J.

*Durga Charan Sarkar*—Petitioner.

v.

*Bishnupada Sana* and *others*—Opposite Party.

Civil Rule No. 65 of 1926, Decided on 26th March 1926, against the order of the 2nd Addl. Dist. Judge, Howrah.

*Civil P. C., O. 21, R. 90—Application for setting aside sale under R. 90 and also on the ground under S. 173, Bengal Tenancy Act—Sale set aside under both provisions—Order setting aside sale is not appealable.—Bengal Tenancy Act, S. 173.*

Where an application for setting aside a sale is made on two grounds, first on the ground under the provisions of S. 173, Bengal Tenancy Act and also under O. 21, R. 90, Civil P. C., and the sale is set aside under the provisions of both, the order setting aside the sale is conclusive and an appeal against the order so far as it purports to be under R. 90, O. 21, is infructuous and an appeal against the order under R. 90, O. 21, should not be entertained, because the appellate Court can not give any relief to the appellant, although the order under O. 21, R. 90, might be erroneous. [P 834, C 1]

*Durga Charan Sircar* and *Narendra Nath Chowdhury*—for Petitioner.

*Rupendra Nath Mitter* and *Moni Lall Bhattacharjee*—for Opposite Party.

**Judgment.**—This rule arises out of an application made by the mortgagee a tenant judgment-debtor in a rent decree for setting aside a sale held on the 14th March 1916. The facts shortly stated are these: A holding belonging to one Gopinath Midday was mortgaged to the petitioner. During the subsistence of that mortgage, the landlord obtained a decree for rent against Gopinath and in execution of that decree brought the holding to sale, as stated above, on the 14th March 1916. The petitioner made an application for setting aside the sale under O. 21, R. 90, Civil P. C., and also under S. 173, Bengal Tenancy Act, on the 5th January 1925. The auction-purchaser opposed the application on the ground that the application was barred by limitation and that there was neither any fraud nor any irregularity in the conduct of the sale. The property was sold for adequate price and the purchase was made by the auction-purchaser for his own benefit and not for the benefit of the judgment-debtor as alleged by the petitioner. The learned munsif tried both the applications or rather the applications under both heads together. He found that the application was not barred by limitation and that so far as the case under O. 21, R. 90, was concerned, the sale was brought about by fraud and that processes were suppressed and not served and that the property was sold for inadequate price. As regards the application under S. 173, Bengal Tenancy Act, the learned Munsif also found that the decree obtained by the landlord was a sham and collusive transaction that the sale was really sham, that the judgment-debtor made the purchase in the name of the auction-purchaser and that the judgment-debtor had all along continued in possession. The learned Munsif in the course of his judgment, after stating that the sale was liable to be set aside under S. 173, Bengal Tenancy Act, in making the order, stated that the petition under O. 21, R. 90 was allowed and the sale set aside. The auction-purchaser preferred an appeal to the learned District Judge so far as the order of the Munsif setting aside the sale was concerned. It was pointed out on behalf of the petitioner before the learned District Judge that the order setting aside the sale so far as it was directed under S. 173, Bengal Tenancy Act, was conclusive and no appeal lay. But the learned District Judge overruled that objection and entertained the appeal on the ground that the order was made under O. 21 R. 90, and disagreeing with the Munsif as to matters which arise under O. 21, R. 90, set aside the order of the munsif. Against that order the present petition for revision was filed.

The learned vakil who appeared to show cause did not contend that when an order setting aside the sale is made, that order is conclusive and is not open to appeal. But he contended that the order setting aside the sale really was made under O. 21, R. 90, and that therefore the learned District Judge had jurisdiction to set aside the sale. It was further contended that so far as the question of limitation was concerned, that was a question common between the two branches of the application of the judgment-debtor. Therefore the application under S. 173, Bengal Tenancy Act, was barred by limitation. Reading the judgment of

the learned Munsif as a whole, it appears to me that he came to the findings upon which he held that the sale was liable to be set eside under S. 173, Bengal Tenancy Act. The learned Munsif further found facts upon which he held that the sale was liable to be set aside also under O. 21, R. 90. There cannot, therefore, be any doubt that the sale was set aside on both the grounds, although his order setting aside the sale was apparently made under O. 21, R. 90. That may be accounted for by the fact that the sale need not be set aside twice over. In fact the sale was set aside both under S. 173, Bengal Tenancy Act, and under O. 21, R. 90. So far as the order under S. 173, Bengal Tenancy Act, is concerned, it is conclusive ; and, therefore, the sale had been set aside and was not liable to be reviewed on appeal. Therefore, the learned District Judge, although he disagreed with the Munsif as to the effect of the evidence so far as it related to the proceedings under O. 21, R. 90, could not give any relief to the appellant before him, because the sale was also set aside by an order which was not open to appeal before him.

In the circumstances like the present where an application for setting aside a sale is made on two grounds, first on the ground under the provisions of S. 173, Bengal Tenancy Act, and also under O. 21, R. 90, and the sale is set aside under the provisions of both, the order setting aside the sale is conclusive and an appeal against the order. so far as it purports to be under R. 90, O. 21, is infructuous, and, in my opinion an appeal against the order under R. 90, O. 21, should not be entertained, because the appellate Court could not give any relief to the appellant, although the order under O. 21, R. 90 might be erroneous. I think, therefore, the order of the Munsif dated the 26th June 1925, setting aside the sale, is conclusive so far as it was made under S. 173, Bengal Tenancy Act, and was not liable to be set aside, because the application of the petitioner under O. 21, R. 90 was infructuous. On the whole, therefore, I think the order of the learned Munsif, dated the 26th June 1925 setting aside the sale should be restored.

The rule is accordingly made absolute. The petitioner will be entitled to costs of this rule which I assess at 2 gold mohurs. The order of the District Judge awarding costs to the parties is set aside but I make no order as to the costs of the proceedings before the District Judge. Costs will bear interest at the rate of 6 per cent. per annum from the date of the judgment of this Court until realization.

R.D. *Rule made absolute.*

---

## A. I. R. 1927 Calcutta 834

MUKERJI AND GRAHAM, JJ.

*Hem Chandra Dutta* and *others*—Appellants.

v.

*Uma Sadhan Mukhopadhya* and *others*—Respondents.

Appeal No. 34 of 1927, Decided on 31st May 1927, from the original order of the Addl. Dist. Judge, Howrah, D/- 12th January 1927.

(a) *Provincial Insolvency Act* (1920), *S.* 68—*Application for challenging act or decision of receiver—Grounds may be supplemented or amplified later on.*

Although the act or decision of the receiver must be challenged, if at all, by an application presented within 21 days from date of such act or decision, there is nothing in the Act to show that all the grounds upon which it is challenged must be stated in that application, or that the grounds mentioned therein may not be supplemented or amplified later on. [P 635 C 2]

(b) *Provincial Insolvency Act, Ss.* 4 *and* 5—*Title of insolvent, to property which is sold, in question—Sale—Purchaser is entitled to have the sale set aside and purchase money refunded to him.*

It is clearly the duty of the Insolvency Court, apart from any objections from the parties before it, to be satisfied as to the propriety of a judicial sale held in respect of the insolvent's estate.

In judicial sales it is incumbent on the Court to be scrupulous in the extreme and anything that may affect the bid has to be disclosed with all fairness and in sufficient detail. It is the clear duty of the Insolvency Court to apprise the intending bidders that the question of insolvent's title to the property is sub judice.

Where the purchasers are misled into purchasing a property, the title whereto is being questioned in a pending litigation of which they were kept in ignorance, the sale is liable to be set aside and the purchase money to be refunded : 36 *Cal.* 323 (*P. C.*), *Appl.* [P 636, C 1]

*B. C. Mitter* and *Chandra Sekhar*—for Appellants.

*Tarakeswar Pal Choudhury, Prokash Chandra Pakrashi, Gopendranath Das, S. N. Banerji, Santimoy Mazumdar, Uma Charan Laha* and *Jnan Chandra Roy*—for Respondents.

**Mukerji, J.**—This appeal has been preferred from an order passed by the Additional District Judge of Howrah in an insolvency case, by which the learned Judge has refused to set aside sale of a property which is alleged to belong to the insolvent, and he has directed the purchaser to deposit the purchase money in full within a week, failing which he has ordered the amount of deposit to be forfeited. The property in question is said to be a garden, consisting of 28 bighas of land including some paddy lands with a brickbuilt house standing thereon. It was under a mortgage in favour of one Mul Chand Baisya whose dues have come up to about Rs. 30,000, the principal amount secured by the mortgage being Rs. 15,000. It was put up to sale free from all incumbrances and the appellants purchased the same at the auction for Rs. 15,050 being the highest bidder therein. They deposited 25 per cent. of the bid, i. e., Rs. 3,672-8. The contesting respondent in the appeal is the mortgagee Mul Chand Baisya. The receiver has supported the appellant in this appeal.

The auction-sale was held on the 27th September 1926. On the 7th October 1926, the first application to set aside the sale was filed; it was based on the ground that there was a gross misrepresentation or misdescription in the handbills that were issued as in them the property was said to be a "big garden" 27½ bighas in area, while in point of fact about 20 bighas out of the land was paddy land. Another petition was filed later on the 24th November 1926, in which it was complained that the title-deeds of the property had not been made available for the inspection of intending purchasers, that the price of the property was much less, that it was not disclosed that litigation was pending in respect of the insolvent's title to the property and that there were no specifications as regards the real character of the insolvent's rights in the property. The receiver who was asked to report submitted his report on the 4th December 1926, into the details of which it is not necessary to enter. Shortly stated, it recommended an order for the setting aside of the sale.

The learned Judge has refused to set aside the sale and has passed the order to which we have referred. Several objections in the nature of objections in limini have been urged on behalf of the contesting respondent. The first is to the effect that the purchase was made by 3 persons jointly, while the application for setting aside the sale filed on the 7th October 1926, was on behalf of only one of them, namely, Nitai Chand Addy and on the basis of that application the proceedings were not competent. The real position is that Nitai Chand Addy bid at the sale. He disclosed that he was making the purchase on behalf of himself and the other two. He made the deposit, and it may also be mentioned that all the three persons are the appellants in this appeal. This objection, in our opinion, has no substance.

The next objection is that the proceedings should in view of S. 5, sub-S. (1), Act (5 of 1920) have been as in suits, and that, therefore, they should not have been started except on a verified petition and evidence also should have been taken. This is a more substantial objection, and unless we are able to dispose of the matter on facts about which there can possibly be no controversy we must have to remand the case to the Court below to proceed more regularly. The third objection is that having regard to the proviso to S. 68 of the Act the petition of the purchasers filed on the 24th November 1925, cannot be entertained. With this we do not agree, because, though the act or decision of the receiver must be challenged, if at all, by an application presented within 21 days from date of such act or decision, there is nothing in the Act to show that all the grounds upon which it is challenged must be stated in that application, or that the grounds mentioned therein may not be supplemented or amplified later on. The last objection is that what was complained of was not really the act or decision of the receiver, but that of the Court itself, because in the present case the sale was held by the Court. In our opinion it is possible to take the view that the auction was held by the receiver, though under the direction and supervision of the Court and even if an appeal did not lie to the Judge under S. 63 of the Act, the order passed by him is appealable under S. 75, sub-S. (3), the requisite leave having been obtained.

On the merits of the appeal the first thing that we desire to say is that we do not feel pressed by the appellant's objection as regards the lands being paddy lands. We think the appellants had sufficient notice of that fact. The findings of the learned Judge as to this matter are clear. It is somewhat curious that the learned Judge did not deal with the other allegations that are contained in the petition of the 24th November 1926, and the matters that arise upon the report of the receiver dated the 4th December 1926. We think the learned Judge should have dealt with them, as it is clearly the duty of the Insolvency Court, apart from any objections from the parties before it, to be satisfied as to the propriety of a judicial sale held in respect of the insolvent's estate. So far as these matters are concerned the one thing that, in our opinion, is sufficient to condemn the sale is the fact that the transfer made by the insolvent in favour of one Nirapada, the validity of which was decided against the claimant Nirapada by the Judge, but as regards which an appeal was pending in this Court at the time of the sale, was not disclosed in the handbills or in the conditions of sale. It may be that the appeal is a frivolous one and that it will not succeed, but it was the clear duty of the Court to apprise the intending bidders that the question of insolvent's title to the property was sub judice. In judicial sales it is incumbent on the Court to be scrupulous in the extreme and anything that may affect the bid has to be disclosed with all fairness and in sufficient detail. The principles relating to this matter are now well settled [see *Mahomed Kala Mea* v. *Harperink* (1)]. We think the appellants may justly complain that they have been misled into purchasing a property the title whereto is being questioned in a pending litigation of which they were kept in ignorance.

The appeal, in our opinion, should succeed. The order of the learned Judge from which the appeal has been preferred is set aside and the deposit money should be refunded to the appellant. There will be no order for costs in these proceedings either in this Court or in the Court below.

(1)[1909] 36 Cal. 323 = 1 I. C. 122=36 I. A. 32 (P. C.).

The rule is discharged. No order to costs.

**Graham, J.**—I agree.

R.D. *Appeal allowed.*

---

## A. I. R. 1927 Calcutta 836

B. B. GHOSE AND ROY, JJ.

*Solema Bibi* and *others*—Appellants.

v.

*Hafez Mahammad Hossein* and *others*—Respondents.

Appeals Nos. 77 and 116 of 1925, Decided on 15th February 1927, from the original decree of the Sub-Judge. Dacca, D/- 3rd January 1925.

(a) *Transfer of Property Act, S. 53—Taking security from other persons jointly with debtor does not render the transaction a fraudulent one.*

If the creditor having a real demand against his debtor takes security from other persons jointly with the debtor for his debt, that cannot be considered as a fraudulent transaction on any ground whatsoever. [P 839, C 2]

(b) *Transfer of Property Act, S. 53—Scope.*

What S. 53 invalidates is a transfer which removes the whole or a part of the debtor's property from the creditors as a body to the benefit of the debtor : *A. I. R.* 1915 *P. C.* 115, *Foll.* [P 839, C 2 ; P 840, C 1]

(c) *Transfer of Property Act, S. 98—Mortgage anomalous—Construction.*

Where an anomalous mortgage provided thus : "We shall pay off your said amount within three years from to-day. But if in the meantime a third party brings any suit against us or any one of us and attaches or endeavours to bring into auction or brings into auction any property of us, then without waiting for the due date you shall forthwith bring a suit for foreclosure of this kot kobala and having got a decree shall be owners of the properties mentioned in the schedule below" and so forth :

*Held*: that the mortgagee was entitled to enforce the contract by bringing the suit for foreclosure, on attachment by other creditors within three years. [P 840, C 1]

(d) *Mahomedan Law—There is no such thing as family trading partnership—Partnership of two Mahomedan brothers is governed by contract—Ordinarily it terminates on death of one of them—Contract Act, S. 253 (10).*

Under Mahomedan Law, there is no such thing as a family trading partnership as under Hindu Law and any partnership transaction between two Mahomedan brothers must be governed by the contract between the parties as regards the partnership. Ordinarily the partnership terminates on the death of one of the partners unless there is evidence to the contrary. [P 840, C 1]

(e) *Partnership—Assets.*

Money or property given away does not continue to be the assets of the firm when it is given over to a third party. [P 842 C 1]

(f) *Guardians and Wards Act, S. 30—Managing partner also appointed guardian of minor partners under the Act — Mortgage by such partner without District Judge's sanction can be invalidated by minors.*

Where a managing partner of a firm is also appointed guardian of minor partners under the Act, his powers must be exercised in accordance with the provisions of the Act and therefore a mortgage of the minor's properties effected without the sanction of the District Judge can be invalidated at the instance of the minors or the person interested under S. 30. [P 842 C 1]

(g) *Power of attorney—Must be strictly construed—No express power to mortgage in am-mukhtearnama—It cannot be construed to give such power.*

Power of attorneys must be strictly construed. Where am-mukhtearnama confered the power on the agent to borrow any money for any purpose and do any other work as necessity arises :

*Held* : that as no express power to mortgage had been given, it was difficult to say that the terms of the am-mukhtearnama can be construed into a power for giving a mortgage. 7 *Cal.* 253 ; 10 *Cal.* 901 (*P. C.*) *Foll.* [P 842 C 2]

(h) *Practice—Appeal—New plea cannot be raised.*

Where a case was fought out on the footing that the properties belonged to all the ostensible mortgagors and all the mortgagors were bound by the mortgage, the position, that if all the mortgagors are not found to be bound by the mortgage it should be decided that some of the properties included in the mortgage do not belong to all of the mortgagors, cannot be allowed to be raised for the first time in appeal. [P 842 C 2]

*Charu Chandra Biswas, Prafulla Chandra Chakravarti, Sircar* and *Durga Charan Roy Choudhury*—for Appellants.

*S. C. Basak* and *Asita Ranjan Ghose, Prabodh Kumar Das, Panchanan Ghosal. Shyamadas Bhattacharjee* and *Jyoti Nath Ghose*—for Respondents.

**B. B. Ghose, J.**—These two appeals arise out of one decree made by the Subordinate Judge for foreclosure of a mortgage, alleged to be by conditional sale by the plaintiff. There were three sets of defendants in the Court below. There were two brothers named Akbar Khan and Amanat Khan. Both of them are dead. The defendants 1 to 9 are the representatives in interest of Akbar Khan. The defendants 10 to 18 are the legal representatives of Amanat Khan. The defendants 19, 20 and 21 are three firms of Marwaris, who may be described as the Marwari defendants, who were made defendants on the ground that they had attached certain of the mortgaged properties for debts alleged to have been due from the mortgagors. The mortgage is dated the 18th March 1921 and it purported to have been made by Akbar Khan for himself and as am-mukhtear for Solema Bibi, defendant 10, the widow of Amanat Khan, and also as am-mukhtear for Rohima Bibi, the adult daughter of Amanat, and as guardian on behalf of the minor sons and daughters of Amanat named Soleman Khan. Rahamat Khan, Sarifatennessa, Shamedanessa and Hamidanessa. It also purported to have been executed by Md. Nainuddi, the adult son of Amanat, and by Asrabannessa, the adult daughter of Amanat. Amanat died on the 8th December 1909 and Akbar died on the 8th October 1921.

Appeal No. 77 is by defendant 10, the widow of Amanat, and defendants 13, 15, 16, 17 and 18, the sons and daughters of Amanat. The defendant 13 is Asrabannessa who had attained majority at the time of the mortgage and who is said to have herself executed the bond. The other sons and daughters who have appealed were as already stated infants at the time of the execution of the bond. The adult son of Amanat, called Naimuddi, was defendant 12 in the Court below. He has not preferred any appeal. Appeal 116 is by defendants 19, 20 and 21, the attaching creditors of the mortgage properties.

The case of the plaintiff is that the two brothers Akbar Khan and Amanat Khan carried on a trading business and with regard to that business they had dealings in money with the plaintiff, who acted as their commission agent and aratdar in connexion with that business. After the death of Amanat the old business continued and the heirs of Amanat continued as partners with Akbar in the business, and that after taking accounts of the dues of the plaintiff it was found that the plaintiff was entitled to get Rs. 29,074-14 annas from the defendants, and in consideration of that debt the mortgage bond already mentioned was executed in his favour, and as defendants 19, 20 and 21 had attached some of the properties they were joined as defendants in the suit. The plaintiff asked for a decree for foreclosure according to the terms of the bond, as they were entitled to sue for foreclosure on any attachment

being made of the properties mortgaged by any person. Various defences were raised to this suit by the contesting defendants in the Court below. It is unnecessary to mention now all these. The points that were taken in appeal against the judgment of the Subordinate Judge will be stated later on. The Subordinate Judge found for the plaintiff and made a preliminary decree for foreclosure allowing the defendants two months' time from the date of the decree for repayment.

The points taken in appeal in both the cases are the same with slight variations. The points taken in the appeal of the Marwari defendants in Appeal 116 are these: First, that the mortgage bond of 1921 in favour of the plaintiff was not an honest transaction, but was intended to defeat and delay the creditors of the mortgagors, and so was vitiated under the provisions of S. 53, Transfer of Property Act. The second point taken is that on a proper construction of the mortgage bond it would appear that it was not a mortgage by conditional sale as defined in the Transfer of Property Act. According to the terms of the bond three years' time was given to the debtors for redemption. The plaintiffs having sued for foreclosure before the expiry of the three years, the time fixed for repayment of the mortgage money, the suit is premature and should be dismissed on that ground. The third point is that the plaintiff is under no circumstances entitled to any decree on this document, for foreclosure regarding the property belonging to any person except the heirs of Akbar and Naimuddin Khan, and the shares of the other defendants cannot be made liable.

The appellants in Appeal 77 do not rely much upon the first point because it is not their case that they were parties in the intention to defraud any creditors. Their case principally is that they are not liable under the bond having regard to the facts of the case. The Subordinate Judge held that the bond was not vitiated under the provisions of S. 53, Transfer of Property Act. He also held that it was a mortgage by conditional sale and the plaintiff was entitled to a decree for foreclosure, and that under the circumstances stated in the bond he was entitled to maintain the suit at the time when it was brought. With regard to the third point the Subordinate Judge held that the power of attorney executed by Solema Bibi and Rohima Bibi did not confer any power on Akbar to mortgage their interest in any property and therefore those persons are not bound by the execution of the mortgage made by Akbar as am-mukhtear on their behalf. He also held that Akbar could not, as guardian of the infant heirs of Amanat, execute the mortgage of their share of the properties. Akbar was appointed guardian under the Guardians and Wards Act by the District Judge by an order dated 16th March 1911, and as he had not taken the sanction of the District Judge for creating a mortgage the infants or any person interested in the property were entitled to avoid the mortgage. The Subordinate Judge also held that the deed was not properly executed by Asrabannessa, the adult daughter of Amanat. But the Subordinate Judge held that the two brothers Akbar and Amanat jointly carried on a trading partnership, and after the death of Amanat the heirs of Amanat continued to remain as partners with Akbar in the business. As Akbar was the managing partner of the trading business he was entitled to effect the mortgage and the properties being partnership properties the mortgage is binding on all the partners including the infants, and a foreclosure decree can therefore be made on the bond in suit.

I will now take the objections urged on behalf of the appellants in the order in which they have been placed before us. It is urged in the first place on behalf of the Marwari defendants that Akbar and Amanat carried on business in stationery and other articles and it was long after the death of Amanat that Akbar began the trade in hides, and that these were two businesses thus continued between the plaintiff and Akbar and the sum of Rs. 29,000 odd, if it was at all due to the plaintiff, was only due from Akbar. It was further urged that the amount of Rs. 29,000 and odd was not at all due, because the accounts filed by the plaintiff show that before the end of 1325 all debts with regard to the Dhubri account with the firm of the plaintiff was closed. But at the end of 1325 it appears that Rs. 10,173 was due to the plaintiff on account of the Dhubri Mokam. It is said that this was advanced

in cash received by Akbar himself and for his personal benefit. This was, therefore, a personal debt of Akbar for which the partnership business was not at all liable.

It is further urged that the circumstances under which the bond was executed also show that it was not a bona fide transaction. It is pointed out that the Marwaris began pressing the debtors for their money from December 1920. They were being put off by promises of payment and were entreated not to bring their suit. This was done by Akbar and Naimuddi. Even after the date of the kot kabala Akbar had written to a third party that the deed was executed with the object of facilitating the payment of the debt due to the Marwaris and asking them not to be anxious. The plaintiff knew about the indebtedness of the debtors to others and being neighbours, he was consulted by the debtors about their affairs. The provision in the mortgage bond that the plaintiff would be entitled to sue for foreclosure as soon as there was attachment of the property was for the benefit of the debtors. It is further urged that it is quite clear from the circumstances that the plaintiff and Akbar were acting in concert to defeat other creditors of Akbar, and it is also urged that, as the evidence shows that there were two businesses and the heirs of the deceased brother Amanat can under no circumstances be made liable for the entire debt to the plaintiff, the bond making all of them equally liable is not bona fide, specially as the plaintiff knew about the involved circumstances of the debtors. One other fact is shown, that on a particular date that is the 23rd January 1921, all the skins that there were in the godown of the plaintiff belonging to Akbar were sold off, for Rs. 20,000 odd. These things according to the appellants' contention lead to the conclusion that this was a fraudulent transfer falling within the provisions of S. 53, Transfer of Property Act.

In my opinion it has not been shown that the debt to the plaintiff did not amount to Rs. 29,000 odd, or that there was any stipulation in the bond that may be construed as being for the benefit of the debtors. It is quite true that the plaintiff knew that the debtors were in involved circumstances, otherwise they would not have been anxious to obtain security for their debt. It might also be assumed that the heirs of Amanat could not be made liable for the entire debt. Whether those persons are at all liable or not will be considered later on. In my opinion, however, if the creditor having a real demand against his debtor takes security from other persons jointly with the debtor for his debt, that cannot be considered as a fraudulent transaction on any ground whatsoever. Another ground is taken that the bond mortgaged all the properties of the debtors. It is pointed out that Akbar had executed a hiba-bil-ewaz in favour of his wife on the 30th December 1920, and the evidence on which the Subordinate Judge relies for his conclusion that the debtors had other valuable properties does not support his conclusion. For example, the plaintiff in his deposition says that there were other properties belonging to the debtors, but the Dacca properties mentioned were given away to the wife previously. The evidence of Yakub Meah also does not show that there was any property of any value remaining to the debtors apart from those mortgaged. Rahaman's evidences on which the Subordinate Judge relies does not support the inference that there are any other properties of any value. But conceding all that, I do not think that the Subordinate Judge is wrong in holding that the transaction is not vitiated under the provisions of the Transfer of Property Act. The law on the subject is settled by the decision of the Judicial Committee in *Musahar Sah* v. *Lala Hakim Lal* (1). Their Lordships quoted with approval in that judgment the following observations of Palles, C. B. :

> Now it follows from this that security given by a debtor to one creditor upon a portion of or upon all his property (although the effect of it or even the interest of the debtor in making it may be to defeat an expected execution of another creditor) is not fraud within the statute because notwithstanding such an act the entire property remains available for the creditor or some one of them, and as the statute gives no right to rateable distribution the right of the creditors by such act is not invaded or affected.

That case further lays down that what S. 53, Transfer of Property Act, invalidates is a transfer which removes the whole or a part of the debtor's pro-

(1) A. I. R. 1915 P. C. 115=43 Cal. 521=43 I. A. 104 (P. C.).

perty from the creditors as a body to the benefit of the debtor. In this case there is nothing which shows that there was anything to the benefit of the debtor in the transaction and if the plaintiff was a vigilant creditor and had taken security for his debt, the transaction cannot be vitiated as a fraudulent conveyance. The first argument, therefore, urged on behalf of the appellants must fail.

With regard to the second question that the document is not one of conditional sale properly so called, the learned advocate appearing for the respondent concedes that it is not a document of conditional sale as defined under S. 58, Transfer Property Act, but the document is a mortgage all the same and it is an anomalous mortgage referred to in S. 98 of the Transfer of Property Act. That being so, the rights and liabilities of the parties should be determined by their contract as evidenced in the mortgage deed in the terms of that section. In the bond it was provided thus:

> We shall pay off your said amount within three years from to-day. But if in the meantime a third party brings any suit against us or any one of us and attaches or endeavours to bring into auction or brings into auction any property of us then without waiting for the due date you shall forthwith bring a suit for foreclosure of this kot kobala and having got a decree shall be owners of the properties mentioned in the schedule below,

and so forth. This circumstance has happened on the Marwari defendants having attached the properties mortgaged by the bond, and the plaintiff is therefore entitled to enforce the contract by bringing the suit for foreclosure. The second argument therefore also fails.

The third point seems to me to be the most important point for decision in the case, and both sets of appellants strongly urge that point against the decision of the Subordinate Judge. It must first be observed that it is not a Hindu family trading partnership which is governed by the Hindu Law. The parties are Mahomedans, and any partnership transaction between two Mahomedan brothers must be governed by the contract between the parties as regards the partnership. This proposition is not contested on behalf of the respondent. Ordinarily the partnership terminates on the death of one of the partners and the contention of the appellants is that on the death of Amanat the partnership business that was carried on between him and Akbar terminated. It is, however, contended on behalf of the respondent that the course of dealings of the heirs of Amanat shows that there must have been a contract to the contrary as mentioned in S. 253, Indian Contract Act, that the partnership would not be dissolved by the death of one of the partners, that is, Akbar or Amanat. The appellants contended that there is no such evidence while the respondent relies upon some oral evidence as well as the statement contained in the amamukhtearnama executed by the two ladies, Solema Bibi and Rohima Bibi, in support of his contention that the partnership continued after the death of Amanat. The evidence on which the respondent relies, contained in the statement of the witness Fatik Chandra De Sarkar, who was examined as a witness for the Marwari defendants. The appellants in appeal 77 object to this evidence being used as against them. Their contention is that the case of the Marwari defendants is different from their case. The Marwari defendants are interested in showing that there was some joint karbar of which Akbar and the heirs of Amanat were partners. But their case is that after the death of Amanat they had nothing to do with any partnership business with Aktar. (After considering evidence his Lordproceeded.) It is quite clear that the sons of Amanat did not continue to be partners after the death of Amanat. Therefore no inference can be made from the course of dealings with regard to the partnership that there was a contract to the contrary with regard to the provisions of sub-S. (10) of S. 253, Contract Act. Further, nothing has been shown from the accounts of the business either of the plaintiff or that of Akbar that any of the heirs of Amanat had obtained any share of the profits of the partnership business. An observation has been made by the Subordinate Judge in his judgment as regards the account books of the partnership business. The Subordinate Judge observes in his judgment:

> I consider the allegation of defendants 10, 15 and 18 to the effect that some khatas were taken away by the plaintiff and Naimuddi recently from the custody of defendant 10 to be unworthy of credit.

The Subordinate Judge seems to have overlooked the fact that these khatas about which the witness spoke were khatas of the joint business during the life-time of Amanat. The production of those khatas would not in any way assist us in the decision of the question in controversy between the parties as to whether there was any partnership continuing between the heirs of Amanat and Akbar after the death of Amanat.

The documentary evidence with regard to the question of the partnership continuing after the death of Amanat on which the respondent relies is the am-muktearnama executed by the two ladies, Solema Bibi, the widow of Amanat, and Rohima Bibi, the daughter of Amanat, dated the 30th July 1910. The passage on which reliance is placed runs thus :

> Appoint an am-mukhtear with full or partial powers for looking after and managing property of our joint tejarati business and do any other work for our benefit as necessity arises."

It is argued by the learned advocate for the respondent that the words "tejarati business" does not bear the common meaning of the word as "money-lending," but it means "trade" as that is the sense in which the word is locally used. There is no evidence in support of the word being used in that sense in this document. But assuming that it was so, the question is whether the lady, Solema Bibi, herself used the word in that sense. We must take this expression in connexion with her own evidence. She says that she had executed a hukumnama for the collection of all outstanding debts of the firm ; and she further says that that hukumnama was not read over to her. In order to establish that these illiterate ladies entered into a partnership with Akbar more positive evidence should have been brought forward. It might very well be, even assuming that the meaning given by the learned advocate for the respondent is the right meaning, that this document was executed for the purpose of enabling Akbar to realize the outstanding debts of the firm and cannot be construed as meaning that the ladies ,entered into a partnership with Akbar.

It is next contended that the partnership transaction was carried on for the benefit of Amanat's heirs, and under the provisions of S. 247, Contract Act, the infants would be liable to the extent of the property of the firm for the obligation of the firm ; and it is further argued that under S. 251, Contract Act, Akbar, as partner of the firm, can bind his co-partners by executing this mortgage as it was for the purpose of carrying on the business of the partnership. It is contended by Mr. Biswas on behalf of the appellant in appeal 77, that this mortgage was not for the purpose of carrying on the business of the partnership and therefore would not under any circumstance be binding on the minors or the adult persons, who have not been found to have been a party to the mortgage. But that contention seems hardly to be right. A valid mortgage by one partner of the partnership property may be made in order to secure a partnership debt. The authority for this proposition may be found in the case of *Jugjeewan Das* v. *Ramdas* (2). The question, however, in this case is, were the minors admitted to the benefit of any partnership ? and the second question is, are the properties mortgaged the properties of the firm ? There is nothing on the record to show that the minors were admitted to the benefits of the partnership. If that is so, S. 247, Indian Contract Act, has no application to the present case, and I have already stated that there is nothing to show that the adult heirs of Amanat had anything to do with the partnership business as alleged.

The next question is whether these are properties of the firm. There is no evidence on the record as to the source of the purchase money of the properties mortgaged. It is contended by the learned advocate for the respondent that it can be shown from the fact that certain properties were included in the application for guardianship made by Akbar on the 15th August 1910, on which he was appointed guardian of the infant of Amanat. In that application in the schedule certain properties have been described as belonging to the late Haji Amanat Khan, and his contention is that comparing the schedule of that application with the schedule of the mortgage bond, the properties which are outside the schedule of the application but included in the mortgage bond must be

(2) [1841] 2 M. I. A. 487=6 W. R. P. C. 10 (P.C.).

considered to be partnership property liable for the debt of the plaintiff.

But the difficulty in accepting that proposition is that the petition made by Akbar cannot be taken as a true and exact enumeration of all the properties left by Amanat. It was an application made by Akbar, whose interest might have been to show that Amanat had not left any considerable property both for his own benefit in future and also with reference to the amount of security he would have to furnish for being appointed guardian of those infants. Besides, even assuming that that was a correct list of the properties left by Amanat, it cannot properly be said that the purchase money with regard to the properties subsequently acquired came from the partnership firm. Further, having regard to the findings I have already arrived at, that the heirs of Amanat did not carry on any partnership business with Akbar even if Akbar took money from his trading business and gave the heirs of Amanat a title to any property purchased by him from such profits of the business, the interest of the heirs of Amanat cannot be treated as property belonging to the firm or in other words, money or property given away does not continue to be the assets of the firm when it is given over to a third party. Solema Bibi, however, gives evidence that the properties were inherited from her father-in-law and there is nothing to show that it is not true. One other point was urged on behalf of the appellants and it is this: that assuming that Akbar had the power to mortgage those properties as partner of the firm, but having been appointed guardian under the Guardians and Wards Act his powers must be exercised in accordance with the provisions of the Act. The authority for this proposition is the case of *Bhupendro* v. *Nemye* (3). The mortgage was effected without the sanction of the District Judge. It can, therefore, be invalidated at the instance of the infant or the persons interested, under S. 30, Guardians and Wards Act. That is a sound contention.

A contention has been made on behalf of the respondent in support of the decree of the Subordinate Judge that under the am-mukhtearnama of the two ladies Solema Bibi and Rohima Bibi, Akbar was empowered to effect a mortgage with regard to their share of the property. The Subordinate Judge, as I have already stated, has found against the plaintiff on that point. The argument of the learned advocate is that as the document confers the power on the agent to borrow any money for any purpose and do any other work for their benefit as necessity arises, it confers the right to effect a mortgage. It is well settled that these powers must be strictly construed. In addition to the case cited by the Subordinate Judge the authority for the proposition, that the powers should be strictly construed, will be found in the cases of *Poorna Chunder* v. *Prosunno* (4) and *Jonmenjoy* v. *Watson* (5), and various other cases. No express power to mortgage has been given and it is difficult to say that the terms of the am-mukhtearnama can be construed into a power for giving a mortgage.

On all these findings the result must be this, that by the mortgage bond, dated the 18th March 1921, the shares of Akbar Khan and Nainuddi Khan only must be considered to have been properly mortgaged. I ought here to mention that it is contended by the learned advocate for the respondent that the properties outside the application for guardianship made by Akbar in 1910 do not belong to the heirs of Amanat, and he says that the title deeds of all the properties mortgaged have been given to the plaintiff many of which show that the properties were acquired after the death of Amanat and stand in the name of Akbar. This is a point which the plaintiff never raised in the Court below. The case was fought out on the footing that the properties belonged to all the ostensible mortgagors and all the mortgagors were bound by the mortgage. In this Court the plaintiff cannot take up the position that if all the mortgagors are not found to be bound by the mortgage it should be decided that some of the properties included in the mortgage do not belong to all of the mortgagors. Such a contention cannot be allowed to be raised for the first time in appeal.

The judgment and decree of the Subordinate Judge must therefore be varied in this way : that the decree for fore-

(3) [1888] 15 Cal. 627.

(4) [1881] 7 Cal. 253=8 C. L. R. 443.
(5) [1884] 10 Cal. 901=11 I. A. 94=4 Sar. 523 (P. C.).

closure should be made with regard to the shares in the properties mortgaged belonging to the heirs of Akbar and Naimuddi, that is to say, the half share belonging to Akbar originally and now belonging to his heirs and the share of Naimuddi which is 7/88ths of the whole property. The result, therefore, is that the decree for foreclosure should be made with regard to 51/88ths share of the properties in suit. The period of redemption is extended to two months from this date.

The appellants in appeal 77 are entitled to their costs in this Court as well as in the Court below. In appeal 116 the plaintiff respondent will be entitled to half his costs in the Court below which will be added to his mortgage money. He will also get half his costs in this Court from the appellants defendants 19, 20 and 21. The defendants 19, 20 and 21 will get half of their costs in the Court below from the plaintiff and also half of their costs in this Court from the plaintiff. One set of hearing fee for the appellants in appeal 116.

**Roy, J.**—I should like to add a few words. It seems to me also that the fallacy underlying the Subordinate Judge's judgment is that he applied the considerations which would attach to a joint Hindu family business to the present case where the family is Mahomedan. The partnership business of Akbar and Amanat came to an end on the death of Amanat. There is nothing in the conduct of the heirs of Amanat to show that they agreed to continue the joint business. Akbar was appointed guardian of the minor children of Amanat by the District Judge. It is to be noted that he did not inform the Judge that he would carry on the business on behalf of the minors. In the schedule of the properties he submitted to the Judge he merely mentioned the amount of capital which would fall to the share of the minors. He asked for no direction from the Judge in respect of this business. Naimuddi, the stepson of Solema Bibi, was a minor at the time, but he seems to have joined Akbar later on when he attained majority. His case is different and he himself was a signatory to the kot kobala. It cannot be said that because Akbar constituted himself the managing partner he continued to represent the other minors. As to Solema Bibi, the widow of Amanat and Rohima Bibi, the adult daughter of Amanat, who gave an am-mukhtearnama to Akbar, their contention was that they gave him power to realize the outstanding dues that would fall to their share on the death of Amanat. The circumstances of the case are susceptible of an inference of that kind. The plaintiff has not produced any evidence to show that these minors or these ladies participated in the profits of the business after Amanat's death, or took any steps which would give rise to the inference that they were partners in the alleged joint business.

The learned Advocate appearing for the plaintiff refers to the evidence of a certain gomastha or karmachari to the effect that after Amanat's death Amanat's heirs became also maliks or that the joint karbar continued. As a matter of fact some of these witnesses are forced to adm it or admitted willingly, that they cannot say who were the actual maliks of the business. The evidence produced is not enough. An inference was sought to be drawn from the fact that Solema Bibi, the widow of Amanat, did not produce certain account books. It appears that when giving her deposition she was only asked about books of the time when her husband was alive. It is not clear how she could have account books of Akbar after Amanat's death. No inference like what the Subordinate Judge has drawn, and in my opinion wrongly, can be drawn against Solema Bibi in respect of the business. There was some controversy as to whether Akbar had also a separate business in addition to the alleged joint business. At any rate this much is clear that from 1322 Akbar was the only person shown in the plaintiff's books. I do not think that the plaintiff can be allowed now to say that Amanat's heirs are also liable. The learned advocate appearing for the plaintiff sought to fix the liability on some of the properties on the ground that they were bought with the profits of the joint business. For this argument he relied on the fact that there were more properties in the kot kobala than in the application for guardianship which Akbar made on the death of Amanat, his elder brother. On this slender material we cannot make the violent inference that the properties, if they were purchased by Amanat's heirs, were pur-

chased from the profits of the joint business. The evidence to my mind is wholly insufficient to bind the heirs of Amanat except of course Nainuddi.

I, therefore, agree with the conclusion arrived at by my learned brother.

R.D. *Decree varied.*

---

## A. I. R. 1927 Calcutta 844

PANTON AND MULLIK, JJ.

*Midnapore Zemindary Co.*—Petitioners.

v.

*Naresh Narain Roy*—Opposite party.

Civ, Rules. Nos. 718 and 719 of 1926, Decided on 25th February 1927, against the order of the Sub-Judge, Nadia, D/- 30th April 1926.

*Civil P. C., O, 22, R. 10—Order for adding parties—Proper remedy of party dissatisfied is to appeal under O. 43, R. 1 (l) and not under S. 115.*

Where in the case of devolution of an interest during the pendency of a suit the Court orders addition of parties under O. 22, R. 10, the proper remedy of the party dissatisfied with such order is to prefer an appeal under O. 43, R. 1 (*l*) and not to invoke the aid of S. 115. [P 844, C 2]

*Narendra Kumar Basu* and *Pasupati Ghosh* for *Prabodh Kumar Das* and *Jogesh Chandra Bose*—for Petitioners.

*Bireswar Bagchi* and *Rabindranath Chowdhury*—for Opposite Party.

*Birajmohan Mojumdar*—for Deputy Registrar.

**Mullik J.**—These two rules are directed against two orders, dated the 30th April 1926, of the Subordinate Judge of Nadia, by which certain persons, Bhowmiks and Chowdhuries, were added as party-defendants in suit. It appears that as early as 1912, one Kumar Naresh Narain Roy instituted a suit numbered 557 of 1912 for partition of his 5 annas odd share in three mehals, mehal 814 (with which was incorporated mehal 3514), mehal 815 and mehal 3587 and it appears also that, at the time when the suit was instituted, the Midnapore Zemindary Company were, besides the plaintiffs, the only other proprietors in mehals 815 and 3587. This partition suit was fought up to the Privy Council and the plaintiff ultimately obtained a preliminary decree for partition. After the preliminary decree, but before the final decree in the partition suit was made, the Bhowmiks and the Chowdhuries acquired the interest which the Midnapore Zemindary Company had in mehals 815 and 3587 and they applied before the learned Subordinate Judge to be added as party-defendants. Their applications were granted and the learned Subordinate Judge made the orders which are complained of now and against which the present rules were obtained.

A preliminary objection was taken before us on behalf of the opposite party that the petitions of the Midnapore Zemindary Company are incompetent. This objection in our opinion is well founded. From what I have stated above, it would appear that the Bhowmiks and the Chowdhuries have acquired a certain interest which the Midnapore Zemindary Company had in mehals 815 and 3587 (which also formed the subject matters of the partition suit) and this interest the Bhowmiks and the Chowdhuries acquired after the preliminary decree for partition had been made but before any final decree was passed. That being so, the case was clearly one of devolution of an interest during the pendency of a suit and the orders, which the learned Subordinate Judge made on the 30th April 1926, were orders under O. 22, R. 10, Civil P. C. If the Midnapore Zemindary Company had any cause to be dissatisfied with those orders, their remedy lay in preferring an appeal under O, 43, R. 1, Cl. (l) and not by invoking as they have done, the aid of S. 115 of the Code.

On the merits also the petitions of the Midnapore Zemindary Company do not stand on any better footing. The suit was for partition of the plaintiff's share in three mehals. It is undisputed that the lands in all these mehals are identical and it could not be denied that the Bhowmiks and the Chowdhuries had acquired certain interest in two of these mehals which at one time belonged to the Midnapore Zemindary Company. These being the circumstances, the preliminary decree for partition could not, in our opinion, be given effect to unless the Bhowmiks and the Chowdhuries were brought in as parties. It was said that the inclusion of the Bhowmiks and the Chowdhuries at such a late stage of the case would be prejudicial to the Midnapore Zemindary Company. But

it is to be observed that the interest which the Bhowmiks and the Chowdhuries have acquired in the two mehals was no other than the interest which the Zemindary Company themselves had in them. It is to be noted also that the Midnapore Zemindary Company at an earlier stage of the litigation had, though unsuccessfully, themselves applied to have the Bhowmiks and the Chowdhuries added as party-defendants in the case. In the circumstances, we are unable to hold that the learned Subordinate Judge when he made those orders, on the 30th April 1926, did anything that would justify us in interfering with them in the exercise of our revisional powers.

Both the rules are, accordingly, discharged with costs: hearing-fee, five gold mohurs in each case, to be divided equally amongst the different sets of opposite parties who appealed.

**Panton, J.**—I agree.

R.D. *Rules discharged.*

---

## A. I. R. 1927 Calcutta 845

PAGE AND GRAHAM, JJ.

*Aswini Kumar Dutta* and *others*—Petitioners—Appellants.

v.

*Raj Kumar* and *others*—Opposite Party—Respondents.

Appeal No. 306 of 1926, Decided on 27th May 1927, from an order of the 2nd Sub-J., Tippra, D/- 26th May 1926.

*Bengal Tenancy Act, S. 153—Fraud not established but only alleged—No second appeal lies—Civil P. C., S. 100.*

**In cases in which an appeal will lie only if fraud is established, it is not open to a litigant to avail himself of the right of appeal, simply because in the original application in respect of which the appeal arises, an allegation of fraud has been made. In such cases an appeal will lie only if the allegation of fraud is established.** [P 845 C 2]

*Jatindra Mohan Ghose*—for Appellants.

*Birendra Kumar Dey*—for Respondents.

**Judgment,**—This is an appeal from an order of the Subordinate Judge of Tippra reversing an order of the Munsif of Commilla. A preliminary objection is taken that no appeal lies. The order was made upon an application to set aside a sale upon the grounds of material irregularity and fraud, under O. 21, R. 90, Civil P. C. It is conceded by the learned vakil on behalf of the appellants that no second appeal lies from an order made under O. 21, R. 92, but he contends that a second appeal lies under S. 153, Bengal Tenancy Act. With respect to this contention, however, he further concedes that unless he can succeed upon the allegation of fraud this appeal is incompetent under S. 153. The lower appellate Court has found that there was no fraud or material irregularity in the conduct of the sale, and that the applicants sustained no substantial injury in consequence of any such fraud or irregularity. The finding of the lower appellate Court upon the issue of fact as to whether there was fraud is not to be questioned in second appeal. The learned vakil for the applicant contended that in every case in which an appeal will lie only if fraud is established, it is open to a litigant to avail himself of the righs of appeal if in the original application in respect of which the appeal arises an allegation of fraud has been made. In our opinion in such a case an appeal will not lie unless the allegation of fraud has been established, and will not lie merely because, in addition to other objections, what proves to be an unfounded allegation of fraud is made. If the contention of the appellant were held to be the law many rules of procedure could and would be evaded by the simple expedient of inserting in an application an utterly frivolous and unfounded allegation of fraud. In our opinion, the preliminary objection prevails, and this appeal must be dismissed with costs, the hearing-fee being assessed at one gold mohur.

There is a further application on the file. In the circumstances the learned vakil does not propose to proceed with it. It is accordingly rejected.

J.V. *Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 846.

DUVAL AND MITTER, JJ.

*Midnapore Zamindari Co, Ltd.*—Plaintiffs—Appellants.

v.

*Sadhumoni Dasi* — Defendant—Respondent.

Appeals Nos. 2001 to 2005 of 1924, Decided on 21st December 1926, from the appellate decrees of the Addl. Dist. J., Midnapore, D/- 30th May 1924.

*Bengal Tenancy Act, S.* 160 — *Occupancy raiyat subsequently obtaining fixed rate grant— His right is still 'protected interest.'*

The right of an occupancy raiyat, who subsequently obtains a grant of fixed rate, continues to be a protected interest within S. 160, *A. I. R.* 1922 *Cal.* 287, *Foll.*; 13 *C. W. N.* 1025, *not Foll.*

[P 846 C 2]

*U. N. Sen Gupta, Apurba Charan Mukerji* and *Shamadas Bhattacharya* for *Prabod Kumar Das*—for Appellants.

*Bijoy Kumar Bhattacharya*—for Respondent.

**Duval, J.**—In these cases the plaintiff-appellant brought five analogous suits. The allegation was that on the 24th June 1921, he purchased a tenure in an auction-sale and subsequently took possession through Court. The defendants were mokarari raiyats under the tenure-holder and so their tenancies, not being protected interests, were liable to be annulled and accordingly notices were issued under S. 167, Bengal Tenancy Act, in August 1922. The defendants not having vacated the land, these suits were brought. The first Court dismissed the suits and so has the Additional District Judge on appeal. The finding of fact of the lower appellate Court is that these holdings came into existence many years ago, but not before the Permanent Settlement. They were occupancy holdings and were recognized as such. But at the time of the last record-of-rights they were recorded as holdings of raiyats holding at fixed rents. It is also found that the plaintiff recognized the defendants as raiyats at fixed rents, and that the defendants, though they were originally occupancy raiyats, had acquired the rights of raiyats at fixed rents by the conduct of the landlord.

The only point which is urged before us is the question as to whether the interest of the raiyats at fixed rent is a protected interest under S. 160, Bengal Tenancy Act. Now these rights were at their inception occupancy rights and the right to hold at fixed rents subsequently accrued to them. It is argued for the appellant that this Court should follow the opinion expressed by Mr. Justice Mukerji in the case of *Bhut Nath Naskar* v. *Manmotho Nath Mitra* (1). In that case that learned Judge observed that the Bengal Tenancy Act made a well-defined distinction between a raiyat holding at a fixed rate of rent and an occupancy raiyat: and that in S. 160 reference has been made expressly to a right of occupancy and the right of a non-occupancy raiyat, but that no mention is made of the right of a raiyat at a fixed rate of rent and that the inference, therefore, seems to be reasonable that the intention of the legislature in S. 160 was to protect from ejectment a raiyat who possesses a right of occupancy as also a raiyat who possesses the right of a non-occupancy raiyat and not to protect from ejectment a raiyat holding at a fixed rate of rent. This dictum of Mr. Justice Mukerji, however, was not concurred in by the late learned Chief Justice with whom he sat. This is not, therefore, a ruling by which we are bound and which we shall show has not been followed.

The next case is of *Abdul Gani Chowdhury* v. *Makbul Ali* (2). In that case the chief consideration was the proviso (3) to S. 37, Act 11, 1859, which says that nothing in that section should be construed to entitle a purchaser as aforesaid to eject any raiyat having a right of occupancy at a fixed rate. But it was held in that case that a person who has obtained an occupancy right does not, by obtaining a grant of fixed rate, lose that right and, though that ruling may in one way be distinguished on the ground that it was passed without reference to the wording of S. 160, Bengal Tenancy Act, this statement shows that the mere fact that an occupancy raiyat obtained a grant at a fixed rent shall not make him cease to have the right of occupancy. In the case of *Lakhi Charan Saha* v. *Hamid Ali* (3), which also came up under S. 37, Re-

(1) [1909] 13 C. W. N. 1025=2 I. C. 675=11 C. L. J. 98.
(2) [1914] 42 Cal. 745=22 C. L. J. 223=31 I. C. 19=20 C. W. N. 185.
(3) [1917] 27 C. L. J. 284=44 I. C. 543.

venue Sale Law, the same view was expressed and the case of *Abdul Gani Chowdhury* v. *Makbul Ali* (2) was followed.

Lastly, we have the case of *Sarbeswar Patra* v. *Bijay Chand Mahtab* (4) and there it was held that the interest of a raiyat at a fixed rent who had occupied his holding for a continued period of more than 12 years is a protected interest within the meaning of S. 160, Bengal Tenancy Act and cannot be annulled by notice under S. 167 and that the status of a raiyat at fixed rent can be combined with that of an occupancy raiyat. This last decision at any rate is clearly binding on us. The point, however, urged on behalf of the appellant is that either we should follow the dictum of Mr. Justice Mukerji in the case of *Bhut Nath Naskar* v. *Surendra Nath Dutt* (1) or in view of the observation of the late learned Chief Justice in the case of *Sarbeswar Patra* v. *Bijab Chand Mahtab* (4) that he would rather like to have the matter referred to a Full Bench, we should now refer the matter to a Full Bench.

As we have pointed out the dictum of Mr. Justice Mukerji was not endorsed by the learned Judge sitting with him and so it cannot be binding on us, though it must be treated with great respect against a subsequent decision of two Judges of this Court forming a Division Bench. The result, therefore, is that these raiyats at fixed rent are protected under S. 160, Bengal Tenancy Act, and as such the appeal must be dismissed with costs.

**Mitter, J.**—I agree with my learned brother in dismissing the appeal. I only desire to add that the defendants in this case, who were originally occupancy raiyats, could not lose their status as such, when their rent at a subsequent period became fixed and was rendered not liable to enhancement. I may refer in this connexion to S. 37, Act 11 of 1859, where the interest of an occupancy raiyat at fixed rent as well as of an ordinary occupancy raiyat is protected and is not affected by a sale for arrears of revenue. In my opinion, the interest of a raiyat at a fixed rent, who was originally an occupancy raiyat, is not a smaller interest but a higher interest than that of a raiyat with a right of occupancy and if the legislature intended that a tenant with an inferior status is to be protected by enacting the provisions of S. 160, it follows a fortiori that a tenant with a higher interest is also protected. I entirely agree with the decision of the learned Chief Justice, Sir Lancelot Sanderson, in the case of *Sarbeswar Patra* v. *Bijay Chand Mahtab* (4).

R.D. *Appeal dismissed.*

(4) A. I. R. 1922 Cal. 287=49 Cal. 280.

---

## A. I. R. 1927 Calcutta 847

MUKHERJI AND GRAHAM, JJ.

*Rajani Kanto Pal*—Appellant.

v.

*Mohim Chandra Roy* and *others*—Decree-holders—Respondents.

Appeal No. 218 of 1926, Decided on 2nd May 1927, from an order of the Offg. 2nd Addl. District Judge, Mymensingh, D/- 2nd June 1926.

*Civil P. C., O. 21, R. 90—Immovable property sold in execution without attachment—Absence of attachment by itself does not vitiate the sale.*

When a sale of immovable property has actually taken place, and its validity is impeached on the ground that the property was not attached, the absence of attachment does not, by itself, vitiate the sale: 13 *C. L. J.* 243, *Foll.* [P 847 C 2]

*Nirode Bandhu Roy*—for Appellant.

*Bijan Kumar Mukherjee*, *Rupendra Kumar Mitter*, *Apurba Charan Mukherjee*, *Narendra Nath Mitra* and *Ramendra Chandra Roy*—for Respondents.

**Judgment.**—The present appeal in so far as it relates to the order under O. 21, R. 90, Civil P. C., is not maintainable as no second appeal is allowed under the law so far as that order is concerned. In so far as the appeal before us relates to the order under S. 47, Civil P. C., the appellant's contention in the appeal is that the attachment of the properties was defective. The learned Subordinate Judge has referred to the ruling of this Court in the case of *Sasirama Kumari* v. *Meherban Khan* (1) where it has been laid down that when a sale of immovable property has actually taken place, and its validity is impeached on the ground that the property was not attached, the absence of attachment does not, by itself, vitiate the sale. Following that decision, we are of opinion that there is no

(1) [1910] 13 C. L. J. 243=9 I. C. 918.

substance in this appeal and it should be dismissed with costs, hearing-fee one gold mohur to be divided amongst the several sets of respondents.

J.V. *Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 848

SUHRAWARDY AND MITTER, JJ.

*Emperor*—Applicant.

v.

*Har Mohan Das*—Accused.

Jury Reference No. 44 of 1926, Decided on 25th February 1927, made by Assistant Sessions Judge, Assam Valley Districts, D/ 16th August 1926.

*Criminal P. C., S. 307—Verdict of jury should not be interfered with, where evidence shows that reasonable men would have taken the same view as the jury.*

Where the evidence is of such a character that the jury as reasonable men can possibly take the view they have taken, the High Court should not interfere with the verdict of the jury in a reference under S. 307. The test, therefore, that has to be applied in estimating the weight of the verdict of the jury, is whether the opinion is such as could on the particular facts and evidence of the case have been held by reasonable men, however much the Judge may differ from that view: *A. I. R.* 1924 *Cal.* 956, and *A. I. R.* 1924 *Cal.* 317, *Expl.* [P 850, C 1]

*B. M. Sen*—for the Crown.

*Suresh Chandra Taluqdar*—for Accused.

**Mitter, J.**—This is a reference under S. 307, Criminal P. C., by the Assistant Sessions Judge of Assam Valley Districts, disagreeing with the verdict of the majority of the jury. The accused Har Mohan Das was charged with an offence under S. 471, I. P. C., read with S. 467, I. P. C. He was charged with having fraudulently and dishonestly used as genuine a document, namely, a receipt for Rs. 530 bearing date the 2nd Baisak 1330 B. S. (15th April 1923), purporting to have been executed by Baliram, which he knew or had reason to believe to be a forged document. The accused was originally tried before a Subdivisional Magistrate and was convicted. That conviction was ultimately set aside by the High Court as it thought that it was a case triable by a Court of Session. The accused consequently was tried by the Assistant Sessions Judge with the aid of a jury. Four of them are of opinion that he is not guilty while one of them says that he is guilty under Ss. 476,/471 I. P. C.

The case for the prosecution is that Baliram who was not living at the time of the trial, having died after he had deposed before the committing Magistrate, filed a civil suit against the accused. That suit was dismissed by the Munsif. The Munsif's decision was reversed on appeal and Baliram's suit was decreed and ultimately that decree was upheld by the High Court. Baliram after the final decree applied for execution of the decree on the 21st July 1922. Notice of the execution proceeding was served on the accused but he did not appear to show cause. The execution case was struck off on the 19th August 1922. On the 19th September 1922 the decree-holder Baliram again applied for execution. That execution case was again stuck off on the 25th November 1922. The decree-holder Baliram again applied on the 10th February 1923, for the arrest of the judgment-debtor—that is, the accused. This case was stuck off on the 4th June 1923. On the 11th June 1923 the fourth execution case was filed. In this execution case the accused was arrested and he was produced before the Munsif on the 1st July 1923. It is to be noticed that neither at the time of the arrest nor when he was produced before the Munsif did the accused say anything about any payment having been made in satisfaction of the decree nor did he mention anything about the receipt marked as Ex. 5 in this case. But on the 2nd July the accused filed a petition before the Munsif stating that he had paid a sum of Rs. 530 to the decree-holder for which he held a receipt. Even in that petition he did not state on which date the payment was made and what date the receipt bore. The receipt (Ex. 5) which bears date, as already stated, the second Baisak, 1330 (15th April 1923), was produced in Court for the first time on the 7th July.

The decree-holder denied before the Munsif having received any payment as evidenced by the receipt and contended that the receipt was forged. The Munsif, after holding an enquiry, started the present prosecution. Now it appears clear that if the payment had been

made as is now contended for by the accused, on the 15th April 1923 it seems somewhat singular that he did not apply to the Munsif to certify the payment. He had under the Civil Procedure Code 90 days to apply for certification by the Court and although on the 1st or 2nd July there remained only a few days for the 90 days to expire he took no steps whatever to have this payment certified. This is a circumstance which tells very strongly against the case of the accused that the payment had been made on the 15th April 1923. It is also a singular feature of the case that he did not mention the fact of this payment when he was taken under arrest to the house of the Munsif. The Munsif has deposed in this case and he clearly stated that the accused did not mention the fact of payment to him. One would have expected that when he was taken under arrest before the Munsif the attitude of the accused should have been one of severe indignation and he would have at once stated to the Munsif that he had been unjustly brought before him under arrest, as the money had already been paid. The fact that this was not mentioned to the Munsif is also a very strong circumstance against the story of the accused that the payment had been made.

Baliram, whose evidence was not avilable before the Sessions Court but who was examined before the committing Magistrate, had denied the receipt of any money. He had also stated that the receipt was a forged one. Great stress is laid on behalf of the accused on the statement he had made before the Magistrate who first tried him that the signature in the receipt was his. But subsequently he said that the signature might bear some resemblance to his signature. It is also to be noticed that the receipt which is on Court paper is signed in two places one at the top and the other at the bottom of that page. The receipt stamp does not bear on it the signature of Baliram and it is likely that the accused might have in his possession the Court paper which was signed by Baliram for Court purpose and that he might have afterwards utilized that paper for the purpose of this receipt. It is a singular circumstance, if the receipt was actually signed by Baliram, that he should not sign on the stamp as is usually done by persons granting receipts when receipts are granted which tells against the story set up by the accused. In addition to the Munsif, another witness has been examined, namely, the peon who arrested the accused. He also stated that he was not told anything about this payment. That also is a circumstance which goes against the accused.

It has been argued here on behalf of the accused that Baliram was not in affluent circumstances. He was really in debt. He had a decree against him for about Rs. 1,600, his properties were under attachment and it was likely that he should deny the payment for the purpose of getting the same money twice and that no reliance should be placed on his testimony. It is said that the accused is a person of some respectability being the chairman of the village union and that it is not likely that he should commit this forgery. We have to judge as between the conflicting statements of these two persons. There is oath against oath. We have, therefore, to judge of the credibility of the accused and of Baliram by the light of the circumstances. We have referred to circumstances which make it extremely improbable that the accused's story is a true one. No reason has been suggested why Baliram even after the 15th April 1923 should take steps and incur expenses for starting a new execution case if the money had already been paid. Judging from the ordinary course of human events it is rather likely that after the accused had been unable to find money and after he had been put to the indignity of the arrest, that he should forge a receipt for the purpose of showing that he had been unjustly arrested and at the same time for the purpose of evading payment. Having regard to all the circumstances to which we have referred we think that the verdict of the jury is clearly wrong. We accept the reference made by the Assistant Sessions Judge, set aside the verdict of the jury and convict the accused under S. 467/471, I. P. C., and sentence him to rigorous imprisonment for one year.

**Suhrawardy, J.**—I agree. I wish to add a few words with reference to the argument which has been vehemently pressed before us and is often advanced from the Bar as to the power of this

Court under S. 307, Criminal P. C. It is said that on the authorities of this Court we should not interfere under S. 307, Criminal P. C., with the verdict of the jury unless we hold that it was not possible for the jury to take the view that they did in the Court below. If the argument as advanced before us is accepted in its entirety this Court will cease to function as a Court of Reference under S. 307, Criminal P. C., its duty being confined only to reject references. Our attention has been drawn to the language used in the case of *Emperor* v. *Golam Kadar* (1) and *Emperor* v. *Nritya Gopal Roy* (2). In the first case Greaves, J., has observed :

> It is necessary to see in the light of these suggestions whether we can say that the verdict of the jury was so unreasonable that seven reasonable men could not have arrived at the verdict, for it seems to us that that is the real test that we have got to apply. We are not able to say that it was not possible for the jury to have arrived at the verdict at which they have arrived.

In the latter case the point is stated thus :

> The High Court should exercise the powers vested in it by S. 307, Criminal P. C. when it can affirmatively, with certainty and safety hold that on the evidence the verdict of the jury is manifestly wrong. It will not interfere with the verdict of the jury in every case of doubt entertainable on the evidence.

The learned Judge further observed :

> We (the High Court) have to find out for ourselves whether on the evidence such as appears on the record it was possible for the jury to take the view which they have taken in this case with reference to the ten accused persons whose case has been referred to us.

These observations read with the text mean that where the evidence is of such a character that the jury as reasonable men can possibly take the view they have taken, this Court should not interfere. Human opinion honestly held may differ on all questions. But the test to be applied with regard to the honesty of such opinion is whether any reasonable man on the materials before him can hold it. The test, therefore, that has to be applied in estimating the weight of the verdict of the jury, is whether the opinion is such as could on the particular facts and evidence of the case have been held by reasonable men, however much the Judge may differ trom that view. In the present case the surmise made by the learned Judge seems to be correct. The jury took away the documents in their retiring room and after ten minutes came out, presumably after a comparison of the signatures and the majority of them brought in a verdict of not guilty. It is evident that they did not take into consideration the very strong circumstantial evidence against the accused. Hence their verdict must be wrong.

R.D. *Reference accepted.*

(1) A. I. R. 1924 Cal. 956.
(2) A. I. R. 1924 Cal. 317.

## * A. I. R. 1927 Calcutta 850

PAGE AND GRAHAM, JJ.

*Banka Behari Deb*—Plaintiff—Appellant.

v.

*Birendra Nath Dutta* and *another*—Defendants—Respondents.

Appeal No. 377 of 1926, Decided on 8th June 1927, from the appellate order of the Sub-Judge, Cachar, D/- 30th June 1926.

* (a) *Civil P. C., O. 41, R. 23—Appellate Court framing additional issue and remanding the case reversing the decree, instead of calling for a finding retaining the case on its file—Order of remand is not appealable either under O. 43, R. 1 (u) or under S. 100, as it is not a decree within Civil P. C., S. 2—Civil P. C., O. 43, R. 1 (u)—Civil P. C., S. 100.*

Whether an order of remand is appealable or not should depend on whether the conditions laid down by O. 41, R. 23, have been complied with, and not on whether appellate Court purported or did not purport to make the order under R. 23. [P 853, C 1]

Where in the case of an order of remand where the appellate Court without deciding any of the issues in the case, reverses the decree of the trial Court and sends the case back, instead of calling for a finding on the additional issue which it frames, retaining the cases on its own file, the order of remand is not passed under O. 41, R. 23, and is not appealable under O. 43, R. 1 (u), nor is the order of remand a decree within S. 2, as it does not itself finally determine all or any of the matters in controversy between the parties, and therefore no appeal lies from this order of remand as being a decree within S. 100 : 31 *C. L. J.* 354 and *A. I. R.* 1925 *Cal.* 1258, *Dist.* [P 851, C 2]

(b) *Civil P. C., S. 151—Specific provisions existing—Inherent powers should not be invoked.*

Where the Code contains specific provisions dealing with a particular matter the Court ought not to invoke the aid of S. 151. [P 853, C 2]

(c) *Civil P. C., S. 115—Scope.*

Where no appeal lies from an order, the memorandum of appeal can be treated as an application for revision. [P 853, C 2]

*Trailokhya Nath Ghose* and *Paresh Lal Shome*—for Appellant.

*Hemendra Kumar Das* and *Benoyendra Nath Palit*—for Respondents.

**Page, J.**—This is an appeal from an order of the learned Subordinate Judge of Cachar remanding for re-trial a suit heard by the learned Munsif of Silchar. At the hearing of the appeal a preliminary objection was taken by the respondents that no appeal lay from the order of remand. It appears that after the hearing of the suit had been concluded the defendant raised the question whether a large number of persons, more than twenty in number represented by the plaintiff in the suit, were not members of an unregistered company within S. 4, Indian Companies Act. During the hearing of the suit no issue was raised with respect to this question although a few casual questions were addressed to the plaintiff on the subject and the learned Subordinate Judge took the view that the issue, as to whether the persons represented by the plaintiff were members of an unregistered company formed for the purpose of carrying on a business for gain, ought further to be investigated. Accordingly, the learned Subordinate Judge ordered that

As the decision of the case mostly depends upon the question whether it is an association or company or partnership consisting of more than 20 members, acquiring lands for the purpose of gain, and as no specific objection was taken in the defendants' written statement, and no issue was framed, and evidence was not fully gone into, the case must go back to the lower Court for the determination of the question. I, therefore, frame the following issue: "Whether the plaintiff and 28 persons as mentioned in Sch. 1 of the plaint formed a company or association or partnership for acquiring lands for the purpose of gain, and if so, whether the suit is maintainable under S. 4 (2), Companies Act. The Court below will allow the parties to give evidence on the point and hear their arguments, and if it is satisfied that they have formed a company or association or partnership for acquiring lands for the purpose of gain, and it was not registered under the Companies Act, the suit will be dismissed. But if the case does not come within the purview of S. 4 (2), Indian Companies Act, the suit will be decided on the merits on the evidence already adduced by the parties. He will consider the effect of the defendants' purchase by kobala (Ex. B), i. e., whether they have purchased 1 bigha of plots Nos. 206, 207 or 208 or less. The appeal is, therefore, allowed. The decree of the lower Court is set aside, and the suit is remanded to the lower Court for disposal according to the directions given above. Costs will abide the result.

It is against this order that the present appeal is brought.

In support of the preliminary objection the learned vakil for the respondents contended that no appeal lay from the order of remand as made, because the learned Subordinate Judge had no jurisdiction to make the order under O. 41, R. 23. It is abundantly clear that the order of remand as made was passed without jurisdiction, because the learned Munsif who tried the case did not determine the case upon a preliminary issue, but heard and decided the suit upon the merits. The condition precedent, therefore, to the exercise of the power of remand with which the Court is invested under O. 41, R. 23, was not fulfilled, and the order of remand as made could not validly have been passed under R. 23, and was ultra vires the Court that passed it. The result is that no appeal lies from the order as made, for, under O. 43, (1) (u) an appeal only lies if the order of remand has been passed under O. 41, R. 23.

Again, the order for remand as made, in my opinion, did not itself finally determine all or any of the matters in controversy between the parties and it was not a decree within S. 2, Civil P.C., therefore, no appeal lay from this order of remand as being a decree within S. 100, Civil P.C. The opinion that I have stated, namely, that the lower appellate Court possessed no jurisdiction to pass the order as made under O. 41, R. 23, or otherwise, is in consonance with the view expressed upon this subject by Jenkins. C. J., and Chatterjea, J., in *Mani Mohan Mandal* v. *Ramtaran Mandal* (1), by Walmsley and Huda, JJ., in *Mohendra Nath Chakraburtty* v. *Ramtaran Bandapadhya* (2) and by Greaves and B. B. Ghose, JJ., in *Radha Krishna Saha* v. *Kamal Kamini Debya* (3). The order now before the Court having been made without jurisdiction, and being one from which no appeal lies, in my opinion, this Court has jurisdiction to treat the memorandum of appeal as an application to the Court to revise the order under S. 115, Civil P. C., *Baikunta Nath* v. *Sita Nath* (4), *Mohini Nohan Roy* v.

(1) [1916] 43 Cal. 148=33 I. C. 329.
(2) [1920] 23 C. W. N. 1049=55 I. C. 96=31 C. L. J. 357.
(3) A. I. R. 1922 Cal. 456.
(4) [1911] 38 Cal. 421=9 I. C. 296.

*Ramdas Paramhansa* (5), *Merali Visram* v. *Sheriff Devji* (6), and *Venkata Ramayya* v. *Veeraswamigadu* (7). I am clearly of opinion that in the exercise of the powers this Court possesses under S. 115, Civil P. C., the Court ought to set aside the order of remand that has been passed in this case as having been made without jurisdiction. It was urged by the learned vakil for the appellant that, inasmuch as a Court to which an appeal lies has jurisdiction to remand a case in the exercise of its inherent jurisdiction in that behalf [*Abdul Karim* v. *Allahabad Bank Ltd.* (8)], this Court ought to treat this order as having been made in the exercise of the inherent powers possessed by the learned Subordinate Judge. I am not disposed to hold that the learned Subordinate Judge in the proper and exceptional circumstances in which the inherent power of the Court may be invoked would not have jurisdiction to order a suit to be remanded, indeed, I should insist that he had; but it is now well settled that a Court ought not to make use of the inherent jurisdiction with which it is invested in circumstances to which the provisions of the Civil Procedure Code are applicable: *Abdul Karim Abu Ahmed Khan Ghaznavi* v. *Allahabad Bank Ltd.* (8) and *Mani Mohan Mandal* v. *Ramtaran Mandal* (1).

The result is that the order to which exception has been taken will be set aside, and the learned Subordinate Judge must proceed to hear the appeal according to law. In making this order in a general form we do so because it is undesirable that we should dictate to the learned Subordinate Judge the course that he should follow with regard to the appeal that has been preferred to him. It is enough to say that whatever order he elects to pass must be one that conforms to the law.

I am, of course, aware of the decisions in *Baseemati Debi* v. *Taritbasani Dassi* (9), *Radha Krishna Saha* v. *Kamal Kamini Debya* (3), *Bhairab Chandra Dutta* v. *Kali Kumar Dutta* (10), *Kayem Biswas* v. *Bahadur Khan* (11), *Gokul Prasad* v. *Ram Kumar* (12), *Kulsoomunnissa* v. *Ram Prashad* (13), contra, *Mohendra Nath Chakraburtty* v. *Ramtaran Bandapadhya* (2) in which it has been held that although the appellate Court which ordered the remand had no jurisdiction to pass the order as made under R. 23, nevertheless, if the learned Judge passing the order of remand without jurisdiction in that behalf "purported" to be acting under O. 41, R. 23, he must be taken to have remanded the case under O. 41, R. 23, and that an appeal from such an order would lie. The later cases other than *Mohendra Nath Chakraburtty's* case (2) decided by Walmsley and Huda, JJ., merely followed the decision in *Baseemati Debi's* case (9), but, with all due deference to the learned Judges who were parties to these decisions, I confess that I find myself unable to assent to the reasoning upon which they were based. It is expressly provided under S. 104, Civil P. C., and O. 43 (1), that no appeal shall lie from an order of remand under O. 41, unless the order was made under R. 23. I apprehend that the meaning and effect of these provisions is that unless the order is one that the Court had jurisdiction to make under R. 23, the order is not subject to appeal, and the proper mode of challenging its validity is to file an application for revision under S. 115. Of course, if the order of remand, as made, is a decree within S. 2 of the Code, an appeal will lie from it, but the appeal will not lie from such an order because the Court purported to make the order under R. 23, but because it is provided elsewhere in the Code that from such a decree an appeal shall lie. But where, as in the present case, the order is not a decree, and is ultra vires, because the circumstances did not exist in which alone the Court would have had jurisdiction to make an order under R. 23, under what principle of law can it be held that the order must be deemed to have been made under R. 23, merely because the Court when passing the order "purported" to be acting under R. 23?

(5) A. I. R. 1924 Cal. 487.
(6) [1912] 36 Bom. 105=12 I. C. 687=13 Bom. L. R. 1017.
(7) [1918] 41 Mad. 554=34 M. L. J. 309=7 M. L. W. 508=45 I.C. 471=(1918) M.W.N. 327.
(8) [1917] 44 Cal. 929=26 C. L. J. 49=41 I. C. 598=21 C. W. N. 877 (F.B.).
(9) [1920] 31 C. L. J. 354=44 I. C. 416.
(10) A. I. R. 1923 Cal. 606.
(11) A. I. R. 1925 Cal. 1258.
(12) A. I. R. 1922 All. 254=44 All. 176.
(13) A. I. R. 1922 All. 226=44 All. 492.

If it is contended that the order must be so regarded because otherwise an appeal will not lie, and injustice might take place, with all respect, that is to legislate and not to administer the law. I invited the learned vakil for the appellant if he could suggest any legal basis to support the view that an order which was not and could not have been made under R. 23, must be treated as having been made under R. 23. No answer was forthcoming and no satisfactory answer, I think, can be found. In my opinion, it never was intended or contemplated that whether an order of remand was appealable or not should depend not on whether the conditions laid down by O. 41, R. 23, had been complied with, but whether the learned Judge purported or did not purport to make the order under R. 23. It may be that on some future occasion these cases will be further considered, but for the purpose of deciding the present case it is enough to say that, in my opinion, the learned Subordinate Judge did not purport to act under O. 41, R. 23. To my mind it is reasonably clear that he intended, and it may be also that he " purported" to act under O. 41, R. 25, for the sole issue which he thought remained for consideration was the issue whether in fact the persons represented by the plaintiff formed an unregistered company or not ; but instead of sending that issue to be determined by the trial Court and retaining the appeal upon his own file, he erroneously and without jurisdiction remanded the suit for disposal by the trial Court. In these circumstances *Baseemati Debi's* case (9) and the later decisions that followed that case do not apply.

Although the appellant in effect has succeeded he has succeeded notwithstanding that he brought an appeal instead of making an application under S. 115, and in the circumstances we make no order as to costs.

**Graham, J.** — The order appealed against is one of those anomalous orders which cannot be brought within the purview of either R. 23, or R. 25, O. 41, Civil P. C., It is quite clear that it cannot come under R. 23 because the suit had not been disposed of on a preliminary point as all the issues framed by the Munsif were decided. If it does not come under R. 23, O. 41, then there is no appeal against the order. Nor does it appear to come under R. 25 of O. 41 since the Court had no jurisdiction if it proceeded under that rule to remand the case in the manner in which it has done but should have retained the case on its own file. It appears to me, however, that probably what the learned Subordinate Judge intended to do was to act under R. 25, but instead of carrying out the procedure laid down in that rule he, through some oversight, adopted the procedure laid down in R. 23. It amounts, therefore, to this that the Court made an order which it had no jurisdiction under the Code to make. It has been urged also before us that the order should be deemed to have been an order made under the inherent power of the Court under S. 151, Civil P. C., and that in that case an appeal would lie. As to whether an appeal would lie in those circumstances the authorities are conflicting. But it seems to me that where the Code contains specific provisions dealing with a particular matter the Court ought not to invoke the aid of S. 151.

Under the particular circumstances of this case as no appeal lies the proper course for us to adopt is, it seems to me, to treat the memorandum of appeal as an application for revision to set aside the order of the learned Subordinate Judge as being made without jurisdiction, and to send the case back to him in order that he may dispose of it according to law as my learned brother has suggested.

R.D. *Case remanded.*

---

## A. I. R. 1927 Calcutta 853

RANKIN, C. J., and Mitter, J.

*Re : Belvedere Jute Mills, Ltd., Chaitram Sagormull*—Appellants.

v.

*Hardwarimull & Co.*—Respondents.

Appeals Nos. 64 and 65 of 1927, Decided on 15th July 1927, from the orders of Gregory, J., D/- 26th April 1927.

*Limitation Act, Art.* 183—*Award filed in High Court under S.* 15, *Act* 9 *of* 1899—*Execution applications are governed by Art.* 183—*Arbitration Act* (9 *of* 1899), *S.* 15.

Where an award has been filed in the Court properly, it is not only to be enforceable as if it

were a decree in general, but, having been filed in a particular Court, it is to be enforceable as if it were a decree of that Court and, therefore, shall for purposes of limitation be governed by Art. 182 or 183 according to as it is filed in a Chartered High Court or not: *A. I. R.* 1924 *Lah.* 544, *Rel. on*; *In re A, Bankruptcy Notice* (1907) 1 *K. B.* 478, *Ref.* [P 854 C 1, P 855 C 1]

*S. N. Banerjee*, *S. M. Bose* and *I. P. Mookerjee*—for Appellants.

*B. K. Ghosh* and *S. R. Das*—for Respondents.

**Rankin C. J.**—In this case, an award was made on the 3rd August 1923 and it was filed in the High Court under the provisions of the Indian Arbitration Act on the 31st August 1923. There was an assignment on the part of the company in whose favour the award was made to the present respondents on the 15th December 1926. In January 1927, the respondents filed a tabular statement and proceeded to issue notices in execution under R. 16, O. 21, Civil P.C. These having been served, the matter came on for hearing before Mr. Justice Gregory on the 26th of April 1927 and it was objected that the application in execution was time barred because Art. 181, Sch. 1, Limitation Act, applied, there being no other article which applied. The learned Judge has held that Art. 183, Limitation Act, is applicable and that is the question before us.

There can be no doubt that the terms of S. 15, Arbitration Act, do not mean that an award shall be or shall be deemed to be a decree and Mr. B. K. Ghosh on behalf of the respondents concedes that completely. Indeed, it was clearly laid down by the Privy Council in the case of *E. D. Sassoon & Co.* v. *Ramdutt Ramkisan* (1) and it has been laid down many times. The words of S. 15 are these:

> An award on a submission on being filed in the Court in accordance with the foregoing provisions shall (unless the Court remits it to the reconsideration of the arbitrators or umpire or sets it aside) be enforceable as if it were a decree of the Court.

So there can be no doubt that it is not only to be enforceable as if it were a decree in general but, having been filed in a particular Court, it is to be enforceable as if it were a decree of that Court.

Now, we have been pressed to hold that this provision refers only to the procedure or manner in which an award is to be enforced by execution; and with reference to the case of *In re A Bankruptcy Notice* (2). it is important to observe that S. 12, English Arbitration Act, 1889, states in express terms:

> An award or a submission may, by leave of the Court or a Judge, be enforced in the same manner as a judgment or order to the same effect.

Under the wording of the English section, it seems to me to be reasonably clear that there could be no successful contention that S. 12, Act of 1889 is addressed in any way to a question of limitation. It is important to notice that the draftsman of the Indian statute having the language of the English statute before him has expressed himself much more widely. The words are

> be enforceable as if it were a decree of the Court.

It is quite true that, even so, it is by no means clear whether the language used in S. 15 is intended to be taken not only as regards manner in the largest sense of that word but also as regards time for the purposes of limitation. It has been pointed to us that similar wide language is to be found in S. 42, Civil P. C., where it says that

> that Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself.

Now, in India we know that the period of limitation is one thing for a decree passed by a mofussil Court and another thing for a decree passed by a Chartered High Court. It is to be observed with reference to S. 42 that the section deals with powers of the Court executing it and only with those powers, so that there cannot be very much doubt that the question of limitation is excluded from the purview of that section. The question of limitation is not merely a question of power. The matter is one of very great importance and it is, I think, to be noticed not merely that the Indian Statute uses wider language than the English Statute but it makes no special provision for limitation. It seems to me, in these circumstances, that, if one looks at the question of limitation from the point of view of the different alternatives, there can be one inference only and that is that the words employed by the legislature in the sub-S. 1, of S. 15, Indian Arbitration Act, were in-

(1) A. I. R. 1922 P.C. 374=50 Cal. 1=49 I. A. 366 (P. C).

(2) [1907] 1 K. B. 478=96 L. T. 131=76 L. J. K.B. 171.

tended to go to the question of limitation as well as to the question of procedure. The Court has been reminded that questions of limitation are regarded for purposes of International law as questions of procedure.

In the decrees of civil Courts other than Chartered High Courts the provisions of the Limitation Act are very elaborate. These are provisions whereby within the time limited by S. 48 of the Code applications in execution can be made so long as they are made within three years of each other: and in the same way with regard to decrees of Chartered High Courts not only is there a limit of twelve years but there are elaborate arrangements for the extension of that period by payment of interest, acknowledgment and so forth. It is further to be observed that on the question of limitation, under Art. 182 there are elaborate arrangements for dealing with the case where the decree has been passed against more persons than one and one of these persons is in a different position to the others. Now, we have to consider the construction of S. 15, Indian Arbitration Act, with a view to choose between two alternatives: one is the view that a decree for purposes of limitation will be governed by Art. 182 or 183 according to as it is filed in a Chartered High Court or not and the other is the view that whatever happens to a decree it can only be enforceable within a period of three years prescribed by Art. 181 for applications for which no period of limitation is provided elsewhere in this schedule or by S. 48, Civil P. C. It seems to me, looking at the absence of all provisions in the Indian Arbitration Act with reference to limitation, looking to the fact that the language of the English Act has been deliberately widened and to the fact that the question of the time limit for execution is a question of enforceability of the decree, as Art. 183 itself shows, that the correct view is that S. 15 does cover the question of time within which the execution of a decree may be had. I, therefore, think that in this case the period of limitation is twelve years. This decision is in accordance with the view taken by a single Judge, Mr. Justice Harrison of the Lahore High Court, in the case of *Pokhardas* v. *Radha Kissen* (3).

(3) A. I. R. 1924 Lah. 544.

In this view, the appeal fails and must be dismissed with costs.

This judgment governs appeal 65 of 1927 which is also dismissed with costs.

**Mitter, J.**—I agree.

J.V. *Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 855

RANKIN, C. J., AND MITTER, J.

*Jonab Biswas*—Appellant.

v.

*Siva Kumari Debi* and *another*—Respondents.

Appeals Nos. 6 to 18 of 1925, Decided on 24th June 1927, from the appellate decrees of the Dist. Judge, Nadia, D/- 17th June 1924.

(a) *Evidence Act, Ss. 34 and 32—Jama wasil baki papers are only corroborative evidence in the absence of proof of facts under S. 32.*

Jama wasil baki papers, in the absence of proof that the writer or the maker of the entries therein at the date of the trial was dead or could not be procured without unreasonable expense or was otherwise such a person as is contemplated by S. 32, merely amount to evidence under S. 34 which in the presence of other substantive evidence may be used as corroborative but which cannot be regarded as proving any fact by itself. [P. 856, C. 1]

(b) *Practice — Appeal — Remand — Evidence Act, S. 32.—Civil P. C., O. 41, Rr. 23 and 25.*

In the absence of proof of some fact within S. 32, what the appellate Court has to do is to find whether or not there was any real contention that the writer was still alive and if so grant a remand. [P. 856, C. 2]

(c) *Practice—New plea should be discouraged at a later stage.*

It is very necessary that every discouragement should be given to an invention of new points at a late stage—points which might have been met if taken properly by adducing further evidence. [P. 856, C. 2]

(d) *Landlord and tenant—Rent—Enhancement—Prima facie there is right to enhance unless there is contract to contrary—Patta—Construction—Tenants to hold from generation to generation—No remission of rent—Cesses to be paid in addition to rent—Landlord is not precluded from enhancing the rent.*

Prima facie the rent is liable to enhancement unless the landlord has precluded himself by contract from claiming such enhancement and it is necessary to have definite materials in the patta before coming to the conclusion that the common law has been excluded · *A. I. R.* 1927 *P. C.* 20, *Rel. on.* [P. 857, C. 2]

Where in the patta it was stated that the tenants were to hold from generation to generation that they were to get remission of rent and

that they should pay cesses separately and in addition to rent, *Held* the landlord was not prevented from enhancing the rent. [P 857, C 2]

*Tarakeswar Pal Chaudhuri* and *Gyan Chandra Roy*—for Appellant.

*Sarat Chandra Basak* and *Urakramdas Chakraburtty*—for Respondents.

**Rankin, C. J.**—In this case there are thirteen appeals arising out of the same set of facts. In the course of settlement the matter had been tried in the first instance by the Settlement Officer and then went on appeal to the District Judge of Nadia. In the proceedings under S. 105, Bengal Tenancy Act and in the record of rights the tenants had been recorded as occupancy raiyats. When the landlord applied for settlement of fair rent the tenants maintained that they were really holding on mokrari terms and they claimed under S. 50, Bengal Tenancy Act, that they had paid rent at the uniform rate so long, that they were entitled to the presumption that they were tenants at a permanent rate of rent. It would appear that for the years 1886-87 the landlord produced jama wasil baki papers which purport on the face of them as evidence to show that for these years a different rate of rent was applicable to these tenancies.

Now the question is whether the learned District Judge has correctly dealt with the contention that these jama wasil baki papers (in the absence of proof that the writer or the maker of the entries therein at the date of the trial was dead or could not be procured without unreasonable expense or was otherwise such a person as is contemplated by S. 32, Indian Evidence Act) merely amount to evidence under S. 34, Indian Evidence Act, that is to say, evidence which in the presence of other substantive evidence may be used as corroborative but which cannot be regarded as proving any fact by itself. Now the position is that there was no proof that the writer was dead or any of the other facts required by S. 32 as the evidence stood. Therefore the position was that the jama wasil baki papers were admissible because they were admissible under S. 34. But there was no other evidence which enabled the Court to base upon it a finding to the effect that their contents were true and proved the facts alleged by the landlord. What the learned District Judge did is this: he said first of all that that was not the objection taken before the settlement officer; he said secondly, that that was not the objection taken before him.

It appears that the memorandum of appeal before the District Judge contains as grounds first that the entries were not admissible and secondly that their evidentiary value was not sufficient to rebut the presumption under S. 50, Bengal Tenancy Act. The learned Judge's view accordingly was that if the express point had been taken that these entries were admissible but were only admissible as corroborative evidence in the absence of proof of some fact within S. 32, Indian Evidence Act, then what he should have done would have been this. He would have found whether or not there was any real contention that the writer was still alive and if so would have granted a remand in favour of the landlord sooner than see his claim defeated by the omission of the evidence on such a point. But the learned Judge said because this exact point had not been taken he would not order a remand and he proceeded upon this evidence which by law is not substantive evidence at all as though it were substantive evidence. He said he should do that by refusing to allow the tenant to take the point since it was not properly taken in the memorandum of appeal. Speaking for myself I cannot uphold that way of dealing with this matter. To my mind it is very necessary that every discouragement should be given to an invention of new points at a late stage—points which might have been met if taken properly by adducing further evidence. But even so I do not think that the District Judge's way of dealing with this matter can be supported. The moment it was shown that the jama wasil baki papers were admissible at that moment it became evident that the tenants could not be prejudiced because they did not object to their admissibility. The evidence having come in at the end of the day, as a matter of argument arose the question of its effect, and it may be that the exact point was not argued before the Settlement Officer. But the documents were attacked in the memorandum of appeal—they were attacked as inadmissible in evidence altogether and also upon the ground that their evidentiary

value was not sufficient to rebut the presumption under S. 50. What the appellant meant by that one cannot of course say but that is an exact description of the objection which was ultimately urged because the evidentiary value of those documents was this that they were corrobora tion simply and could not base any finding of fact. The memorandum of appeal being in that form I do not think that the learned District Judge was right to be so very strict as against the tenant as in fact he purported to be. The position was, that if these jama wasil baki papers were to be used at all, it was necessary for the plaintiff to induce the learned Judge as an indulgence to him to grant him a remand. The fault was the plaintiff's and not of the defendants.

In my judgment the learned District Judge might very well have said to the defendants that they must remember that if they really had no reasonable belief that the writer was alive it might very well be that he would in the end visit them with the cost of taking further evidence upon remand. What the learned Judge has said is that he will proceed upon evidence which the law says, is mere corroborative evidence as though it was substantive evidence which under the law it is not. In my judgment it was at the plaintiff's risk to induce the learned Judge to remand these appeals. The way in which the learned Judge has dealt with the matter is not satisfactory. Accordingly we allow the appeals and remand the cases to the lower appellate Court with the directions to that Court to take evidence on both sides upon the question whether the writer of these jama wasil baki papers was or was not alive at the time of the trial.

If the learned Judge finds that the writer was alive at the date of the trial of the suit then he should dismiss the claim of the landlord. But if the Judge finds that the writer was dead at the date of the trial of the suit then he will allow the claim of the landlord.

The costs of these appeals to abide the result.

It remains to deal with appeal 12 of 1925. This appeal is not affected by the question of jama wasil baki papers. The contention of the appellants in that case is that the patta itself shows that the tenancies were created to be permanent tenancies at a fixed rate of rent and that there is in the four corners of the document enough to show that the contract of the parties precluded the landlord from enhancing the rate of rent. That is a case which is very similar to the case *Krishnendra* v. *Kusum Kamini* (1), and looking at the patta in that case I find a strong analogy to the patta in the case before us. There again we have reference to "generation to generation." There too we have a clause saying that the tenants were not to get remission of rent without any parallel clause that the landlord was not to get enhancement. The phrase is similar with reference to payment of cesses separately and in addition to rent. The principle being that prima facie the rent is liable to enhancement unless the landlord has precluded himself by contract from claiming such enhancement, it is necessary to have definite materials in the patta before coming to the conclusion that the common law has been excluded.

On the whole I see nothing in this patta that is sufficient to justify this Court in saying that the landlord by the terms of patta has precluded himself from enhancement. I, therefore, think that this appeal must be dismissed with costs. Hearing fee one gold mohur in each case.

**Mitter, J.**—I agree.

R.D. *Appeal No.* 12 *dismissed*: *Other appeals allowed.*

(1) A. I. R. 1927 P. C. 20=54 Cal. 166=54 I. A. 48 (P. C.).

---

## * A. I. R. 1927 Calcutta 857

MUKERJI AND CAMMIADE, JJ.

*Joyesh Chandra Ray*—Plaintiff—Appellant.

v.

*Sharfaddin Ahamad* and *others*—Defendants—Respondents.

Appeal No. 499 of 1925, Decided on 9th February 1927, from the appellate decree of the Dist. Judge, Chittagong, D/- 24th September 1924.

(a) *Bengal Tenancy Act, S. 74—Illegal cesses (Mukerji, J.)*

In all cases about illegal cesses, the question will primarily turn about the meaning of the words " actual rent " used in S. 74. [P 858 C 2]

* (b) *Landlord and Tenant— Abwab— Each case depends upon the contract in question.*

In order to determine whether a particular item is abwab, the rule that has been followed is that each case must depend upon the proper construction of the contract before the Court and if upon a fair interpretation of the contract it can be seen that a particular sum is specified in the contract or agreed to be paid as the lawful consideration for the use and occupation of the land, i. e., if it is really part of the rent although not described as such, the landlord can recover it. The facts that a certain sum is dealt with in the kabuliyat in a separate clause or that it is not included in the instalments of rent have an important bearing upon the question of intention of the parties to the contract. They show whether the parties intended to treat a particular item as part of the rent agreed upon to be paid or as something different from the rent: 45 *Cal.* 259, *Foll.* [P 861, C 1]

*Cammiade, J.*—In each case it has to be determined whether or not the item called in question as an abwab is covered by the definition of the term "rent." To put it in other words, it must be found that that item is part of the consideration agreed to be paid or delivered by the tenant for the use and occupation of the land provided that such consideration is lawful. The consideration may be wholly monetary or wholly one in kind, or it may be partly in money and partly in kind. The statute does not restrict consideration in kind to grain or other produce of the soil. The consideration may be a cartload of paddy or a cartload of money and in either case it would be perfectly lawful. [P 861, C 2]

*Jadunath Kanjilal* and *Nripendra Chandra Das*—for Appellant.

*Narendra Kumar Das*—for Respondents.

**Mukerji, J.**—The substantial question in controversy in this appeal is whether Rs. 2-8 mentioned in the respondents' kabuliyat or the price of two he-goats which are annually deliverable at the time of the Dusserah puja is an abwab.

The relevant provisions of the statute are the following: S. 54, Regulation 8, 1793, laid duwn that all existing abwabs should be consolidated with the asil jama into one specific sum; S. 55 prohibited the imposition of any new abwab or mahtut upon the raiyats upon any pretence whatever upon pain of a penalty of three times the amount imposed for the entire period of the imposition; and S. 61 enacted that in the event of any claim being preferred by proprietors of estates..... on engagements wherein the consolidation of asil, abwab etc., shall appear not to have been effected they are to be nonsuited with costs. S. 3, Regulation 5, 1812, which altered some of the provisions of Regulation 8, 1793, declared that nothing therein contained should be construed as sanctioning or legalizing the imposition of arbitrary or indefinite cesses whether, under the denomination of abwab, mahtut or any other denomination. By Act 10, 1859, S. 10, and Act 8 (B. C.), 1869, S. 11, exactions beyond the rent specified in the patta subject the landlord to damages not exceeding double the amount of such taxation. S. 61, Regulation 8, 1793, and S. 3, Regulation 5, 1812, were repealed by S. 1, Act 16, 1874. S. 74, Act 8, 1885 says:

> All impositions upon tenants under the denomination of abwab, mahtut or other like appellations in addition to the actual rent shall be illegal, and all stipulations and reservations for the payment of such shall be void.

It should be remembered that this Act repeals Ss. 54 and 55, Regulation 8, 1793 (vide Sch. 1), without enacting any provision about the consolidation of rent of the whole with the asil into one entire sum. The position then, apart from anthorities, is that now in all cases about illegal cesses, the question will primarily turn about the meaning of the words "actual rent" used in S. 74.

The authorities bearing upon the point are too numerous and varied and are far from being reconcilable, but it is not impossible to deduce from them one consistent principle which, however, does not take us beyond the words of S. 74 itself.

The law assumed a somewhat settled state under the Full Bench decision of this Court in the case of *Chultan Mahton* v. *Tilukdhari Singh* (1). There were formerly decisions in which the stringent provisions of the regulations were not strictly given effect to: e. g., *Jeeatoollah Paramanick* v. *Jugodindro Narain Roy* (2), where the demand was of a cess over and above the original rent and the ryot consented and contracted to pay it: *Juggodish* v. *Turrikoollah* (3), which was the case of a parabi: *Budhna Orawan Mahton* v. *Juggessur Doyal Singh* (4), where the payments were not so much in the nature of cesses as of

(1) [1885] 11 Cal. 175 (F. B.).
(2) [1874] 22 W. R. 12.
(3) [1875] 24 W. R. 90.
(4) [1875] 24 W.R. 4

rent in kind, and which were fixed and uniform and had been paid by the ryot from the beginning according to local custom ; *Nabin Chunder Roy Chowdhry* v. *Gooroo Gobind Mojoomdar* (5), which was the case of bhika or payments made over and above the rents due, but paid voluntarily and not exacted ; *Serajgunge Jute Co. Ltd.* v. *Torabdee Akoond* (6), where a talab beshi of two annas in the rupee had been paid for many years in addition to the asil jama and had been in course of time incorporated with the asil jama and one receipt used to be given for the consolidated amount, it being found that it was paid for the purpose of preventing disputes with the landlord and for securing the ryot's own interest and that the ryot had agreed to make a definite payment in addition to his rent ; *Mahomed Fayez Chowdhury* v. *Jamoo Gazee* (7), in which a condition in a lease that a certain sum was to be paid as collection charges was held to be a part of the rent and not an abwab and was capable of enforcement if the condition was certain and definite in its nature and formed part of the consideration for the lease.

In the Full Bench case of *Chultan Mahton* v. *Tilukdhari Singh* (1), certain items were claimed as "old usual abwabs" and in the zamindari papers they were described as abwabs. The question referred to the Full Bench was :

> Whether assuming that the abwabs in question have, by the custom of the estate of which the lands form part, been paid by the defendant and his ancestors for a good many years, they are legally recoverable by the plaintiffs, although they are not actually proved to have been paid or payable before the permanent settlement.

To answer this question two important questions were considered (vide judgment of Mitter, J.) :—1st whether the imposition of abwab is prohibited and made unlawful by any law in force in this country, because if it is, S. 23, Contract Act, would make the contract to pay the same void ; secondly whether, if there was a contract between the parties for payment of abwabs, under the latter part of S. 3, Regulation 5, 1812, the contract was enforceable.

As regards the first question, on reference to Ss. 54, 55 and 61, Regulation 8, 1793, and S. 3, Regulation 5; 1812, S. 10, Act 10, 1859, S. 11, Bengal Act 8, 1869, it was held that a contract for the imposition of abwabs is unlawful and is not enforceable by law. To decide this question a construction of the latter part of S. 3, Reg. 5, 1812, was necessary. This portion is worded thus :

> But the Court shall notwithstanding maintain and give effect to the definite classes of the engagements between the parties, or in other words, enforce payments of such *sum as may have specifically agreed upon* between them.

Mitter, J., (Tottenham and Pigot, JJ., concurring) held that the words "such sum, etc." refer to the amount of the rent specified. On the second question it was held that the abwab not having been consolidated with the asil jama as required by S. 54, Reg. 8, 1793, a claim for recovery thereof would be nonsuited by S. 61 of that regulation. The case went up to the Judicial Committee, *Tilukdari Singh* v. *Chulhan Mahton* (8). The Judicial Committee held that the High Court was right in holding that the items in question were abwabs, and that if they were payable at the time of the permanent settlement, they ought to have been consolidated with the rent under S. 54, Reg. 8, 1793, and not being so consolidated they could not be recovered ; and if they were not payable at the time of the permanent settlement they would come under the description of new abwabs in S. 55 of that regulation and their imposition would be illegal.

In the meantime another case came up before the High Court, viz. the case of *Pudmanund Singh Bahadur* v. *Baij Nath Singh* (9). In this case certain items designated "silam" and "tehwari" were claimed in addition to a fixed rent on the basis of a kabuliyat which created a permanent tenure and in which the tenant had agreed to pay the same. The learned Judges (Tottenham and Ghose, JJ.,) held that the Full Bench decision in *Chultan Mahton* v. *Tilukdari Singh* (1), did not mean

> to exclude the operation of Reg. 5, 1812, where that regulation could apply,

and the items in question were not illegal cesses within the meaning of the Full Bench decision not being uncertain

(5) [1875] 25 W. R. 8.
(6) [1876] 25 W. R. 252.
(7) [1882] 8 Cal. 730.
(8) [1889] 17 Cal. 131=16 I. A. 152 (P. C.).
(9) [1888] 15 Cal. 828.

and arbitrary in their character, but specific sums which the tenants had agreed to pay to the landlords and the payment of which, no less than the payment of rent itself, formed part of the consideration upon which the tenancy was created, and which are in fact part of the rent agreed to be paid although not so described, they were recoverable under Reg. 5, 1812. There was another Full Bench decision in the case of *Radha Prosad Singh* v. *Bal Kowar Koeri* (10). There the question was whether certain cesses designated as "sarak," "batta," "neg" and "kharach" (without any specification of its nature) were realizable. The findings were that the rental was Rs. 18-10-6, that the difference between this rental and Rs. 22-2-0 which was claimed was made up of these items, and that they used to be realized and one receipt for the total amount, that is to say, the rent and these items, used to be given without any separate specification of them. The argument was that the plaintiff was entitled to recover at the rate of Rs. 22-2-0 as though the rent was Rs. 18-10-6 only, the balance was made up of items which were neither uncertain nor arbitrary and which the defendant had agreed to pay as part of the consideration for his holding the land.

This argument received support from the case of *Pudmanund Singh* v. *Baij Nath Singh* (9), which, according to referring Judges had put a wrong interpretation upon the Full Bench decision in *Chultan Mahton* v. *Tilukdari Singh* (1). When the case was heard by the Full Bench, *Radha Prosad Singh* v. *Bal Kowar Koeri* (10), Petheram, C.J., was of opinion that *Pudmanund Singh* v. *Baij Nath Singh* (9) must be held to have been overruled by the decision of the Judicial Committee in *Tilukhdari Singh* v. *Chultan Mahton* (8), and expressed his opinion as follows :

> By this judgment I understand the Privy Council, while affirming that of the High Court, to go beyond it and to hold that under the regulations nothing could be recovered for the occupation of the land, except one sum which must include everything which was payable for such occupation arrived at either by agreement or by some judicial determination between the parties, and that any contract, whether express or implied, to pay anything beyond that sum, under any name whatever for or in respect of the occupation of the land, could not be enforced.

O' Kinealy J., (Prinsep and Pigot, JJ., agreeing) also observed that it is only one, sum being the "ground rent" of the permanent settlement which could be recovered. Ghose, J., on the other hand interpreted the decision of the Judicial Committee as follows (5) :

> I do not understand that they intended to go any way beyond what Mr. Justice Mitter said in his judgment, and to lay down, as it is said that they did lay down, that nothing, save and except one sum, including every item of payment, could be recovered as payable for the occupation of land ; and that an agreement to pay anything beyond that sum, although it might be a lawful consideration for the lease could not be enforced. It appears to me that if in any case the Court finds that any particular sum specified in the lease or agreed to be paid, is a lawful consideration for the use and occupation of any land, that is to say, if it is really paid out of the rent, although not described as such it would be justified in holding that it is not abwab, and is recoverable by the landlord.

The learned Judge proceeded to observe with regard to the case of *Pudmanund Singh* (9) that, although in point of fact on a reconsideration of the matter he was of opinion that selami and tehwari were abwabs, it was not intended in that case to hold that anything that is not arbitrary and indefinite is recoverable although it may not be part of the rent ; that in that case both the elements were supposed (though wrongly, it afterwards appeared) to be present, viz. : first that the items in question were not of an arbitrary or indefinite character, and secondly, that they formed part of the rent agreed to be paid.

The opinion expressed by Petheram, C. J. in *Radha Prosad Singh* v. *Bal Kowar Koeri* (10) as to the interpretation to be given to the decision of the Judicial Committee has not been followed in several cases : e. g., *Kalanand Singh* v. *Eastern Mortgage Agency Co. Ltd.* (11) ; *Assanulla Khan Bahadur* v. *Tirthabashini* (12) ; *Mathura Prasad* v. *Tata Singh* (13) *Upendra Lal Gupta* v. *Ataullah* (14).

Cases of this Court after the aforesaid decisions of the Full Bench and of the Judicial Committee referred to above, are many and varied and it would be too

(10) [1890] 17 Cal. 726 (F. B.).

(11) [1913] 18 C. L. J. 83=19 I. C. 701.
(12) [1895] 22 Cal. 680.
(13) [1912] 40 Cal. 806=17 I. C. 177=16 C. L. J 296.
(14) [1916] 21 C. W. N. 108=36 I. C. 404.

tedious to deal with them. Many of them have been referred to and dealt with in detail in the judgments of Sanderson, C. J. and N. R. Chatterjea, J. in the case of *Bejoy Singh* v. *Krishna Behari Biswas* (15). The numerous cases that were cited at the Bar at the hearing of this appeal are all discussed in the judgments in that case. The position has been accurately stated by both the learned Judges in that decision. Sanderson, C. J., observed there :

> The rule that has been followed in this Court is that each case must depend upon the proper construction of the contract before the Court and if upon a fair interpretation of the contract it can be seen that a particular sum is specified in the contract or agreed to be paid as the lawful consideration for the use and occupation of the land i. e, if it is really part of the rent although not described as such the landlord can recover it.

N. R. Chatterjea, J. observed thus :

> It is contended that the mere fact that a certain item is dealt with in the kabuliyat in a separate clause or that it is not included in the instalments of rent ought not to make any difference in determining whether the item is or is not rent. But those facts have an important bearing upon the question of intention of the parties to the contract. They show whether the parties intended to treat a particular item as part of the rent agreed upon to be paid or as something different from the rent, and those facts have accordingly been taken into consideration in all the cases decided since the Full Bench. The question whether a particular item is or is not rent, no doubt, depends upon the construction of the lease in each case. But once it is held that a particular item has not been agreed upon by the parties as "the rent" nor described in the lease as such the further question whether such sum, although it may not form part of the consideration mentioned in the contract is recoverable or not must depend upon the law as laid down in the Regulations and Acts on the point.

With the above observations of the learned Judges I entirely agree. Applying these principles to the kabuliyat in the present case there is no doubt whatever that the intention of the parties was that the total rental of the jote would be Rs. 106-1-6 made up of Rs. 97-8-0 in cash, two he-goats or their price Rs. 2-8-0 and Rs. 6-1-6 as cesses. It appears that the *bhet* was deliverable at the time of the Dusserah puja and if not so deliverable its price is to be paid at the September kist along with the cash due to be paid at that kist. It also appears that the cesses payable are also calculated on the cash and the price of the *bhet* taken together. There are no indications in the kabuliyat which may incline us to take a contrary view. The Courts below appear to have been in error in the view they have taken. The appeal accordingly is allowed and the decrees of the Court of appeal below will be varied. The appellants will be allowed a decree taking the annual rental to be of Rs. 100 and cesses Rs. 6-1-6 as mentioned in the kabuliyat. In other respects, the decree, as passed will stand. The appellant will be entitled to his costs in this Court.

**Cammiade. J.**—I entirely agree with what my learned brother has said. An abwab, as defined in S. 74, Bengal Tenancy Act, is whatever is recovered from the tenant in addition to the actual rent : and rent is defined in S. 3, sub-S. (5) as whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant. In each case it is to be determined whether or not the item called in question as an abwab is covered by the definition of the term rent. To put it in other words, it must be found that the item is part of the consideration agreed to be paid or delivered by the tenant for the use and occupation of the land, provided that such consideration is lawful. The consideration may be wholly monetary or wholly one in kind or it may be partly in money and partly in kind. The statute does not restrict consideration in kind to grain or other produce of the soil. The consideration may be a cartload of paddy or a cartload of money ; and in either case it would be perfectly lawful. There is nothing in the law prohibiting a stipulation such as the one in the present case, that two he-goats are to be delivered as part of the consideration for the use and occupation of the land. The he-goats in such a case do not come within the definition of "abwab." The payments in money or the deliveries in kind at which the law strikes are such as are not payable or deliverable under the terms of the contract between the landlord and the tenant. Real abwabs are payments or deliveries, sometimes fixed and customary and sometimes arbitrary and uncertain which were not agreed upon between the parties as consideration for the use and occupation of the

(15) [1917] 45 Cal. 259=41 I. C. 561=21 C. W. N. 959.

land. The reports of the various surveys and settlements in Bengal show a large number of levies of various kinds made from the tenants on the occasion of marriages, sradhs, first-rice ceremony, sacred thread ceremony, pujas, journeys etc., performed by the landlord's family or on the occasion of certain ceremonies in the families of the tenants. These are survivals of the times when the relations between landlord and tenant were governed by custom and not by contract, and when also the landlords, however petty, considered themselves the overlord of their tenants. Mr. Jameson, in his report of the Midnapur settlement operations, divides the abwabs he found there into three classes:

1. Those connected with the holding of land and payment of rent.

2. Miscellaneous collections for various purposes.

3. Impositions of the nature of fines for breach of caste rules of offence against the social law.

He says this rough division indicates the three capacities in which the zamindar stood in relation to the tenants, and in virtue of which he demanded the payments, namely, as owner of the soil, as feudal overlord to whom special services are due and as "censor morum."

The same Settlement Officer has mentioned in his report that in the same district certain chhars or remissions of rent were made by the landlords. He found four kinds of remissions, one made to artisans, another to village headman, a third to bhadralok and a fourth, termed mamuli, which was unexplained,

Landlords thought more of the abwabs they collected than of what they were legally entitled to collect under the terms of the contract between them and their tenants. The result has been that Settlement Officers throughout Bengal have reported that the vast majority of the tenancies to which the presumption laid down in S. 50, sub-S. (2), have been applied were not really mukurari tenancies, Mr. J. C. Jack in his report of the Bakarganj settlement has said that tenants preferred abwabs to enhancements of rent, because the latter are permanent additions to the rent, whereas the former being illegal, could be repudiated in better times. Agreements such as the one before us do not belong to the class of arrngements last described.

In some of the cases that have come before this Court, the payments which were found to be abwabs had been voluntarily made for a long time and were even fixed in amount; but the amounts levied had never actually formed part of the rent agreed to be paid and had never been treated as such. There are, however, certain cases in which it has been held that because a certain amount of money was mentioned in the written lease as khazana, the stipulation for the delivery of certain movables was not one for rent. The assumption conveyed is that the term "khazana" is equivalent to the term "rent." This can hardly be correct in view of the definition of the term "rent" in the Act. By the word "khazana" is meant what is payable in money. Rent includes also what is deliverable in kind under the terms of the contract.

In the present case, the contract expressly provides for the payment of money and the delivery of two he-goats. The goats are part of the rent. It is perfectly immaterial that no cess is assessed on the value of the goats. That circumstance in no way affects the nature of the stipulation for the delivery of goats. I, therefore, agree with my learned brother that this appeal must be decreed.

D.D. *Appeal decreed.*

---

## A. I. R. 1927 Calcutta 862

B. B. GHOSE AND PAGE, JJ.

*Rajaram Singh*—Defendant — Appellant.

v.

*Pancha Deogi* — Plaintiff — Respondent.

Appeal No. 81 of 1925, Decided on 5th May 1927, from the original decree of the 3rd Sub-Judge, 24-Parganahs, D/- 12th January 1925.

*Minor—Debts incurred by guardian for minor's business—Creditor can proceed against the assets provided guardian has not acted improperly.*

Minor cannot be personally made liable for any debt incurred by his guardian on his own personal liability : 11 *Bom.* 551 (*P. C.*) and *A. I. R.* 1919 *P. C.* 129, *Foll.* [P 863. C 2]

But if a guardian incurs a debt for the purpose of carrying on a business of a minor which was continuing from before the date of the

**debt incurred by the guardian, then, as the guardian is entitled to indemnify for liabilities properly incurred out of the assets of the minor embarked in the business, creditors of the business are entitled to proceed directly against such assets. Where, however, the guardian has no right to indemnify against the assets in the business, as where he has acted improperly, neither have his creditors: 35 *Mad.* 692, *Foll.***

[P 863, C. 2 ; P 864, C 1]

*Brojo Lal Chakravarty* and *Gopendra Krishna Banerjee*—for Appellant.

*Sarat Chandra Basak, Sitaram Banerjee* and *Diptendra Mohan Ghose*—for Respondent.

**B. B. Ghose, J.**—This appeal arises out of a suit brought by the plaintiffs for recovery of a certain sum of money borrowed by the guardian appointed by the Court for the minor defendant. The plaintiffs' case is that the minor had a business for supplying labour for certain works done under the Port Commissioners of Calcutta. The money was required for carrying on that business and the guardian of the minor entered into an agreement with the plaintiffs for the advance of money from time to time for the purposes of the business and for repayment in certain ways. It was also stipulated that the guardian should pay interest at the rate of 3 per cent. per month on the amount taken from the plaintiffs. The plaintiffs' case is that the amount of the claim made in this suit was found due to them in December 1923, but as the defendant did not pay the amount, they ceased to make any further advance and the plaintiffs now sue for the amount of Rs. 5,846 odd for principal and interest at the rate of 3 per annum till the date of realisation. The suit was brought on the 13th March 1924. Various objections were taken in the defence which it is needless now to state in detail. The minor was represented by the same person as his guardian who borrowed the money from the plaintiffs. It is undisputed that that guardian carried on the business in which the minor was engaged from a time previous to the transactions entered into with the plaintiffs. It is also clear from the evidence that unless the guardian was able to find any money by borrowing from some person or other he would not have been able to carry on the business on behalf of the minor, and it is also admitted that the business was a profitable one so far as the minor was concerned although it might not have been so profitable as the learned Subordinate Judge has found it to be. The Subordinate Judge has made a decree in favour of the plaintiffs for Rs. 5,836 to carry interest at the rate of 6 per cent. per annum from the date of the decree and the decretal amount was to be realized from the estate of the minor which is confined to his contract business under the Port Commissioners for the purpose of which the money was borrowed. From this decree the defendant has appealed.

The first contention raised on behalf of the appellant is that the minor cannot be made personally liable for the money that the certificated guardian borrowed for him. That proposition cannot be contested. The proposition is well settled by the case: see *Waghela* v. *Masludin* (1); *Ma Hnit* v. *Hashim* (2). But in this case the Subordinate Judge has not made a decree making the minor personally liable; or in other words, he has not made a decree by which the plaintiffs can pursue any property of the minor other than the assets of the business with the Port Commissioners. The broader contention that was sought to be raised, namely, that in the circumstances of this case plaintiffs are not entitled to any decree as against the minor cannot at all be supported. It is no doubt true, as I have already said, that the minor cannot be personally made liable for any debt incurred by his guardian on his own personal liability. But, it has been settled that if a guardian incurs a debt for the purpose of carrying on a business of a minor which was continuing from before the date of the debt incurred by the guardian, the creditor cannot make the minor directly liable for the money borrowed. He can, however, recover the money from the guardian. The guardian in his turn is entitled to indemnify himself for the money properly borrowed by him for the purpose of carrying on the business of the minor. According to the rule which has been enforced in the Court in India the creditor is, as it were, subrogated to the position of the guar-

(1) [1887] 11 Bom. 551=14 I. A. 89=5 Sar 16 (P. C.).
(2) A. I. R. 1919 P. C. 129.

dian and it has been held that the creditor under such circumstances can reimburse himself of the money which the guardian borrowed for the purpose of carrying on the business of the infant. The case in our Court, which has been followed in numerous cases is that of *Joykisto Cowar* v. *Nittyanuned Nundy* (3). Following that case the law has been laid down, if I may say so, very clearly in the case of *Sanka Krishnamurthi* v. *Bank of Burma* (4), where Mr. Justice Wallis, as he then was, in delivering the judgment of the Court, stated the rule thus :

> Creditors of the business have, therefore, no right of direct recourse against the minor or his estate, but, as the guardian is entitled to indemnity for liabilities properly incurred out of the assets of the minor embarked in the business, creditors of the business, it has been held, are entitled to proceed directly against such assets. Where however the guardian has no right to indemnity against the assets in the business as where he has acted improperly neither have his creditors, as held by Sir George Jesselin *In re Johnson* (5) which was followed in *In re Evans* (6).

In the present case as there is no question that the liabilities were properly incurred by the guardian for the purpose of conducting the business of the minor the creditor is entitled to recover the sum claimed. The same principle has been again stated in the case of *Batchu Ramajogayya* v. *Vajjula Jagannadhan* (7). There is no evidence on the side of the defendant from which it can be argued that the liability was not properly incurred by the guardian on behalf of the minor for the purpose of carrying on the business. It has been contended on behalf of the appellant that the plaintiffs are only entitled to recover the money out of the money which the defendant recovered from the Port Commissioners during the period during which the plaintiffs continued to advance money to the defendant. That argument does not appeal itself to me. It is quite probable, and there is evidence on the record to show, that it is a fact that certain sums which were due to the defendant from the Port Commissioners for work done during the period referred to by the appellant were not paid immediately within that period. It cannot be argued that the plaintiffs cannot recover their dues out of the sums so outstanding in the hands of the Port Commissioners.

Another argument was addressed to us on behalf of the appellant and it arises out of issue 4 framed in the lower Court. It was stated that a sum of Rs. 2,500 was taken from the plaintiffs in order to pay off a creditor, Bahal Singh. It is faintly urged that the creditor Bahal Singh was a creditor of the guardian himself and not of the minor. There is, however, evidence on the side of the plaintiffs that Bahal Singh was a person who had advanced money previously to the guardian for carrying on the business of the minor. His loan carried a higher rate of interest, over 6 per cent. per month, and the guardian by taking a loan from the plaintiffs discharged the loan of Bahal Singh. That should, therefore, be considered as money received from the plaintiffs for the purposes of the business of the minor.

Another argument was addressed to us to the effect that the loan advanced did not represent the money that was required for the purpose of the defendant alone. It was stated that the money advanced to another person named Deo Kumar was entered in the hat-chita. The plaintiffs, however, say that they never advanced any loan to Deo Kumar. It was pointed out that in the hat-chita there were certain entries showing that Deo Kumar obtained the money on behalf of the guardian of the infant, and it is contended that those entries really show that those were independent transactions with Deo Kumar. That contention can hardly be supported in the absence of any evidence. It rather shows that Deo Kumar took money on behalf of the guardian for the business of the infant. It was further argued that the accounts show that certain cheques payable to Deo Kumar had been credited in the defendant's account. Nothing turns upon that. It may be that Deo Kumar had paid the cheques to the defendant and the defendant had with those cheques repaid the debt to the plaintiffs in part. These are all the arguments that were advanced on behalf of the ap-

---

(3) [1878] 3 Cal. 738=2 C. L. R. 440.
(4) [1911] 35 Mad. 692=21 M. L. J. 620=11 I. C. 79=(1911) 1 M. W. N. 385.
(5) [1880] 15 Ch. D. 548.
(6) [1887] 34 Ch. D. 597.
(7) [1919] 42 Mad. 185=36 M. L. J. 29=9 M. L.W. 229=49 I. C. 872=(1919) M. W. N. 148 (F. B.).

pellant which require any answer. It was sought to make out a case of undue influence and coercion on the guardian of the infant by the plaintiffs. There is absolutely no evidence to support that suggestion. It was urged in the Court below, but it was negatived by that Court. All the points urged by the appellant, therefore, fail and this appeal is dismissed with costs.

**Page, J.**—I agree. According to principles of law that are now well settled it is clear that the plaintiffs have no cause of action against the minor defendant either personally or against his estate in respect of the personal contracts entered into by his guardian on his behalf : See *Waghela Raj Sanji* v. *Maslu-din* (1). I agree, however, that the creditors could have recourse to the estate of the minor's business to the extent of which the guardian was entitled to claim indemnity from the minor in respect of debts prudently incurred by the guardian for the purpose of carrying on the minor's business. See the case of *Sanka Krishnamurthi* v. *Bank of Burma* (4). Having regard to the evidence adduced I also agree that the decree of the lower Court should be confirmed and this appeal should be dismissed with costs.

R.K. *Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 865

MUKERJI AND MITTER, JJ.

*Bepin Chandra Das* and *others*—Defendants 1-3—Appellants.

v.

*Menajaddi* and *others*—Respondents.

Appeal No. 2239 of 1924, Decided on 16th June 1927, from the appellate decree of the 1st Sub-Judge, Backerganj, D/-21st July 1924.

*Civil P. C. O.* 32, *R.* 3 (4)—*Non-service of notice on the minor, or guardian not taking steps to defend is not sufficient to set aside decree on the ground of fraud—Minor must prove fraud in such suit.*

**In a suit by a minor to set aside a decree on the ground of fraud the mere fact that there was non-service of notice upon the plaintiff would not be sufficient for the purpose of enabling the plaintiff to obtain a decree in the suit. Nor would the fact that the guardian appointed by the Court did not take proper steps to defend the suit be sufficient for the purpose. The plaintiff will have to prove fraud upon which his whole case is based. The Court will have to consider whether non-service, if any, of the notices under Cl. (4), R. 3, O. 32, Civil P. C., was brought about intentionally or wilfully by the plaintiffs in the prior suit in order to prevent the plaintiff who was the defendant in that suit from having his case properly represented before the Court. The Court will also have to go into the question whether the appointment of the Court guardian was obtained by means of contrivance resorted to by the plaintiffs in that suit with a similar object. [P 865 C 2, P 867 C 1]**

**Unless and until it is found that the provisions of O. 32, R. 3 (4), have been infringed, it cannot be said that the appointment of the Court guardian was not a valid one. [P 866 C 2]**

*Abinash Chandra Ghose*—for Appellants.

*Jatindra Nath Sanyal*—for Respondent 1.

**Mukerji, J.**—This appeal arises out of a suit which was instituted by the plaintiff for setting aside a decree and a sale held in execution thereof on the ground of fraud. The suit has been decreed by both the Courts below. The defendants 1 to 3 have preferred this appeal. The plaintiff's case was that he held a jama under the 4 annas share in a certain taluk for which he was to deliver 11 katis of paddy as rent per year, that defendants 1 to 3, who were the plaintiff's landlords, instituted a suit for rent being suit No. 1883 of 1918 alleging that the plaintiff's jama, together with two other jamas in which the plaintiff was not interested constituted one jama of which the plaintiff and defendants 4 to 9 were tenants, and in collusion with defendants 4 to 9 obtained an ex-parte decree, fraudulently suppressing the summons that had been issued on the plaintiff and not having the plaintiff properly represented in the said suit and thus having fraudulently obtained decree by adducing perjured evidence.

The learned Munsif held that there was no evidence to show that the summons in the suit was served upon the plaintiff who was a minor at the time or on his natural guardian Aminaddi who was his maternal uncle and with whom he was living at the time. He, however, found that the non-service could not be attributed to the interference of defendants 1 to 3 who were the plaintiffs in the rent suit and, therefore the plaintiff was not entitled to any relief on that ground. He, held, however, that the suit was a false one and therefore, the decree was liable to be set aside.

The falsity of the suit, so far as the learned Munsiff appears to have found, consisted in this: that the suit was instituted in respect of the rent for the 4 annas share of the three jamas without disclosing the fact that it was only in respect of one of these jamas that the plaintiff was interested and that for this he had to deliver rent in the shape of paddy at the rate of 11 katis a year. There was an appeal perferred from this decision of the learned Munsif by defendant 1 and this appeal has been dealt with by the Subordinate Judge.

The findings of fact which the learned Subordinate Judge has recorded are somewhat difficult to comprehend and indeed some of the findings which he has so recorded have very little to do with the questions which are relevant in a suit for setting aside a decree on the ground of fraud. He has held in the first instance that the defendants 1 to 3 in the rent suit No. 1883 of 1918, in which they were the plaintiffs, treated the three jamas as one jama and there is no evidence to show that rent had been realized from the present plaintiff of the three jamas treated as one, and further, that so far back as 1308, the said defendants 1 to 3 or some of them had accepted a kabuliyat from the plaintiff's father in respect of the separate jama which the plaintiff alleged, and that the record-of-rights also was in plaintiff's favour. He thus found that the claim in the rent suit was a false one.

Having done so he proceeded to consider the question whether the plaintiff was properly represented in the said suit. He held in one passage in his judgment that the natural guardian of the plaintiff who was then a minor was not properly communicated with in respect of the said suit. But later on he makes an observation which detracts to a certain extent from the strength of the finding, the said observation being to the effect that, even if the natural guardian had notice of the rent suit, and for that reason the guardian appointed by the Court be treated as having been validly appointed, the latter did not in point of fact take any interest in the plaintiff's case and did not take proper care to defend the said case on behalf of the plaintiff. As regards the question as to whether notice of the suit had been given to the natural guardian the finding of the learned Subordinate Judge is, therefore, not very clear. As regards service of notice on the plaintiff himself there is a passage in the judgment of the learned Subordinate Judge which is to the effect that the plaintiff at the time of the suit lived at the house of his maternal grandfather under the guardianship of his maternal uncle. This passage means that at the time of the suit the plaintiff was living in the village Araji Kalikapur, because that is the place where according to the evidence, the house of the maternal grandfather was situated. There is no finding, however, as to where the notice in the name of the plaintiff was addressed, or where it purported to have been served.

It is true that in the judgment of the learned Munsiff these matters have been dealt with but in absence of a clear finding on this question by the learned Subordinate Judge it cannot be said either that the notice on the plaintiff himself or the notice on his natural guardian was properly served for the purpose of the provisions of O. 32, R. 3, sub-R. 4, Civil P. C. Unless and until it is found that the provisions of that clause have been infringed it cannot be said that the appointment of the Court guardian was not a valid one. The question, therefore, as to whether the provisions of that clause have been satisfied or not is a question of fact upon which the learned Subordinate Judge will have to record clear and proper findings on a consideration of the materials that have been adduced on behalf of the parties in the present case.

The mere fact that in the opinion of the Courts below the facts were not correctly placed before the Court by defendants 1 to 3 in the rent suit aforesaid, or that the plaintiff should have been successful in the said rent suit, or that there was non-service of notice upon the plaintiff would not be sufficient for the purpose of enabling the plaintiff to obtain a decree in the present suit. Nor would the fact that the guardian appointed by the Court did not take proper steps to defend the suit be sufficient for the purpose. The plaintiff will have to prove fraud upon which his whole case is based. The Court will have to consider the materials on the record in order to arrive at a conclusion as to whether non-service if any, of the notices under Cl. 4, R. 3, O. 32, Civil P. C., was brought about

intentionally or wilfully by the plaintiffs in that suit, that is to say, in order to prevent the plaintiff who was the defendant in that suit from having his case properly represented before the Court. The Court will, therefore, also have to go into the question whether the appointment of the Court guardian was obtained by means of a contrivance resorted to by defendants 1 to 3, the plaintiffs in that suit, with a similar object. These are the material questions which will arise for a satisfactory decision of the present suit.

We accordingly set aside the decree passed by the learned Subordinate Judge and send down the case to his Court so that the appeal may now be re-heard, and proper findings being arrived at on these questions the appeal may be disposed of in accordance with law.

Costs of this appeal will abide the result.

**Mitter, J.**—I agree.

R.K. *Case remanded.*

---

## A. I. R. 1927 Calcutta 867

PAGE AND GRAHAM, JJ.

*Khetro Mohan Mitter* — Applicant— Appellant.

v.

*Nalini Bala Dassi*— Objector— Respondent.

Appeal No. 337 of 1925, Decided on 22nd June 1927, from an order of the Dist. Judge, 24 Pergannas, D/- 20th May 1925.

*Civil P. C., S.* 151—*Appeal*— *Civil P. C., O.* 43.

No appeal lies from an order under S. 151, as it is not one of the orders appealable under O. 43, Civil P. C. [P. 868, C. 1]

*Amarendra Nath Bose, Satindra Nath Mukerji* and *Hira Lall Ganguli*—for Appellant.

*Hira Lall Chakrabarty*—for Respondent.

**Page, J.**—This is a very simple case. The appellant challenges the validity of an order passed by the learned District Judge of 24-Pergannas of the 20th May 1925. The learned advocate who appears for the appellant conceded and contended that the order under review was made by the learned District Judge, and could only have been made by the learned District Judge, in the exercise of the inherent powers which he contended the learned Judge possessed under S. 151, Civil P. C. We are asked to interfere with the order under review. It is to be borne in mind that the learned Judge would only be entitled to reverse the two orders of the 20th July and 5th September 1923, if in his opinion those two orders amounted to an abuse of the process of the Court or it was necessary for the ends of justice that those two orders should be reversed. The learned District Judge, after considering the matter, came to the conclusion that

> it cannot be contended that a disclosure of the order passed by the District Judge on the 5th April 1910, would have been sufficient for the Court to stay its hands in the matter of dealing with the application for permission to sell.

He further came to the conclusion that there was no necessity for him to exercise any inherent power which he might possess for the purpose of abrogating the two orders to which objection was taken, because another remedy was open to the applicant. In my opinion, he was quite right in the view which he took of the position. The learned advocate for the appellant contended—contrary I think, to his own conviction—that the validity of the two orders of the 20th July and 5th September 1923, and the sale by the administratrix which followed from them, could not be challenged in a suit upon the ground that they had been obtained by fraud. He cited two authorities in support of his contention the earlier of which is the case of *Chuni Lal Haldar* v. *Makshada Debi* (1) in which case the Court left the matter open, and the latter of which is the case of *Rakshab Mandal* v. *Tarangini Deyi* (2), in which case the Court appears to have been of opinion that under such circumstances a suit would lie.

The result is that, in my opinion, the present attempt to induce the Court to reverse the decision of the learned District Judge of the 20th May 1925, whether the present proceeding is to be regarded as an appeal or as an application under S. 115 is misconceived, and both the appeal and the application are dismissed with costs, the hearing-fee being assessed at two gold mohurs.

(1) [1919] 23 C. W. N. 652=52 I. C. 309.
(2) A. I. R. 1921 Cal. 332.

**Graham, J.**— I agree. The learned District Judge appears to have been of the opinion that the application before him could not be entertained under the Probate and Administration Act. It seems to me that, in so holding, the learned District Judge was in error and that by virtue of S. 53, Probate and Administration Act, he had jurisdiction to deal with the matter with reference to S. 151, Civil P. C. It appears to be conceded that the order must be deemed to have been one under that section. If that is so, then no appeal lies as the order under S. 151 is not one of the orders appealable under O. 43, Civil P. C. The appeal, therefore, must be dismissed.

An application for revision has also been filed before us under S. 115, Civil P. C. But, in my judgment, the facts are not of such a nature as to justify our interference in the exercise of our revisional jurisdiction, and the appellant must seek his remedy elsewhere.

R.K. *Appeal and revision dismissed.*

---

## A. I. R. 1927 Calcutta 868

RANKIN, C. J., AND MITTER, J.

*Nirmala Sundari Dassi*—Defendant—Appellant.

v.

*Deva Narayan Das Choudhuri* and *another*—Plaintiffs—Respondents.

Appeal No. 2110 of 1924, Decided on 26th May 1927, from the appellate decree of the 1st Sub-Judge, Sylhet, D/- 30th June 1924.

*Hindu Law—Widow—Property purchased by widow benami from surplus income—Reversioner must prove that widow intended to make it an accretion.*

In a suit to set aside a deed of gift executed by a Hindu widow in respect of property which the reversioners allege was acquired by her with the surplus income of her deceased son's estate, the plaintiffs, in order to succeed, have to make out that although this property was purchased with the income of the son's estate, this was not treated by the widow as her own separate property. The fact that the purchase was made in the benami of another person and that it is not made in widow's name is an indication that she wanted to treat this property as her own separate property and not to form an accretion to her son's property. That realizations from the property in dispute and the properties which admittedly belonged to the son were entered in the same collection papers is not a circumstance which, standing by itself can justify the conclusion, that the widow wanted to treat this property on the same footing as the property which devolved on her from her son: 10 *Cal.* 324 (*P. C.*), *Dist.* 20 *Cal.* 433 (*P. C.*), *Foll.*

[P 868 C 2; P 869 C 1, 2]

*Brojo Lall Chakravarti, Gopal Chunder Das, Provash Chander Chatterji* for *Satyendra Kishore Ghose*—for Appellant.

*Sarat Chunder Basak* and *Nikunja Behari Roy*—for Respondents.

**Mitter, J.**—This is an appeal from a decision of the learned Subordinate Judge of Sylhet, dated the 30th June 1924, reversing a decision of the Munsif, Habigunj, dated the 29th May 1923. The plaintiffs, who are now the respondents, commenced the present suit to set aside a deed of gift executed by a lady of the name of Baisakha in respect of property which the plaintiffs allege, was acquired by her with the surplus income of her deceased son's estate. The plaintiffs claim as the reversionary heirs of Krishna Chandra Das Choudhuri, son of Baisakha, who inherited her son's estate after his death. The present suit was commenced about five years after Baisakha's death. The defence of the defendant to the suit is that she obtained this property by a deed of gift which was executed by Bisakha a short time before her death which took place in the year 1917. The property in question was purchased in the name of one Krishna Gobinda by Baisakha. The date of acquisition of this property does not appear from the record of the suit, but the fact that Baisakha purchased it in the name of Krishna Gobinda is relied on on behalf of the defendant, who is the appellant before us, as showing the intention of Baisakha to keep it separate from the estate of her son,

The Court of first instance gave effect to the defence that the gift had been made by Baisakha and that although the property was purchased out of the surplus income of Baisakha's son's estate she treated it as her separate property and consequently she was in a position to make a gift of it. The Court of first instance accordingly dismissed the plaintiffs' suit.

An appeal was carried to the Subordinate Judge of Sylhet by the plaintiffs and the learned Subordinate Judge has thrown the burden on the defendant of showing that the property in dispute

was property which Baisakha was entitled under the Hindu law to make a gift of. The learned Subordinate Judge states. and the passage is to be found at page 7 of the paper-book,

that the defendant was doubly bound to prove the due execution of a document by a pardanashin lady and also as a donee from a Hindu widow who had only life interest in the properties left by her husband and son, though the learned pleader for the respondent says that the burdent of proof is on the plaintiff.

After having thrown the burden of proof wrongly as I shall show presently, the learned Subordinate Judge enters into an enquiry as to the validity or otherwise of the deed of gift and comes to the conclusion that it has not been established that the lady who was about 100 years old knowingly executed the deed of gift. The learned Subordinate Judge, on these findings, allowed the appeal before him and decreed the plaintiffs' suit declaring the plaintiffs' maliki right by succession and granted a decree also for recovery of khas possession.

Against this decree the defendant has preferred a second appeal and several grounds have been taken before us by the learned vakil for the appellant. In the first place, it is contended that the lower appellate Court has erred in law in throwing the onus on the defendant and that it ought to have held that the onus was on the plaintiffs to show that these lands were accretions to Baisakha's son's estate; and if after throwing the onus upon the plaintiffs it found that the plaintiffs had failed to make out that the disputed property was an accretion to Bisakha's son's estate, it should have dismissed the plaintiffs suit. It is contended in the second place that there are certain facts which the lower appellate Court has not taken into account in coming to the conclusion that the gift was not validly executed or was not knowingly executed by the lady. It has been contended in the third place that the gift was justified as it made provision of a small portion of the property in favour of a dependent member of the family.

With regard to the first ground taken, we think that the contention of the learned vakil for the appellant must prevail, for it appears to us that the plaintiffs' own case is that the property in dispute was purchased with the surplus income of Baisakha's son's estate, The plaintiffs in order to succeed have to make out that although this property was purchased with the income of the son's estate this was not treated by Bisakha as her own separate property. It appears to be a fact which is borne out by the record that the purchase was made in the benami of another person and that it was not made in Baisakha's own name. It seems to us that it is an element to be taken into consideration as to whether this fact is not an indication that she wanted to treat this property as her own separate property and not to form an accretion to her son's property. It is said that as against such an intention to keep it as a separate property there is the fact that realizations from the property in dispute and the properties which admittedly belonged to the son were entered in the same collection papers. That, in our view, is not a circumstance which, standing by itself, can justify the conclusion that Baisakha wanted to treat this property on the same footing as the property which devolved on her from her son. In dealing with the appeal the lower appellate Court has not dealt with these considerations which are essential for the purpose of determining as to whether the plaintiffs are entitled to any relief in the present suit.

On behalf of the respondent it has been argued that the moment it is shown that the property in question was purchased out of the income of Baisakha's son's estate the plaintiffs are entitled to succeed unless the defendant establishes that Baisakha disposed of the property during her lifetime. It has been contended on the authority of the case of *Isri Dutt Koer* v. *Hansbutti* (1), that the plaintiffs ought to succeed as soon as they establish this proposition. We are unable to agree with this contention of the learned advocate for the respondents. The cases show that the true test in suits of this kind is to ascertain what is the intention of a limited owner under Hindu law. It is conceded that the income from the son's estate was absolutely at the disposal of Baisakha and it is also conceded that if she had made any disposition of the property by gift inter vivos, that disposition would be good. But it is said that if she made no disposition of her property and

(1) [1884] 10 Cal. 324=10 I. A. 150=13 C. L. R. 418=4 Sar. 459 (P. C.).

although she wanted to treat this property as her own, still the devolution of such property would follow the same course as the property which devolved on her from her son. I have been unable to find any authority for such a proposition in the case in *Isri Dutt Koer* v. *Hansbutti* (1). In that case, as the facts show, there was no endeavour or attempt made for the purpose of distinguishing the properties acquired from the income of the original estate and the original estate itself, and it was held that in the absence of anything which would show a contrary intention, the after-acquired properties which would be derived from the income of the original estate would follow the same line of devolution as the original estate. In the case of *Saodamini Dasi* v. *Administrator-General of Bengal* (2), their Lordships of the Judicial Committee at page 22 point out :

> The claim of Badam Coomaree to this part of the income of her husband's estate was made by her as heiress of her husband entitled to income not disposed of. She claimed this income as her absolute property, and their Lordships can see nothing in the language of the deed of agreement, or in the transaction with Shama Churn Mullick, which can support the appellant's contention that she agreed to receive this income as capital in which she should acquire only the estate of a Hindu widow, or that the nature of the fund should differ in any way after she received it from what it had been before ;

and at page 24 [of 20 *I. A.*] their Lordships point out :

> She did nothing to indicate an intention to make the fund received, or the interest on it, part of her husband's estate which was in other hands or to justify the inference that she wished it to revert to her husband's heirs. It was said she had placed it in investments of a permanent nature. Had she done so, it does not appear to their Lordships that this circumstance alone would have added the fund to the estate devolving on her husband's heirs. But the fact is, that having received the money in currency notes which yielded no return and the keeping of which was attended with much risk, she at once placed it, as any prudent person would do, in securities, investing it in Government promissory notes yielding regular interest, but which were negotiable instruments transmissible by mere indorsation ;

and at page 24 bottom their Lordships, further point out :

> Their Lordships, being thus of opinion that the fund in question was not in any sense received by Badam Coomaree as capital or capitalized income of her husband's estate, but was received as income which, under the arrangement with Sham Churn Mullick, was her own absolute property, and further that she never indicated any intention to make the same part of her husband's estate for the benefit of his heirs, will humbly advise Her Majesty to dismiss the appeal.

In this case the fund devolved on the stridhan heirs of Badam Coomaree.

We think, therefore, that the contention of the respondents in this behalf must fail.

It is necessary, therefore, to remand this case to the lower appellate Court for determination of two important questions on the evidence on the record : first, as to what was the source of the purchase-money by which this 8 annas-share of the property now in dispute was acquired ; and, secondly, if it is found that this was acquired out of the income of Baisakha's son's estate whether the facts show an intention on her part to treat it as her own separate estate as distinct from the estate of her son. If the lower appellate Court come to an affirmative finding on the second question, namely, that the property was purchased out of the income of her son's estate, but that she wanted to treat it as separate, then the plaintiffs' case will fail. If the lower appellate Court comes to the conclusion on the first point that the plaintiffs have failed to make out that the property was purchased out of the income of Baisakha's son's estate, then also the plaintiff's suit will fail. The lower appellate Court will also retry the question of gift.

The decree of the lower appellate Court is set aside and he is directed to re-hear the appeal in the light of the observations made above.

The appellant is entitled to costs of this appeal. As to the costs in the Courts below they will abide the final result.

**Rankin, C. J.**—I agree.

R.K. *Case remanded.*

(2) [1893] 20 Cal. 433=20 I. A. 12=6 Sar. 272 (P. C.).

---

## A. I. R. 1927 Calcutta 870

MUKERJI AND MITTER, JJ.

*Surendra Nath Rath* and *others*—Plaintiffs—Appellants.

v.

*Sambhu Nath Dobey* and *others*—Defendants—Respondents.

Appeal No. 54 of 1925, Decided on 9th June 1927, from the decree of the Dist. Judge, Midnapore, D/- 26th August 1924.

(a) *Evidence Act, S. 90—Presumption is discretionary so that Court may require document to be proved without making any presumption.*

The presumption referred to in S. 90 is one which the Court is not bound to make. and notwithstanding that the elements mentioned in that section are satisfied the Court may require the document to be proved in the ordinary manner : 26 *All.* 581 (*P.C.*), *Rel. on.* [P 872 C 1]

Where the plaintiff do not rely upon such presumption but adduce evidence in order to prove the genuineness of a document but such evidence is disbelieved by the Court, they cannot complain if such presumption was not made by the Court. [P 872 C 2]

(b) *Civil P. C., O. 32; R. 7,—Compromise—effected between parties to a suit who are major—Court need not consider its effects on minors not on the record—Obiter.*

So long as any compromise is between the parties to a suit who are sui juris, the Court will not be called upon to enter into the question whether such compromise may not affect persons who are not parties to the suit and who are not sui juris. [P 873 C 3]

(c) *Hindu Law — Alienation — Mitakshara father—His powers as karta to bind infant sons by admissions or dealings with family property rest on implied consent of all members and on presumption of benefit resulting to them—Obiter.*

The powers of a Mitakshara father as karta of the family to bind his infant sons with regard to disposal or management of joint family properties are wider than those of other kartas of such families and rest upon an implied consent on the part of all the members and a presumption that what is done is for the benefit of the family : *A. I. R.* 1917 *P. C.* 61, *Foll.* [P 873 C 1]

In the case of a Mitakshara father who is the karta, an implied authority to make an admission for the benefit of his minor sons may well be presumed. [P 873 C 1]

*Tarakeswar Pal Chawdhury* and *Jnan Chandra Roy*—for Appellants.

*Nanda Lal Bhattacharjee*, *Monmohan Bannerjee* and *Anil Chandra Dutta*—for Respondents.

**Mukerji, J.**—This appeal arises out of a suit which was instituted by the plaintiffs for certain declarations, namely, that the plaintiffs have got brahmottor niskar right to the plaint lands, that the defendants 1 to 8 are not the landlords of the plaintiffs, and further that the solenama and the solenama decree that were respectively filed and passed in Suit No. 958 of 1918 were not binding on the plaintiffs and for other reliefs. The suit has been dismissed by both the Courts below and the plaintiffs have thereupon perferred this second appeal to this Court. Shortly stated, the facts which led to this litigation are as follows:

The plaintiffs are the sons of defendant 9 in the suit. The plaintiffs' case is that they belonged to a family governed by the Mitakshara school of law ; that defendants 1 to 8 instituted a rent suit being Suit No. 958 of 1918 against their father, the defendant 9, and in that suit the defendant 9 filed a solenama, and a decree was ultimately passed on the basis of that solenama. The plaintiffs' case is that the defendant 9 did not in that suit disclose that he and the plaintiffs were members of a family governed by the Mitakshara school of law but that, on the other hand, defendant 9, in his written statement, asserted his exclusive title to the lands which formed the subject-matter of the suit and, although the lands were in point of fact the plaintiffs' brahmottor niskar lands, defendant 9 ultimately filed a solenama in collusion with defendants 1 to 8, and, acting under their influence, agreeing to pay rent for the lands at the rate of Rs. 5 per year. The plaintiffs' case shortly stated is that this solenama is not binding on them and that they are entitled to the declarations which they sought for in the present suit.

The defence of defendants 1 to 8 was that the lands are not brahmottor niskar lands, but are lands paying rents and have been recorded as such in the settlement records. As regards the solenama : their case was that it was not vitiated by collusion or undue influence as alleged on behalf of the plaintiffs and furthermore that it was a bona fide and binding document.

The Court of first instance held that the family was governed by the Dayabhaga school of law and that defendant 9 the father had acted perfectly bona fide in the matter of solenama and that, as a matter of fact the lands were rent paying and accordingly the plaintiffs' suit should fail. The learned District Judge has affirmed the decision of the trial Court. He has held, however, that the family is governed by the Mitakshara school of law, but that in the matter of compromise that was entered into by defendant 9 with the plaintiffs in Suit No. 958 of 1918, the said defendant acted perfectly bona fide and that the said compromise had greatly benefited the other members of the family

including the appellants. He has held that the document of 1272 upon which the plaintiffs relied for the purpose of establishing their niskar brahmottor right to the property was not genuine and that the plaintiffs had accordingly failed to prove that they had any such right. He has held that, on the other hand, the respondents proved a chitta and a jamabandi which contained the signature of the appellants' father and which showed that the lands were held under the said defendants and that the annual rental of the tenancy was Rs. 8-15-6 exclusive of cesses. He has further observed that, inasmuch as by the compromise decree the rental of the tenancy was reduced to Rs. 5, the compromise was to be considered as being beneficial to the plaintiffs. He has characterised the suit as not being a bona fide one and has observed that defendant 9 who is the karta of the family has kept himself in the back ground and has put forward his minor sons to institute the present suit only in order to get rid of the solenama and the decree in Suit No. 958 of 1918.

The contentions that have been urged on behalf of the appellant in this appeal are mainly two. The first contention is to the effect that in considering the question of the genuineness or otherwise of the document of 1272 the Courts below have ignored the presumption which arises under S. 90, Evidence Act, from the fact that the document purports to be more than 30 years old, and that if that presumption had been relied upon the said Courts would have been in a position to hold that the document was a genuine one. Now, as regards this contention it is sufficient to say that upon the plain language of S. 90 the presumption that is referred to in that section is not one which it is obligatory on a Court to raise in favour of a person who desires to prove a document more than 30 years old, but that it is discretionary with the Court either to rely on that presumption or not. It is a presumption which the Court is not bound to make, and, notwithstanding that the elements mentioned in that section are satisfied, the Court may require the document to be proved in the ordinary manner. If any authority is needed for this proposition, reference may be made to the case of *Shafiq-un-nissa* v. *Shaban Ali Khan* (1). Of course, if the plaintiffs asked the Court to make a presumption in their favour in accordance with the provisions of this section it would have been necessary for the Court to deal with that matter, but it appears from the judgments of the Courts below as well as from the record itself that in point of fact the plaintiffs did not rely upon this presumption but, on the other hand, adduced evidence in order to prove the genuineness of the document. The evidence so adduced has been disbelieved by the learned District Judge. In these circumstances the appellants can hardly complain if this presumption has not been referred to in the judgments of the Courts below.

The second contention of the appellants relates to the solenama and the solenama decree. The argument in the form in which it has been put forward before us is that the father not having acted in the suit of 1918 on behalf of the members of the family but on his own behalf and, on the other hand, having asserted in that suit his own exclusive and absolute right to the lands which formed the subject-matter of the suit, should be deemed to have acted adversely to the plaintiffs who were then, and are now, minors, and consequently the solenama and the solenama decree should be held to be not binding on the plaintiffs. Charges of misrepresentation, collusion and undue influence were laid in respect of this solenama, but the findings being against the plaintiffs on these points they need not be considered any further. Now if the lands were not niskar and the defendants 1 to 8 are the landlords of the plaintiffs, as has been found by the learned District Judge upon the view that the sanad of 1272, upon which the plaintiffs relied, is not genuine and the jamabandi of 1308 containing the signature of the plaintiffs' father is to be relied on and the settlement record stands as correct, there must be an end of the plaintiffs' case. In that event, I do not think it will be at all advantageous to the plaintiffs to challenge the solenama and the solenama decree, as by them the rent that is noted in the jamabandi, viz. Rs. 8-5-6, has been reduced to Rs. 5. As, however, the question has been dealt with by the Courts below it is

(1) [1904] 26 All. 581=31 I.A. 217=7 C.C. 290=8 Sar. 674 (P.C.).

perhaps necessary to state our views with regard to it. It should be remembered that the defendant 9 was admittedly the karta of the family, and he was also the recorded tenant. The suit was instituted against him alone. The mere fact that he did not disclose in his written statement that he was but the karta of the family and that the members of the family were co-parceners, but averred in the written statement that he came to be entitled to the property on the death of his father and suggested thereby that the family was governed by the Dayabhaga law, does not indicate that he was acting adversely to the interest of the other members of the family. The appellants' argument is that if the defendant 9 had disclosed that there were minors concerned, the Court would not have allowed the compromise to be recorded unless it was satisfied that the compromise was beneficial to the minors. This argument is not well founded, because the minors were not on the record as parties to the suit and so long as the compromise was between the parties who were sui juris the Court would not be called upon to enter into the question whether the compromise might not affect parties who were not parties to the suit and who were not sui juris. The powers of a Mitakshara father who is the karta of the family, to bind his infant sons with regard to disposal or management of joint family properties as explained by the decision of the Judicial Committee in *Sahu Ram Chandra* v. *Bhup Singh* (2) and other cases, are wider than those of other kartas of such families and rest upon an implied consent on the part of all the members and a presumption that what is done is for the benefit of the family. Nothing has been shown in the case to destroy that presumption. If the solenama be regarded as containing an admission of liability and if it be argued that the plaintiffs are not bound thereby as they do not derive their interest through defendant 9, then the answer to that argument is that in the case of a Mitakshara father who is the karta, an implied authority to make an admission for the benefit of his minor sons may very well be presumed. Such a presumption is quite in consonance with the authority of a Mitakshara father who is karta, as explained in the authoritative decisions. For these reasons, I am of opinion that there is no substance in this contention as well. The appeal accordingly fails and must be dismissed with costs.

**Mitter, J.**—I agree.

J.V. *Appeal dismissed.*

(2) A.I.R. 1917 P.C. 61=39 All. 437=44 I.A. 126 (P.C.).

---

## A. I. R. 1927 Calcutta 873

GRAHAM, J.

*Nakul Chandra Das* and *others*—Judgment-debtors—Petitioners.

v.

*Rajendra Chandra Gangopadhya* and *others*—Opposite Parties.

Civil Rule No. 1023 of 1926, Decided on 20th May 1927, from an order of the 1st Sub-Judge, Barisal, in the matter of Misc. Appeal No. 91 of 1926.

(a) *Bengal Tenancy Act* (8 *of* 1885), *S.* 158-*B* —*Notice not served on co-sharers—Rent-sale is altered to execution sale in money-decree.*

The non-service of notice upon the co-sharers in accordance with the provisions of S. 158-B (2) does not invalidate the rent sale but totally alters it to a sale in execution of a money decree : 23 *C. W. N.* 931, *not Foll.* [P 874 C 1]

(b) *Execution Sale—Setting aside—Minor not represented by guardian—It is not sufficient to avoid sale.*

Non-representation of an infant by a guardian in execution proceedings is not in itself sufficient ground for avoiding an execution sale : *A. I. R.* 1926 *Cal.* 109 and *A. I. R.* 1921 *Cal.* 476, *Foll.* [P 874 C 1]

(c) *Civil P. C., O.* 21, *R.* 90—*Substantial loss must be proved.* [P 874 C 2]

Court cannot make an order setting aside a sale when it has been found that no substantial loss has been proved.

*Suresh Chandra Talukdar*—for Petitioners.

*Jotindra Nath Sanyal*—for Opposite Parties.

**Judgment.**—In this case a Rule was issued on the opposite party to show cause why the judgment and decree of the officiating Subordinate Judge of Barisal, dated the 4th August 1926, reversing a decision of the 1st Munsif of Barisal should not be set aside. Two points only have been argued before me on behalf of the petitioners: firstly, that the sale was bad by reason of failure to comply with the provisions of S. 158-B (2), Bengal Tenancy Act; and secondly, that one of the judgment-debtors,

who was a minor not having been properly represented in the execution proceedings the sale was bad in law.

On the first point, the trial Court, relying upon a decision of this Court reported as *Ahamad Biswas* v. *Bejoy Bhusan Gupta* (1) held that the provisions of S. 158-B. (2) are mandatory and that the omission to serve the notice invalidated the sale. The learned Subordinate Judge, dissenting from this view, held that the non-service of notice upon the co-sharers in accordance with the provisions of S. 158-B (2) invalidated the rent sale only and altered it to a sale in execution of a money-decree. In my opinion this is the correct view of the matter.

It was next contended that one of the judgment-debtors, a minor, not having been properly represented, the Court below ought to have held that this was an irregularity which vitiated the sale. The learned Munsif, relying apparently upon a decision of this Court in *Salauddin* v. *Afzal Begam* (2), gave effect to this contention. The case in question is authority for the view that in cases of decrees for payment of money fresh appointment of a guardian ad litem is necessary in execution proceedings. It is not, however, an authority for holding that the omission to make such appointment will invalidate the sale. In a more recent case *Matiur Rasul* v. *Abdul Said* (3) the contrary view was taken, and where no guardian ad litem for a minor judgment-debtor was appointed in the execution proceedings and notice of execution in connexion with the issuing of sale proclamation was served upon the minor judgment-debtor, it was held that this amounted to an irregularity, and that this irregularity could not be taken to have vitiated the sale, for non-representation of an infant by a guardian in execution proceedings is not in itself sufficient ground for avoiding an execution sale. The only point in which that case is distinguishable from the present case is that there a notice was served upon the minor judgment-debtor, which was not done in this instance. The same view with regard to the effect of non-representation of an infant by a guardian in execution proceedings was taken in *Fani Bhusan Bhuian* v. *Surendra Nath Das* (4).

Apart from those decisons there is another difficulty in the way of the petitioner. Under O. 21, R. 90, Civil P. C. a sale can only be set aside on the ground of irregularity or fraud if substantial injury by reason of such irregularity or fraud is proved This is one of the points, No. 3, set out for decision in the judgment of the learned Subordinate Judge, and his finding on the point is that

there was no satisfactory evidence that the price fetched at the sale was inadequate.

That finding concludes the matter, as this Court cannot make an order setting aside the sale when it has been found that no substantial loss has been proved.

In the result the Rule fails and is discharged with costs. Hearing-fee: one gold mohur.

R.K. *Rule discharged.*

(1) [1919] 23 C. W. N. 931=53 I. C 515.
(2) A. I. R. 1925 Cal. 23.
(3) A. I. R. 1926 Cal. 109.
(4) A. I. R. 1921 Cal. 476.

---

## A. I. R. 1927 Calcutta 874

B. B. GHOSE AND ROY, JJ.

*Secretary of State*—Opposite Party—Appellant.

v.

*Amulya Charan Banerjee* and *others*—Objectors—Respondents.

Appeal No. 194 of 1925, Decided on 17th June 1927, from the decree of the Spl. Land Acquisition Judge, 24 Pergannas, D/- 10th June 1925.

*(a) Land Acquisition Act, S. 23—Capitalizing upon rack rental—Number of years is* 20.

In Calcutta and its suburbs the number of years taken in capitalizing upon a rack rental is usually 20, not 25. [P 876, C 1]

*(b) Land Acquisition Act, S. 23—Valuation is based on inference—There is no exact rule.*

In all valuations, judicial or other, there must be room for inferences and inclinations of opinion, which, being more or less conjectural, are difficult to reduce to exact reasoning or to explain to others: 26 *Bom.* 1 (*P. C.*), *Foll.* [P 876, C 2]

*(c) Land Acquisition Act, S. 23—Prices given by Collector—Owners accepting them—It is valuable evidence of market value.*

Prices which are given by Collector to people whose lands are acquired and who accept them, are valuable evidence in ascertaining the market value of the property in suit: 36 *Cal.* 967 (*P. C.*), *Foll.* [P 877, C 1]

*(d) Land Acquisition Act, S. 3 (f)—Land acquired for one purpose can be used for other authorized purposes.*

A municipality is not bound to use the land for the propose for which it is professedly acquired

and it is justified in using the land for any purpose for which the statute authorized it to use : 18 *Cal.* 99 (*P. C.*), *Rel. on.* [P 878, C 1]

*Dwarka Nath Chakravarti* and *Surendra Nath Guha*—for Appellant.

*Sarat Chandra Bose, Surendra Madhub Mullik, Dhirendra Kumar Roy* and *Krishna Lal Banerjee*—for Respondents.

**Roy, J.**—This appeal is by the Secretary of State for India and against the decision of the Special Land Acquisition Judge of the 24-Pergannas in reference made to him under S. 18, Land Acquisition Act, 1894. The land in question is a small plot of land 10 cattas 10 chataks and 16 square feet in area situate near the Kalighat Temple. It may be mentioned that though there was a controversy in the Court below as to the actual area, it is not now disputed that the area is as stated above. The acquisition was made at the instance of the Calcutta Corporation. The Collector awarded to the owners for the land and the structures on it a sum of Rs. 81,675. This was based on the annual assessment of Rs. 3,267 borne on the assessment register of the Corporation The claimants demanded Rs. 1,27,000 (Rs. 20,000 for the structures and the balance for the land, the value being estimated at Rs. 10,000 per catta). The learned Judge has made an award of Rs. 1,09,000. He valued the structures at Rs. 20,000 and the balance he allowed for the land. From this decision the Secretary of State for India has appealed and the claimant-respondents have filed cross-objections which they value at Rs. 18,000.

The land in suit has to its north the Kalighat Temple Road and on its west lies the main Kalighat Road. On the south is Kalighat 1st lane which leads to the main temple gate. It appears that for some time before there were schemes for improving the area surrounding the temple and this particular bit of land was also the subject of discussion in connexion with the scheme of improvement. The structures were let out by the owners to tenants who catered to the large numbers of pilgrims visiting Kali's temple by providing them with food and shelter and the articles necessary for their devotional purposes. The Corporation decided first to widen the Kalighat 1st lane. The declaration was made on 9th February 1914, and by November 1914, the lane was actually widened and paved to the extent of 20 feet. For some reason or other a strip of land was left vacant between the land in dispute and the paved Kalighat 1st lane. It appears that the Corporation put up a fencing as well. On the 16th February 1914, there was a declaration for the acquisition of land east of this land in suit for constructing a new road. In August 1914, there was a proposal to acquire the disputed land as surplus land of the proposed road to the east. There were objections from various people and the proposal seems to have been given up. In February 1915, the Corporation proceeded to lease out the strip of land between Kalighat 1st lane and the land in suit now. The bids were taken by Messrs. Mackenzie Lyall & Co., in auction. It appears that the bids went up very high and as far as I can Judge suspicions were aroused and the matter was dropped. Thereafter in May 1915, it was decided to construct a colonnaded dharamsala on the site of the land in suit and this was followed up by a declaration of 9th September 1915. The acquisition in question has been made under this declaration. The delay in pushing on the scheme is due to the fact that the owners (the claimants here) tried unsuccessfully to restrain the Corporation from making the acquisition by a suit which they carried to the Privy Council. The acquisition proceedings were renewed after this litigation in 1924 leading up to this appeal.

Another fact which should be mentioned is that the assessment of 1915 on which the Collector's award is based was disputed at the time when it was made and we have the strange spectacle of the owners claiming that the assessment should be higher and the corporation holding that the rents had been pushed purposely in wiew of the proposed acquisition. The municipality decided that the correct assessment should be the figure on which the Collector has based his award.

The presumption arising out of S. 557 (d), Calcutta Municipal Act cannot be said to be strong in the above circumstances of the case and has been, it might be said, rebutted by the claimants show-

ing that the rents actually paid at the time when the assessment was made were really higher than what the corporation officials entered in their books. Evidence was given that the annual assessment should have been Rs. 4,584 being the annual rents actually payable instead of Rs. 3,267. The learned Judge seems to have had his doubts whether the actual rent amounting to Rs. 4,584 was ever realized. The difference between the figures appearing in the books of the corporation and the figures given by the claimants may be said to be due mainly, to the increased rents realizable under their kabuliyats. Two of these kabuliyats were obtained in September 1914, and the third a little earlier. These kabuliyats were thus obtained at a time when the project for acquisition of this plot was already under discussion. We are not satisfied that these rents were actually realized and we do not think, therefore, that this can be a very satisfactory basis for ascertaining the actual market value of the land. There is another difficulty, and it is this, that if the statutory basis afforded by S. 557 (d), Calcutta Municipal Act, is given up, then the claimants cannot insist on taking 25 years' purchase of the annual value. The contention of the learned Government pleader, that the rental should be capitalized at 20 years' purchase seems to be of some weight. Questions of selami were raised and it was also asserted that the tenants paid taxes over and above their rents. Deductions, on the other hand, have to be made on account of the collection charges and also loss by vacancies and loss by the accidents of non-realization. The learned advocate appearing for the claimants urged that they are entitled to 25 years' purchase because of the position of the land and in this connexion, he has referred to the fact that the assessment of the corporation in 1921-1922 shows that the rents had increased by that time to Rs. 4,510. The evidence of the rents payable or paid shows, however, that they were rack rents and it is doubtful whether the claimants are entitled to 25 years' purchase. In Calcutta and its suburbs the number of years taken in capitalizing upon a rack rental is usually 20. The Judge's award works out at 25 years' purchase on a rental basis of Rs. 4,360.

The claimants examined an expert Mr. Shrosbree, at one time the Chief Surveyor and Valuer of the Calcutta Improvement Trust. He divided the area into four belts :

One abutting on Kalighat Lane ;

second, abutting on Kalighat Road ;

third, abutting on Kalighat Temple Road ;

the rest or the balance ;

and gave different valuations for the different belts. The learned Judge seems to have accepted this method for valuing the land but was of opinion that Mr. Shrosbree's estimate was exaggerated. He has reduced Mr. Shrosbree's figures with the result that his award is a reduction of Mr. Shrosbree's valuation for the land by about 25 per cent. The learned Government pleader argues, therefore, that the learned Judge's decision is arbitrary.

The learned Judge has himself remarked that it is impossible to determine an exact valuation. Their Lordships of the Privy Council observed in *Secretary of State for Foreign Affairs* v. *Charlesworth, Pelling & Company* (1), that in all valuations, judicial or other, there must be room for inferences and inclinations of opinion which, being more or less conjectural, are difficult to reduce to exact reasoning or to explain to others. The learned Judge's idea seems to have been that the valuation claimed by the owners on the rental basis was pitched too high and that Mr. Shrosbree's valuation left a margin for reduction. The exact exposition of reasons for the conclusion arrived at by the Judge are not forthcoming. We have to see if the valuation made by him is consonant with any reliable evidence.

The value of the structures on the land has been found to be Rs. 20,000. This is not disputed. The land falls conveniently into belts by reason of its situation and the case has been argued by both sides on that footing. The strip of land abutting on the Kalighat Road, 55 feet by 32 feet has to be considered first, for we have positive evidence here, which can lead us to make a fairly correct valuation. There is a sale-deed of 1907 which shows that 3 chattaks of land on the Kalighat Road was sold

(1) [1902] 26 Bom. 1=28 I. A. 121=8 Sar. 1 (P. C.).

there at a rate which works out at Rs. 7,830 per catta. This bit of land lies 180 feet further north. For the claimant it is argued that the assessment book at the Corporation in 1915 shows that the rent realized from this property rose to Rs. 119 per annum, and on a calculation of area and giving 25 years' purchase, it is contended that the valuation of Rs. 12,000 as deposed to by Mr. Shrosbree per catta, is not extravagant. It appears, however, that, even after the declaration, sales of lands in the neighbourhood (Exs. 21 and 22) fetched about Rs. 7,800 per catta. For the Secretary of State reliance is placed on the awards made when the Kalighat Lane was widened. They average from Rs. 5,000 to Rs. 8,000 per catta. The learned Judge rejected them. He was in error in thinking that the Collector cannot rely on his own admission in these awards. They are prices which were given to people whose lands were acquired and who accepted them and, therefore, they are valuable evidence in ascertaining the market value of the property in suit. This was so held by this Court and the judgment of this Court was approved by their Lordships of the Privy Council in *Secy. of State* v. *India General Steam Navigation & Ry. Co.* (2). Now, we have the fact that just across the lane the Collector awarded Rs. 8,000 per catta for a plot which also abutted on the lane as well as also on the Kalighat Road. The learned Government pleader asks us to rely on the award made for this corner plot. It is unquestioned, however, that the land in suit is better situated and, as the Judge has observed, it is unique with three main thoroughfares round it by which pilgrims may go to the temple. The learned Judge's award, therefore, for this strip, at Rs. 10,000 per catta, is not unreasonable.

Then comes the strip on the Kalighat Temple Road 82 feet by 23 feet. The Judge has awarded Rs. 8,000 per catta for this bit. This is not challenged by the learned Government pleader. Admittedly the situation of this strip is somewhat inferior and Rs. 8,000 a catta is consonant with the evidence referred to above. The award of the Judge for the fourth strip with an area of 2,445 square feet, at the rate of Rs. 5,000 a catta, (to be found on p. 82 of the printed paper book) has not been challenged by either party and may be accepted.

There remains the strip of land 105 feet by 15 feet situate on the side of the Kalighat 1st lane. The Judge allowed for this portion at the rate of Rs. 12,000 per catta. Mr. Shrosbree valued it at Rs. 20,000 per catta. The learned Judge, while holding that Mr. Shrosbree's valuation was based upon a future scheme of development and not on the present disposition of the land, and while being of opinion that the land was cut off from the Kalighat Lane by the strip of land 5 to 7 feet wide, left vacant by the municipality, thought that Rs. 12,000 a catta would be a fair market value for this portion. The contention of the learned Government pleader is that it is really the back land of the entire plot of 10 cattas odd. It appears that there were tin sheds on this portion which were used as kitchens for the pilgrims. The widening of the Kalighat 1st lane and the prospect of a new road on the east, however, placed it in a very good position. It is urged on behalf of the claimants that the corporation, having acquired land on the south for widening the Kalighat 1st lane, are not entitled to use any portion for some other purpose. It is contended that the claimants have the right of abuttal on the Kalighat 1st lane and it is mainly on this ground that the cross-objections were pressed before us. It was said that they had a right of passage on to the lane before and they did not move any further in the matter because they expected that their land on the south would in the ordinary course of things abut on the widened Kalighat Lane which leads to the main entrance to the temple.

The English Law on the subject was referred to. That law seems to be that after acquisition the new owners have the ordinary rights of proprietors and may use their lands as they think fit for any purpose which does not infringe the rights of others and is not inconsistent with the purposes sanctioned by the statute under which the lands have been taken. There are, however, restrictions in the English law which do not find place in our law. The learned Government pleader has quoted the case of *Luchmeswar Singh* v. *Chairman, Dar-*

(2) [1909] 36 Cal. 967=4 I. C. 443=36 I. A. 200 (P. C.).

*bhanga Municipality* (3). The point was not raised in controversy, but there are observations in the judgment of this case that a municipality is justified in using the land for any purpose for which the statute authorized it to use land although not for which it was professedly taken. The land in the above case was acquired for a public ghat, but the municipality made a ghat upon a part and used the rest for a market. The difficulty in the present case has arisen because of the piecemeal acquisitions of bits of land in the neighbourhood. The portion in question here was back land, but suddenly occupied a prominent position by reason of acquisition round it. It was known that this land was going to be acquired. The claimants may say, however, that they are entitled to the advantage their land was placed by the acquisition round it. The municipality delayed in acquiring the land and there was the possibility that the Municipality might not have proceeded with the acquisition of the land in suit. The circumstances of the case might, again justify the proposition that the owners would get a right of passage to the land, but the municipality might, on the other hand, use the strip they left vacant for some public purpose. They might for instance use it for a stand for carriage or some such purpose. It cannot be said by the owners that they would have the right of abuttal all along the lane. With a passage they might still be able to utilize this portion to good purpose, but the portion would not be in the excellent position they contemplated. I think, taking into consideration all the circumstances of the case, it might be said that they would be in no worse position here than their position abutting on the Kalighat Temple Road. We think, therefore, that it would be fair to allow Rs. 8,000 a catta for this portion. This reduces the valuation of the learned Judge for this portion by Rs. 8,833-5-4. The total valuation for the land thus comes to Rs. 80,045-13-3. To this should be added Rs. 20,000 for the structures. The total award then will be Rs. 1,00,045-13-3. The award of the learned Judge will be modified accordingly and the appeal allowed in part with costs proportionate to success. The claimants are, of course, entitled to the statutory allowence and interest as provided for in the Act.

The cross-objections are dismissed.

**B. B. Ghose, J.**—I agree.

R.K. *Appeal partly allowed.*

(3) [1891] 18 Cal. 99=17 I. A. 90=5 Sar. 564 (P.C.).

---

## A. I. R. 1927 Calcutta 878

CUMING AND CAMMIADE, JJ.

*Raj Kumar Dutta Gupta*—Defendant—Appellant.

v.

*Ramani Mohan Kunda* and *another*—Plaintiffs—Respondents.

Appeals Nos. 112 and 113 of 1925, Decided on 28th June 1927, from the appellate decrees of the 2nd Sub-J., Comilla, D/- 8th July 1924.

(a) *Bengal Tenancy Act*, (8 *of* 1885), *S.* 18—*Transfer* : (*Per Cuming, J., Cammiade, J. dissenting.*)

The word "transfer" includes "lease" : 19 *C. W. N.* 1127, *Foll.* [P 879, C 2]

(b) *Bengal Tenancy Act* (8 *of* 1885), *S.* 48—*S.* 48 *is controlled by Bengal Tenancy Act S.* 18 : (*Per Cuming, J., Cammiade, J. dissenting.*)

The restriction imposed by S. 48 on the amount of rent that a raiyat can recover from an under-raiyat has no application in the case of a raiyat at a fixed rate of rent, the section being governed by S. 18. In other words, S. 18 controls S. 48 as it does S. 85 : *A. I. R.* 1921 *Cal.* 603, *Appl.* [P 879, C 2]

*Dhirendra Lal Kastgir* and *Nagendra Nath Basu*—for Appellant.

*Abinash Chandra Guha* and *Bhupendra Nath Das*—for Respondents.

**Cuming, J.**—These two appeals arise out of two suits for rent. In the first Court the learned Judge held that the plaintiffs were kayami mourasi raiyats and the defendant was an under-raiyat and, therefore, they were governed by the provisions of S. 48, Bengal Tenancy Act, which provides that

> the landlord of an under-raiyat holding at a money rent shall not be entitled to recover rent exceeding the rent which he himself pays by more than the following percentage of the same: (a) when the rent payable by the under-raiyat is payable under a registered lease or agreement-50 per cent; and (b) in any other case—25 per cent.

He granted to the plaintiffs a proportionate decree in the suits. On appeal

to the District Court the learned Judge held that the plaintiffs were tenure-holders and the defendant was a raiyat and hence he held that the provisions of S. 48 did not apply to the present cases. Further, he held that, even if the plaintiffs were raiyats and the defendant an under-raiyat, still, as the plaintiffs were kayami mourasi raiyats, that is to say, raiyats holding at a fixed rate of rent, they were not governed by the provisions of S. 48, Bengal Tenancy Act. On those findings he decreed the appeals and allowed the plaintiffs' claim in full. The defendant has appealed to this Court. The first argument which was addressed to us is that the question of status of the plaintiffs and the defendant is res judicata and, therefore, the learned Judge erred in holding that the defendant was estopped from saying that he was an under-raiyat and the plaintiffs raiyats. With regard to this question : the learned vakil would seem to argue that the question of the plaintiff and the defendant's status had been decided in some previous suit which had been fought up to the High Court. There is no reference whatever to this previous suit in either of the judgments of the lower Courts and for a good reason, that no such judgment has been filed or exhibited in the case. There is on the record a judgment of this Court, but whether it refers to the lands of the present suits is not apparent. Neither, as far as I can see, does this judgment determine the question of status of the plaintiffs and the defendant. It was a judgment in a Letters Patent appeal by which a judgment of a Judge of this Court, sitting alone, was set aside and a judgment of a Subordinate Judge was restored. What judgment of the Subordinate Judge was restored it is impossible to say as no copy of it appears on the record.

The learned vakil for the appellant then contends that the parties went to trial on the footing that the plaintiffs were raiyats and the defendant under-raiyat. As far as can be seen from the plaint this was so. In the plaint the plaintiffs described the defendant as an under-raiyat. It is somewhat difficult to understand, in view of this admission of the plaintiffs that the defendant was an under-raiyat, how the learned Subordinate Judge held that the defendant was estopped from saying that he was an under-raiyat when apparently the plaintiffs from the commencement of the suit admitted that he was an under-raiyat. It is, however, immaterial for the purpose of the decision of these appeals whether the defendant was a raiyat or an under-raiyat. The plaintiffs admittedly had a raiyat holding at a fixed rent or rate of rent and, therefore, they were persons to whom S. 18, Bengal Tenancy Act, would apply. S. 18 Bengal Tenancy Act, provides that

> a raiyat holding at a rent, or rate of rent fixed in perpetutity shall be subject to the same provisions with respect to the transfer of, and succession to, his holding as the holder of a permanent tenure.

Now, it has been held by this Court in the case of *Hari Mohan Lal* v. *Atul Krishna Bose* (1), that the word 'transfer' includes 'lease' and that a raiyat at a fixed rate of rent can grant leases in the same way as a permanent tenur-holder, in other words, S. 85, Bengal Tenancy Act, is controlled by S. 18. In the present case, the question is whether S. 48 controls S. 18 or S. 18 controls S. 48. There is no direct authority on this point. I am, however, of opinion by analogy with the finding of this Court that S. 18 controls S. 85 that S. 18 also controls S. 48. Section 85 imposes certain restrictions on sub-letting by raiyats. In the decision to which I have referred and which has been followed by this Court in the case of *Amar Chand Roy* v. *Prasanna Dasi* (2), it was held that the restriction imposed by S. 88 on sub-letting by a raiyat did not apply to sub-letting by a raiyat at a fixed rate of rent it being governed by S. 18, Bengal Tenancy Act. By analogy it seems to me that the restriction imposed by S. 48 on the amount of rent that a raiyat can recover from an under-raiyat has no application in the case of a raiyat at a fixed rate of rent, the section being governed by S. 18. In other words, S, 18 controls S. 48 as it does S. 85.

The result is that these two appeals must be dismissed with costs.

**Cammiadé, J.**—I am not prepared to agree with the view of law that the word "transfer" in S. 18, Bengal Tenancy Act, includes "lease" nor that raiyats holding at a fixed rent or rate of rent can create tenancies under themselves which would not be under-raiyati tenancies

(1) [1915] 19 C. W. N. 1127=32 I. C. 503.
(2) A. I. R. 1921 Cal. 603.

and which would not be controlled by the provisions of the Tenancy Act relating to under-raiyat tenancies. In this case, however, it would not be necessary to enter into these matters because although in the plaint the plaintiffs have described the defendants as under-raiyats it appears from the course of conduct between the parties that it was agreed between them and the parties did behave towards one another as if the relationship between them was that of a tenure-holder and a raiyat. The defendants were allowed to purchase the tenancy they now hold on the footing of its being a raiyati holding and to execute a kabuliyat in which it was expressly stated that they held the land as raiyats. Estoppel arising from such conduct is mutual. It affects both the plaintiffs and the defendants and now they cannot resile from the position.

I agree, therefore, that the appeals should be dismissed with costs.

R.K. *Appeals dismissed.*

---

## A. I. R. 1927 Calcutta 880

CUMING AND CAMMIADE, JJ.

*Makram Ali Molla* and *others*—Plaintiffs—Appellants.

v.

*Abdul Hamid Molla* and *others*—Defendants—Respondents.

Appeal No. 245 of 1925, Decided on 20th July 1927, from the appellate decree of the Sub-Judge, Noakhali, D/- 19th July 1924.

*Civil P. C., O. 1, R. 10, sub-Cl. (2)—Suit in the name of dead person as a sole plaintiff cannot be amended—Suit brought in the name of two plaintiffs, one of whom is dead, can be amended.*

A suit which is instituted in the name of a sole plaintiff who is dead at the time of the institution of the suit cannot be amended in any way.

But where a co-mortgagee brings a suit on his mortgage and adds his co-mortgage who is dead, either as a pro forma defendant or as a co-plaintiff, the suit cannot be said to be bad ab initio. In such cases the plaint can be amended by adding the heirs of the co-mortgagee as co-plaintiffs.

*Santosh Kumar Bose* and *Chandra Sekhar Sen*—for Appellants.

*Mukunda Behari Mullik* and *Mohendra Kumar Ghose*—for Respondents.

**Cuming, J.**—The facts of the case out of which this appeal has arisen are shortly these: Two persons, by name Pana Mea and Ayub Ali, lent a certain sum of money on mortgage to the present respondents. A suit was brought on the mortgage-bond against the defendants. It was brought in the names of the two mortgagees Ayub Ali and Pana Mea. As a matter of fact at the time when the suit was brought Ayub Ali was dead. It would appear that the plaint had been verified by Mokram Ali, the father of Ayub Ali, apparently signing his name. The defendants, in their written statement, contended that the suit was not maintainable as Ayub Ali was dead at the time of the institution of the suit. Then Mokram Ali, who was the heir of Ayub Ali, put in a petition to be substituted in the place of his deceased son Ayub Ali. This was allowed and the suit proceeded to judgment, the suit being decreed in favour of the plaintiffs. The defendants appealed to the District Court. The learned Subordinate Judge who heard the appeal held that there was no mistake in making the dead man a plaintiff in the suit; and that the dead man's father who signed the plaint, verification and vakalatnama on behalf of his son knew that he was dead and, therefore, apparently O. 1, R. 10, would have no application. On these findings he decreed the appeal and dismissed the whole suit. The plaintiffs have appealed to this Court.

The contention of the learned advocate who appears for the appellants is that the suit was not wholly bad. Pana Mea, who was one of the mortgagees, could bring the suit. It was quite possible that the suit might ultimately have been defeated on the ground that the co-mortgagee should have been made a party. But O. 1, R. 10, sub-Cl. (2), enables the Court at any time, on such terms as it thinks fit, to add any person as plaintiff or defendant. The respondents contend that it is only where there has been a bona fide mistake in making a person plaintiff that O. 1, R. 10, has any application and that it is only in such a case that the Court should allow the plaint to be amended and add the name of the proper plaintiff to the suit.

It seems to me that this is a case of non-joinder of party. None of the authorities to which we have been referred

really touch this point. The cases to which we have been referred were cases of sole defendant or sole plaintiff. Now, obviously if this were the case of a sole plaintiff who was dead at the time of the institution of the suit there would have been no suit which could be amended in any way, because a dead person cannot institute a suit. But in the present case one co-mortgagee can bring a suit on his mortgage if he adds his co-mortgagee either as a pro forma defendant or as a co-plaintiff. The suit cannot, therefore, be said to be bad ab initio. It is possible that the suit might fail ultimately if the plaintiff, when the matter was brought to his notice, refused to add the heirs of the deceased co-mortgagee either as co-plaintiff or pro forma defendant. But this was done, as a matter of fact, as soon as he realized that this person should be made a party to the suit. O. 1, R. 10, sub-Cl. (2) gives the Court power at any stage of the proceedings either on his own motion or on the application by any party to either strike out the name of any person improperly joined whether as plaintiff or defendant or add the name of any person as plaintiff or defendant. As far as I can read this rule it does not depend upon the fact whether the party has originally been made a party by mistake. Assuming for the sake of argument that there was no mistake in bringing the suit originally in the name of the dead man that would not prevent the Court from adding the names of the proper persons as plaintiffs or pro forma defendants. The decision of the learned Subordinate Judge is clearly wrong.

The appeal must, therefore, be decreed and as it has been decided on a preliminary point, the appeal will now be sent back to the learned Subordinate Judge who will hear the appeal on the other points which may arise in it.

Costs of this appeal will abide the final result of the appeal.

**Cammiade, J.**—I agree.

N.D. *Case remanded.*

---

1927 C/111 & 112

## A. I. R. 1927 Calcutta 881

PAGE AND MITTER, JJ.

*Mt. Rahela Khatun* and *others*—Defendants—Appellants.

v.

*Amburennessa Choudhurani* and *others*—Respondents.

Appeal No. 2137 of 1924, Decided on 17th May 1927, from the appellate decree of the Dist. Judge, Noakhali, D/- 31st March 1924.

*Civil P. C., O. 21, R. 92—Sale confirmed by Court—Absence of formal order or of sale certificate does not affect purchaser's title.*

Sale certificate is no more than evidence of title. Absence in the record of a sale certificate or of a formal order confirming the sale, does not affect the purchaser's title when in substance and in fact the Court did confirm the sale. [P 882, C 1]

*Jatindra Nath Sanyal, Mahendra Kumar Ghose* and *Suresh Chandra Talukdar*—for Appellants.

*Nurul Huq*—for Respondents.

*Biraj Mohan Majumdar*—for Deputy Registrar.

**Page, J.**—This is an appeal from a decree of the learned District Judge of Noakhali. The plaintiff's suit is to recover possession after dispossession of a 4-annas share in certain property. As regards 2-annas no question arises in this appeal. As regards the other 2-annas, this share of the property belonged to Rupjan, who from the genealogical table would seem to be the second wife of Kala Mian, the propositus. The plaintiff claims by a gift from her father Hosainuddi. Now, the plaintiffs' suit being to recover possession after dispossession, she must prove her title to the property and also that she was in possession within 12 years before suit. She can have no better title in the circumstances of this case than her father Hosainuddi. Hosainuddi purchased the 2-annas share belonging to Rupjan at an auction-sale held in execution of a decree which Hosainuddi himself had obtained against Rupjan. With respect to this purchase the learned vakil on behalf of the appellant contended that Hosainuddi obtained no title to the property at the auction-sale because there did not appear in the records of the sale which took place in January 1878, any formal order confirming the sale or any sale certificate,

As regards the sale certificate, it is well settled that it is no more than evidence of title. As regards the absence in the record of a formal order confirming the sale, it is clear that in substance and in fact the Court did confirm the sale to Hosainuddi, and the learned District Judge had found that the sale was in substance confirmed. After a lapse of 50 years, during which no attempt has been made to invalidate the sale, and in the circumstances obtaining in this case I am not disposed to re-agitate the question as to whether the sale was confirmed by the Court or not. I am satisfied that the finding of the learned District Judge upon this matter is correct and ought to be upheld.

Hosainuddi, having obtained possession of the 2-annas share of Rupjan in the manner stated, in 1881 made an oral gift of this 2-annas share to the plaintiff, his daughter. The learned vakil on behalf of the appellant in a skilful argument has contended that the oral gift to the plaintiff was not duly made in accordance with the rules of the Mahomedan law, because it is an essential ingredient in a gift by a Mahomedan that seisin should be effected. The learned District Judge has found as a fact that possession under the oral gift was given to the plaintiff; and although the form in which this possession was taken is not free from ambiguity owing to the fact that the plaintiff was the holder of a 2-annas share of the property with certain other persons who were co-sharers under ostensible possession of the property, I am not disposed in the circumstances of this case to disturb the finding of fact arrived at by the learned District Judge that in fact possession was given to and taken by the plaintiff under the deed of gift.

In 1898 Hosainuddi superadded to the oral gift a kobala in favour of the plaintiff. The learned District Judge has held that this kobala was in fact confirmatory of the oral gift and a mode in which the father attempted to make it clear that he had relinquished his interest in the property in favour of his daughter. It is enough to say that inasmuch as the oral gift, in my opinion, conformed to the rules laid down for a valid gift under Mahomedan law the kobala as a document of title was of no value and had no effect. But the learned vakil for the appellant has urged that the kobala, if it amounted to a deed of gift, required registration; but, in my opinion, it is enough to say that the kobala being for property of not more than Rs. 50 in value did not require registration.

It was further urged on behalf of the appellant that the suit was barred by limitation because the plaintiff was not proved to have been in possession within twelve years prior to action brought. The learned District Judge, however, has found as a fact that the plaintiff was in possession within 12 years prior to the filing of the suit and that is a finding which concludes this issue adversely to the appellants.

Upon all those considerations, in my opinion, the appeal fails and is dismissed with costs.

**Mitter, J.**—I agree.

R.K. *Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 882

MUKERJI AND GRAHAM, JJ.

*Mt. Syamnessa Bibi* and *others* — Defendants—Appellants.

v.

*Abdul Gani* and *others* — Pro-forma Defendants—Respondents.

Appeal No. 1638 of 1924, Decided on 2nd May 1927, from the appellate decree of the 1st Sub-Judge, Mymensingh, D/- 26th March 1924.

*Co-sharer—Permanent lease by one without other's consent—In partition the property allotted to the other—He takes it not subject to the lease.*

A person to whom a parcel of land has been allotted by a decree for partition of a civil Court does not take it subject to a permanent lease granted by his former co-owners without his concurrence when the land was the joint property of all the co-sharers; but for the practical application of the principle there must be a finding as to whether the lands covered by the lease are homestead lands and as to the character of the lease. Besides there may be equitable considerations which may in certain circumstances protect a lessee of this sort; *A. I. R.* 1926 *Cal.* 714 (*F. B.*), *Rel. on.*

[P 883, C 2]

*Birendra Kumar De*—for Appellants.

*Prafulla Chandra Chakravarti*—for Respondents.

**Judgment.**—The predecessors of the plaintiff and their co-owners had a certain taluk in which lay 13 cottahs of land which formed the subject-matter of the suit. In April 1910 two of these co-owners, namely, one Ramdas and one Radha Charan who claimed to have been in exclusive possession of the said 13 cottahs of land granted an ordinary kasra lease without any term fixed in respect of the said lands to one Umesh Pandit. In December 1910 Umesh Pandit sold his lease-hold interest to defendant 4. In 1911 a partition suit was commenced between the plaintiff's predecessors and their co-sharers. During the pendency of this suit Ramdas and Radha Charan sold their taluki right to defendants Nos. 1 to 3. In 1913 the partition suit terminated in a final decree and under the said decree the then co-owners were put in possession of their respective allotments. In 1921 the plaintiff acquired his interest in the allotment which fell to his predecessors. The present suit was thereupon commenced by the plaintiff for a declaration of his taluki right to the lands and for recovery of khas possession thereof. The suit was decreed in part by the learned munsif who declared the plaintiff's taluki right to the lands but disallowed his prayer for khas possession. There was an appeal as well as a cross-appeal preferred before the lower appellate Court and the result thereof was that the plaintiff's claim for khas possession was allowed by the learned Subordinate Judge. Against this decision the present appeal has been preferred by defendant No. 4.

Some general arguments have been advanced before us on behalf of the appellant as regards the unsatisfactory character of the judgment of the learned Subordinate Judge. It has been pointed out that the learned Judge's judgment shows that he made no distinction whatsoever between legal proof and suspicion. These arguments are not without foundation but if we could hold that the specific findings of fact at which the learned Subordinate Judge has arrived in the case are not open to challenge we would not have felt inclined to interfere with his judgment on these general arguments. We propose to deal with the errors of law which, in our opinion, appear in the judgment of the learned Subordinate Judge. But before we do so it would perhaps be convenient to refer to what has been urged on behalf of the respondents as a general answer to the criticizms that have been advanced on behalf of the appellant in this appeal. It has been urged by the learned vakil who appears for the respondents that even assuming that the appellant has succeeded in establishing all her contentions she has no right to remain on the lands in view of the decision of the Full Bench of this Court in *Niranjan Mukherjee* v. *Soudamini Dasi* (1).

In that case it has been authoritatively laid down that a person to whom a parcel of land has been allotted by a decree for partition of a civil Court does not take it subject to a permanent lease granted by his former co-owners without his concurrence when the land was the joint property of all the co-sharers. This argument no doubt is sound but for the practical application of the principle to which reference has thus been made there are obviously some difficulties. In the first place it has not been found in the case, though there are some materials which may go to support such a finding, that in point of fact the lands covered by the lease on which defendant 4, relies were homestead lands and indeed the question as to the character of this lease does not appear to have been gone into in the present case. Without a finding on that question it cannot be said that the decision on which the respondents rely applies to the case. Furthermore, from the concluding words of the judgment of the acting Chief Justice in that case which are to be found at p. 343 of the report it would appear that there may be equitable considerations which may in certain circumstances protect a lessee of this sort. That being our opinion so far as this contention of the respondents is concerned, it becomes necessary to examine the judgment of the learned Subordinate Judge in the light of the other criticizms that have been advanced on behalf of the appellant. Leaving aside the technical defects that are noticeable in that judgment, in our opinion there are three points on which it may with reason be said that the judgment cannot be supported. In the first place the learned Subordinate Judge in

(1) A. I. R. 1926 Cal. 714=53 Cal. 694 (F. B)

dealing with the document Ex. A, which is the lease granted by Ramdas and Radha Charan to Umesh Pandit, says that there is no evidence that any consideration passed in respect of it. This statement is evidently wrong for, in point of fact besides the recitals of the consideration that are to be found in the document itself there is the evidence of at least one witness, namely, witness 2, on behalf of the defendant. Whether that evidence is worth accepting or not is not a matter for us to consider. But it certainly is not right to say that there is no evidence in support of the case as to passing of consideration in respect of the lease. The next thing that we find is that a very important piece of evidence on which reliance was placed on behalf of the appellant and which was also relied upon by the learned Munsif in the judgment that he passed, has not at all been referred to by the learned Subordinate Judge. That piece of evidence is the document Ex. 4 which is the butwara chitta of the taluk in question. In it we are told it is mentioned as against these 13 cottahs of land that defendant 4 holds a jote in respect of them. It is a document which was filed on behalf of the plaintiff and if the defendants relied upon an entry contained in that document which in their view supported their case it was certainly a piece of evidence which should have been specifically dealt with by the learned Subordinate Judge. Whether the statement contained in this document is worth much or not is a matter for the final Court of fact to determine and not for us to consider in the present appeal. Nextly, the learned Subordinate Judge speaking of the settlement record, has expressed the view that as the settlement record is impeached by both sides it has got no evidentiary value of its own. The matter so far as the settlement record is concerned stands in this way: The settlement record shows that there is a jote in respect of these 13 cottahs of land in the name of Abid and others, that is to say, of defendants 1 to 3. The plaintiff challenges the correctness of this entry and says that there is no jote. The defendants, on the other hand, contend that there is a jote but that the entry is wrong only so far as it purports to show that the jote was held by defendants 1 to 3 and not by the defendant 4. They seek to explain the entry by suggesting that defendant 4 being a woman the jote was actually possessed and the cultivation in respect of it was made by her husband, defendant 1. Whether this explanation is reasonable or not is a question which has got to be determined by the learned Subordinate Judge. It is enough for us to say that it is not right to leave this document entirely out of consideration by saying that it is of no evidentiary value. All that can be said is that in view of the circumstances to which we have referred the presumption of correctness which attaches to such an entry does not arise. These defects and errors are, in our opinion, sufficient to vitiate the findings of the learned Subordinate Judge.

We accordingly allow the appeal, set aside the judgment appealed from and send the case back to the Court of the learned Subordinate Judge, so that the appeal may be re-heard in the light of the observations made above and then disposed of in accordance with law. Costs of this appeal will abide the result.

R.K. *Case remanded.*

---

## A. I. R. 1927 Calcutta 884

PAGE AND GRAHAM, JJ.

*Muhammad Yakub Miah Majumdar*—Appellant.

v.

*Hamid Ali* and *another*—Respondents.

Appeal No. 346 of 1926, Decided on 16th June 1927, from an order of the Sub-Judge, Cachar. D/- 17th June 1926.

*Civil P. C., O. 34, R. 14—Mortgage with possession—Property let to mortgagor under kabuliyat—Mortgagee obtaining decree for arrears of rent—He cannot bring the mortgaged property to sale in execution of the decree.*

Where a mortgage-deed and a lease, back to the mortgagor, form part of the mortgage transaction the mortgagee landlord cannot bring the mortgaged property to sale in execution of a decree for arrears of rent due under the lease otherwise than by instituting a suit for sale in enforcement of the mortgage. *A. I. R.* 1927 *P. C.* 32, *Rel. on.* [P 885, C 1]

*Upendra Chandra Roy*—for Appellant.

*Satyendru Kishore Ghose*—for Respondents.

**Page, J.**—This is an appeal from an order of the learned Subordinate Judge of Cachar, allowing an objection to an application by the appellant for leave to issue execution by selling certain property belonging to the judgment-debtors. On the 16th September 1915, the respondents mortgaged the property in suit to the appellant under a registered deed of mortgage upon the following terms. The principal sum secured by the mortgage was Rs. 800

and the right, title and interest to and possession of the mortgaged property

passed under the deed of mortgage to the appellant. The mortgagor was to have three years within which to pay off the principal sum and redeem the mortgaged property. There was no provision for the payment of interest, but it is apparent from the terms of the mortgage-deed that the appellants were to enjoy and possess the land in lieu of interest. By a kabuliyat executed on the same date, which recited the deed of mortgage and that the mortgagors were desirous of cultivating the land, the mortgaged property was let to the mortgagors for the period within which the mortgagors were entitled to redeem the mortgaged property at an annual rental of Rs. 160. Upon the failure of the mortgagors to pay the rent due under the lease the mortgagee-landlord brought a suit to recover the arrears of rent, and obtained a decree. For the purpose of obtaining execution of the decree the mortgagee-landlord applied for leave to issue execution. The mortgagor-tenants filed an objection to the sale of the mortgaged property under S. 47, Civil P. C., upon the ground that in substance the decree which the mortgagee-landlord sought to execute was

a decree for the payment of money in satisfaction of a claim arising under the mortgage within O. 34, R. 14,

and, therefore, that the mortgagee landlord was not entitled to bring the mortgaged property to sale

otherwise than by instituting a suit for sale in enforcement of the mortgage.

The question which falls for determination is whether this contention of the respondents is sound or not. In my opinion, upon a perusal of the mortgage deed and the kabuliyat it is clear that the two documents formed part of the mortgage transaction, and to adopt the language of Lord Sinha in the case of *Panaganti Ramarayaningar* v. *Maharaja of Venkatagiri* (1),

the two deeds . . . should be read together as they form parts of one transaction, the lease being in the nature of machinery for the purpose of realizing the interest due on the mortgage.

It follows that the objection preferred by the respondents to the sale of the properties in suit in execution of the rent decree must prevail and, in my opinion, the appeal should be dismissed with costs, the hearing-fee being assessed at three gold mohurs.

**Graham, J.**—I agree.

R.K. *Appeal dismissed.*

(1) A. I. R. 1927 P. C. 32=50 Mad. 180=54 I. A. 68 (P. C.).

---

## A. I. R. 1927 Calcutta 885

CUMING AND CAMMIADE, JJ.

*Bharat Chandra Pal*—Defendant—Appellant.

v.

*Gouranga Chandra Pal* and *another*—Plaintiff and Pro-forma defendants—Respondents.

Appeal No. 224 of 1925, Decided on 13th July 1927, from a decree of the 3rd Sub-Judge, Tippera, D/- 22nd September 1924.

*Civil P. C., O. 38, Rr. 5 and 7—No prohibitory order passed—Only notice to give security served—There is no legal attachment—O. 21, R. 54.*

Where no prohibitory order, as contemplated by O. 21, R. 54, was given to the peon to publish, but what the peon did was to go to the locality and to proclaim by beat of drum that the property, was attached and affixed on the property, which he was directed to attach, a copy of the order, as contemplated under O. 38, R. 5, which was made over to him :

*Held* : that there had been no legal attachment : 9 *C. W.* N. 693, *Rel. on.* [P 886 C 2]

*Upendra Kumar Roy*—for Appellant.

*Hemendra Kumar Das*—for Respondents.

**Cammiade, J.**—The facts of the present case are as follows : The plaintiff, who is the respondent before this Court, sued one Shuramani and another on a bond in the year 1916 and he obtained an order for attachment before judgment of a raiyati holding belonging to Shuramani. The order which was recorded by the learned Munsif in that case was as follows :

On the application of the plaintiff, supported by an affidavit, I am satisfied that the defendants are about to transfer their properties with a view to defraud the plaintiff. It is, therefore, ordered that notice be issued upon the defendants to show cause within seven days from the service thereof why they should not furnish security for money. In the meantime I also order conditional attachment of the immovable properties mentioned in the plaintiff's application.

The order was issued to the peon in form No. 5 of Appendix F, directing the peon, in case securities were not given, to attach the properties. Nothing further was done. Subsequently the defendant in that suit, Shuramani, sold the tenancy to the defendant of the present suit. This was in the year 1920, and in the year 1921 the plaintiff brought the tenancy to sale in execution of his own decree, and, having purchased it, he sued for a declaration of his title and for recovery of possession.

The learned Munsif who tried the suit dismissed it holding that there had been no legal attachment and that, therefore, S. 64, Civil P. C., could not operate to nullify, as against the decree-holder, the transfer that had been made. The plaintiff appealed to the District Court. The learned Subordinate Judge who heard the appeal reversed the decree of the Munsif.

The only question, therefore, in the case is whether or not there was a proper attachment before judgment. Attachments before judgment are dealt with in O. 38, Rr. 5 to 7, of the Code. R. 5 states in what circumstances the Court may call upon the defendant to furnish security and at the same time make a conditional attachment of the property specified by the plaintiff. We are not concerned with R. 6, as no action was taken under that section. But R. 7 is relevant because it is the rule which lays down the manner in which attachments are to be effected. That rule states as follows :

> Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree.

As there is no express provision on the subject in any of the rules relating to attachment before judgment such attachments are governed by the provisions of O. 21, R. 54, which relates to attachment of immovable properties in execution of decrees. According to this rule, where immovable property is to be attached, the Court is to pass an order on the judgment-debtor prohibiting him from transferring the property or making any charge thereon and on all persons from taking any benefit from such transfer or charge, and further it provides that such order shall be proclaimed on the property or in its neighbourhood by beat of drum or other customary mode and that a copy of such order shall be affixed on some conspicuous part of the property and also in a conspicuous part of the Court-house. Now, in the present case, no prohibitory order was given to the peon to publish. The prohibitory order contemplated by O. 21, R. 54, is to be found in Appendix E, form No. 24. No notice in that form was given to the peon to publish. According to the evidence of the peon what he did was to go to the locality and to proclaim by beat of drum that the property was attached, and affixed on the property which he was directed to attach a copy of the order which was made over to him, namely an order in form No. 5 of Appendix F. This was clearly not a compliance with the provisions of R. 54, O. 21. In a previous case of this Court *Satya Charan Mukherji* v. *Madhab Chunder Karmokar* (1), where the peon was given a proper prohibitory order to publish, and no such order was published in the Court-house as required by the rule, it was held that there had been no legal attachment. The present case is much stronger as no prohibitory order was published at all. Therefore there was no legal attachment.

The learned Munsif was right in holding that the plaintiff was entitled to no relief in this suit, and the Subordinate Judge's order reversing the Munsif's judgment is erroneous and is set aside.

The appeal is allowed and the Munsif's decree is restored with costs of this Court as also those of the lower appellate Court.

**Cuming, J.**—I agree.

R.K. *Appeal allowed.*

(1) [1905] 9 C. W. N. 693.

## A. I. R. 1927 Calcutta 887

CUMING AND CAMMIADE, JJ.

*Guimoni Dasi* —Defendant— Appellant.

v.

*Tarini Charan Porel*—Plaintiff—Respondent.

Appeal No. 164 of 1925, Decided on 12th July 1927.

*Civil P. C., O. 23, R. 3—Award made on private reference during suit objected to by one party—Court cannot record it as adjustment of suit under R. 3—S. 89 is a bar to enforcement of such award—Nor can it be enforced under general law of contract—Civil P. C., S. 89—Civil P. C., Sch. 2, R. 1.*

Once a suit has been instituted, all proceedings in arbitration are subject to the control of the Court. It is not permissible to the parties to deprive the Court of its jurisdiction by private reference to arbitration, and no award made on such reference, unless consented to by both parties, can be enforced in the suit, either by treating it as an adjustment of the matters in dispute under R. 3, O. 23, or under the general law of contract 29 *Cal.* 167 (*P. C.*); *A. I. R.* 1921 *Cal.* 238; *A. I. R.* 1922 *Cal.* 404 and 40 *Bom.* 386, *Foll.*; *A. I. R.* 1921 *Bom.* 310, *Diss. from.* (*Case Law discussed*);

[P 888, C 1]

*Shyama Prosad Mukherjee*—for Appellant.

*Jadu Nath Kanjilal* and *Nani Lal Dey*—for Respondent.

**Cammiade, J.**—This appeal arises out of a suit for declaration of the plaintiff's title to certain lands and for recovery of possession. During the pendency of the suit, a composition was arrived at between the parties in criminal proceedings pending between them, relating apparently, to the same lands. The parties agreed to refer the matter in dispute to the arbitration of the zemindar. When the zamindar gave his award, the defendant, in whose favour the award was made, filed it in Court and prayed that a decree be passed in accordance therewith. The plaintiff refused to abide by the award, making various allegations against the zemindar. The learned Munsif who tried the suit held that the award was an adjustment of the matters in dispute within the meaning of R. 3, O. 23, Civil P. C., and he passed a decree in accordance with this award.

On appeal this decision was reversed on the ground that the above finding on the question of law was erroneous. The learned Subordinate Judge who heard the appeal remanded the suit for trial on the merits. The defendant has appealed to this Court.

A preliminary objection is taken on behalf of the respondent that no second appeal lies. This objection is based on sub-S. (3), S. 96, of the Code which provides that no appeal shall lie from a decree passed by the Court with the consent of parties. In the present case, the learned Court of appeal below has held that consent of parties did not exist, and has granted no decree. The objection, threfore, is not maintainable.

The only question in the case is whether or not an award made on a reference to arbitration, without the intervention of the Court, during the pendency of a suit, may be recorded as an adjustment of the matters in dispute under the provisions of R. 3, O. 23, when one of the parties objects to its being so recorded. This matter has been considered in its various aspects in a series of cases, and no further light can be thrown upon it. There is no judicial pronouncement by a Bench of this Court on the question; but there are two reported decisions of Mr. Justice Rankin, as he then was, sitting on the original side of this Court, namely the cases of the *Dekari Tea Co., Ltd.* v. *Assam Bengal Ry. Co.* (1) and *Aniar Chand Chamaria* v. *Banwari Lall Rakshit* (2). In both these cases, the learned Judge held that an award made on a reference to arbitration during the pendency of a suit neither made under the Sch. 2, Civil P. C.. nor under the Arbitration Act could not be enforced in the suit, In the second case mentioned above, his Lordship expressed his disagreement with the view taken by the High Court of Bombay in the case of *Manilal Motilal* v. *Gokaldas Rowji* (3) that such a submission could be enforced in the suit under the general law of contract.

There is practically universal agreement that S. 89, Civil P. C., is a bar to the enforcement of the award as such, although Fawcett, J., in the case of *Manilal Motilal* v. *Gokaldas Rowji* (3) followed the dictum of Davar, J. in *Harakhbai* v. *Jamnabai* (4), that R. 3, O. 23, came within the meaning of the

(1) A. I. R. 1921 Cal. 238.
(2) A. I. R. 1922 Cal. 404=49 Cal. 608.
(3) A. I. R. 1921 Bom. 310=45 Bom. 245.
(4) [1913] 37 Bom. 639=19 I. C. 786=15 Bom. L. R. 340.

words "any other law for the time being in force" in S. 89, Civil P. C. With all respect to the learned Judge, I agree with the contrary view taken in the same case by Macleod, C. J., and the reasons given by him.

As regards the view that, in spite of the provisions of S. 89, an award made on a reference to arbitration during the pendency of a suit is enforceable under the general law of contract, it seems to me that there are strong reasons against its acceptance. As has been pointed out by Rankin, J., in *Amar Chand Chamaria* v. *Banwari Lall Rakshit* (2) and by Macleod., C. J., in *Shavaksha Dinsha Davar* v. *Tyab Haji Ayub* (5), the Code makes elaborate provisions for the control by the Court of proceedings in arbitration held on a reference through the Court, and it is inconceivable that the legislature intended that it should be open to the parties to cast aside these provisions and carry on the proceedings in any way they choose. Of course, if the parties agree about the result of the proceedings there is an end of the matter; but. if they do not, the fact that the proceedings are illegal nullifies the award of the arbitrator. If, indeed, the view expressed in the case of *Manilal Motilal* v. *Gokaldas Rowji* (3), were correct, an award made in such circumstances should be enforced even if both parties objected to it. Such was the case in *Ghulam Khan* v. *Muhammed Hassan* (6). Their Lordships of the Judicial Committee have laid it down very clearly in that case, that once a suit has been instituted all proceedings in arbitration are subject to the control of the Court. It is not permissible to the parties to deprive the Court of its jurisdiction by private reference to arbitration; and no award made on such reference, unless consented to by both parties can be enforced in the suit.

The view of the law taken by the learned Subordinate Judge is correct. This appeal is, accordingly, dismissed with costs.

**Cuming, J.**—I agree.

J.V. *Appeal dismissed.*

---

(5) [1916] 40 Bom. 336=37 I.C. 140=18 Bom. L. R. 559.

(6) [1902] 29 Cal. 167=29 I. A. 51=3 C. W. N. 226=8 Sar. 154 (P.C.).

## A. I. R. 1927 Calcutta 888

PAGE AND GRAHAM, JJ.

*Gobinda Chandra Mukherjee* — Plaintiff—Appellant.

v.

*Banka Behari Das*—Defendant—Respondent.

Appeal No. 72 of 1926, Decided on 16th June 1927, from an order of the Dist. Judge, Assam Valley Districts, D/- 28th November 1925.

*Civil P. C., O. 41, Rr. 17 and 19—Appeal dismissed for default — Opportunity must be given to appellant as required under R. 19.*

It is not open to an appellate Court to dismiss an application to restore an appeal dismissed under R. 17 for default without giving the appellant an opportunity as required by R. 19, O. 41. [P 889 C 1]

*Krishna Kishore Basak* — for Appellant.

**Graham, J.**—This is an appeal from an order of the District Judge of the Assam Valley Districts, dated the 28th November 1925 dismissing an application for restoration of an appeal. The plaintiff-appellant brought a suit for recovery of a sum of money as the price of certain medicines. The trial Court gave a partial decree. There was then an appeal by the plaintiff to the District Judge and that appeal was registered and the usual notices were issued. Various orders were passed thereafter and on the 13th November 1925, an order was passed fixing the following day, the 14th November 1925, for the hearing of the appeal and it was directed that the appellant's pleader should be informed. On the 14th November the appellant's pleader was absent and his assistant, another pleader named B. C. Barooah, stated that he had no instructions. Thereupon the learned District Judge dismissed the appeal for non-prosecution. An application was then made by the appellant for restoration of the appeal. On the 16th November the hearing of the application was fixed for the 21st November 1925. No order bearing the date of 21st November appears on the order-sheet but on the 28th November the learned District Judge recorded an order to the following effect :

Application seen. I see no reason to restore the stay order or the appeal. In case of an appeal pending for so long the pleader concerned should have known that he could not expect an adjournment and should, therefore, have made

arrangements for some of the pleaders to appear in his place if he could not himself appear.

The appeal was dismissed under O. 41, R. 17, Civil P. C., and the procedure applicable, therefore, was the procedure prescribed under R. 19 of that order. That rule lays down inter alia that where an appeal is dismissed under R. 17 of the order, the appellant may apply to the appellate Court for re-admission of the appeal, and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the Court shall readmit the appeal. We are informed by the learned vakil for the appellant that on the 21st November which was the date fixed for hearing the application, the appellant and his witnesses were in attendance, but, as already stated, there is no order in the order-sheet relating to that date.

In my judgment it was not open to the learned District Judge to dismiss the application without giving the appellant an opportunity as required by R. 19, O. 41. There was no proper hearing of the case. In my opinion the appeal succeeds and the only course is to send the case back to the learned District Judge to be disposed of in accordance with law. Costs of this appeal will abide the result of the application to restore. The hearing-fee is assessed at one gold mohur.

**Page, J.**—I agree.

R.K. *Case remanded.*

---

## A. I. R. 1927 Calcutta 889

B. B. GHOSE AND ROY, JJ.

*Ram Sundar Sıha* and *others*—Plaintiffs—Appellants.

v.

*Kali Narain Sen Choudhury* and *others*—Defendants—Respondents.

Appeal No. 121 of 1925, Decided on 20th June 1927, from the Original decree of the Sub-Judge, 3rd Court, Tipperah, D/- 16th March 1925.

(a) *Contract Act, S. 12—Unsoundness of mind.*

The question whether a contract is invalidated by unsoundness of mind does not depend merely on belief or disbelief of the witnesses before the Court, but depends largely upon the inference to be drawn from the evidence. [P 892 C 1]

(b) *Transfer of Property Act, S. 54—Price may not be ascertained in the first instance.*

In all sales it is evident that price is an essential ingredient, and that where it is neither ascertained nor rendered ascertainable the contract is void for incompleteness and incapable of enforcement, but it is not, however, necessary that the contract should in the first instance determine the price. It may either appoint a way in which it is to be determined, or it may stipulate for a fair price. [P 893 C 1]

(c) *Contract Act, S. 29—Contract to execute a kobala "containing necessary stipulations" is not void for vagueness or indefiniteness.*

Where the contract was to execute a kobala containing necessary stipulations :

*Held* : that the "necessary stipulations" evidently mean the stipulations for sale implied under the law and contained in the Transfer of Property Act and that there was no vagueness or indefiniteness in the contract : *Rummens* v. *Robins* (1865) 13 *W. R.* 979 and 20 *C. W. N.* 66, *Dist.* : *A. I. R.* 1923 *P. C.* 47. *Rel. on.* [P893 C 2, P 894 C 1]

(d) *Specific Performance—Contract concluded—Another person offering higher price—Specific performance cannot be refused.*

Specific performance cannot be refused to a purchaser merely on the ground that another person offered a higher price after the contract was concluded. [P 894 C 2]

(e) *Specific Relief Act, S. 22—Mere hardship of the results of a contract will not affect Court's discretion to grant specific performance.*

If the contract has been entered into by a competent party, and is unobjectionable in its nature and circumstances, specific performance is as much a matter of course and, therefore, of right, as are damages. The mere hardship of the results will not affect the discretion of the Court to grant specific performance. [P 894 C 2]

(f) *Contract Act, Ss. 12 and 16—Undue influence and incapacity are totally different.*

*Roy, J.*—Undue influence and incapacity to enter into a contract are totally different things : 22 *Cal.* 324, (*P. C.*) *Foll.* [P 896 C 1]

(g) *Contract Act, S. 12—Loss of vigour owing to old age is not alone sufficient to invalidate a contract—Disablement to understand the transaction owing to old age must be proved.*

*Roy, J.*—With increasing old age there must be loss of vigour and even mental energy and there may come a time when extreme old age has brought a vacuity of mind, but all transactions made by a man before his mind became a blank cannot be set aside. It must be shown clearly that when any particular transaction is made, there is that infirmity of mind which disabled the man of old age from understanding what he is doing. Mere loss of vigour and infirmity on account of old age is not sufficient to invalidate a contract. [P 899 C 2]

(h) *Contract Act, Ss. 16 and 12—Equitable jurisdiction.*

Where a party to a contract is weak but has ample protection and independent advice, and the other party is not shown to have taken any undue advantage of his weakness, the Court will not extend its protection in favour of such weak party. [P 892 C 2, P 893 C 1]

*(i) Contract Act, S. 12—Unsoundness, to render a contract invalid, must exist at the time of contract.*

In order to avoid a contract on the ground of unsoundness of mind of one of the contracting parties the all-important question to be decided is whether that person was of unsound mind when the contract was made. [P 892 C 2]

*Dwarka Nath Chakrabarty, Upendra Kumar Roy, Bipin Chandra Bose, Hiran Kumar Roy, Monmohan Banerji* and *Ramendra Chandra Roy*—for Appellants.

*N. Sircar, Rameshchandra Sen, P. C. Sen* and *Kamini Kumar Dutta*—for Respondents.

**B. B. Ghose, J.**—This appeal by the plaintiffs arises out of a suit for specific performance of a contract for sale of certain immoveable properties embodied in a bainapatra dated 4th December 1920, executed by Kali Narain Sen Chowdhury who was the original defendant in the suit, and who will be referred to as the defendant henceforth. Kali Narain died during the pendency of the suit on 29th July 1922, and his legal representatives have been substituted in his place. The suit was instituted on 30th June 1921. After service of summons, Krishna Kumar Sen, the second of the surviving sons of the defendant, and another person serving as manager under the defendant, presented a petition in Court on 29th July 1921, that the defendant, by reason of unsoundness of mind and mental infirmity was incapable of protecting his own interest and a guardian ad litem should be appointed for him. Thereupon the Subordinate Judge held that though the defendant was not mentally deranged and could fully understand the questions put to him and give rational answers, he was incapable of sustained or independent mental efforts owing to senile decay. He made an order of the appointment of a guardian for the defendant. This order was set aside by the High Court in revision which directed a fuller enquiry on the question of unsoundness of mind or mental infirmity for reasons stated in the order. Before this enquiry could be held the defendant died and his legal representatives were substituted in his place as stated above.

The substituted defendants filed lengthy written statements contesting the plaintiff's claim. Their main plea was that Kali Narain was not of sound mind and certain other questions were also raised. A large number of issues were framed by the Subordinate Judge, but the principal questions were dealt with by him under issues 3, 5, 6 and 10. After a very elaborate discussion of the evidence and the circumstances of the case, the Subordinate Judge came to the following conclusions on the first three issues stated above: (1) that Kali Narain did not contract to sell the disputed properties to the plaintiffs; (2) that his mind was so much enfeebled and impaired by age and disease that Kali Narain was quite incompetent to enter into the contract referred to in the plaint and was incapable of understanding the terms of the bainapatra and of forming a rational judgment of its effect upon his interests; (3) that the bainapatra had been secured by the undue influence and unfair means of Satis Kabiraj and without Kali Narain understanding its contents and without obtaining proper advice. With regard to the issue 10, the Subordinate Judge observed, the price or the method for ascertainment of the price in the contract for sale was not definitely settled between the parties and he was, therefore, of opinion that the contract was bad for vagueness and indefiniteness. Upon these findings the Subordinate Judge dismissed the claim for specific performance of the contract but made a decree for the earnest money, Rs. 11,000 paid by the plaintiffs, with Rs. 750 as interest. From this decree the plaintiffs, appeal to this Court and the respondents prefer cross-objections against the decree for money in favour of the plaintiffs. The cross-objections, however, have not been pressed by the learned advocate for the respondents.

The plaintiffs urge that the finding of the Subordinate Judge is erroneous on every point. It is conceded by the learned advocate for the respondents that the finding of the Subordinate Judge that Kali Narain did not contract to sell the disputed properties is inaccurate as there is no question that he signed the bainapatra. It is also conceded that there is no evidence on which the finding that the bainapatra was secured by undue influence and unfair means could be based. The effective issues are simplified before us and the

questions we have to consider in this appeal are: (1). whether the defendant was of sound mind at the time when he made the contract; (2) whether the contract is vague and indefinite and so incapable of being specifically enforced; and (3) whether specific performance should be decreed in the exercise of the discretion of the Court having regard to the allegation of hardship made by the defendant. Another question was raised by the learned counsel for the respondents, that, although the defendant was not actually of unsound mind he was a man of weak intellect and incapable of managing his own affairs. Under such circumstances the Court should not make a decree for specific performance of the contract, although the plaintiffs might be entitled to damages. The appellants object to this point being raised before us on the ground that it is a new one.

Before I take the points for decision I must express my strong disapproval of the manner in which the case was conducted in the Court below. Hundreds of pages of depositions of witnesses have been recorded a good deal of which was admitted in the lower Court to be useless and a considerable portion of which was not at all referred to by counsel on either side before us. Although in the elaborate and careful arguments addressed to us, both sides tried their best to avoid irrelevant matters, still the mere act of finding the relevant pages caused much useless waste of our time. It reflects little credit on the practitioners who conducted the case in the Court below that they went on examining witnesses for days and days to no purpose and which was not at all for the benefit of their clients.

Kali Narain, the defendant, was a zamindar having his residence at a village called Bandar in the district of Dacca within Naraingunj sub-division. His income was about Rs. 12,000 or Rs. 15,000 a year and it appears his family was held in great respect in the locality although he could not be called a very rich man. He was about 75 years old when the story opens in 1920. For some years previously it appears he had made over the management of his properties to his sons. Their management does not appear to have been very successful. Kali Narain got into debts. He had executed two mortgages on his properties, one for Rs. 10,000 in January 1918, and another for Rs. 47,000 in January 1919. He had also incurred other debts on hundis. His properties were situated within the districts of Dacca and Comilla. The plaintiffs are residents in the district of Comilla. They are traders by profession and apparently having made money they desire to acquire zamindari properties in their own district. Kali Narain wanted to dispose of some of his properties within Comilla District in order to pay off his debts, and in June or July 1920 the plaintiffs came to Kali Narain and made offers as to the price they were prepared to pay. The offer not being accepted, they went away. Again, in September or October, they renewed negotiations and made higher offers which also were not accepted. The plaintiffs found at that time that another zamindar family, called the Majidpur Babus, were also endeavouring to purchase the properties. Being unsuccessful, the plaintiffs again went away. Subsequently they got a printed notice purporting to have been issued under the authority of the defendant, which is Ex. 1 in the case, offering to sell some properties and inviting purchasers. On receipt of the notice they again went to the defendant about the end of November expressing their willingness to purchase item 3 given in that notice. At that time the Majidpur Babus were also making their offers. It is not necessary to state in detail the story of the various negotiations on that occasion. It is sufficient to state that the plaintiffs' case is that, on the 30th November 1920, the defendant accepted the offer of the plaintiffs and agreed to sell the properties included in the bainapatra at 33 years' purchase of the net income. The Majidpur Babus had previously offered 32 years purchase. A draft of the bainapatra was prepared by a pleader on behalf of the plaintiffs. It was made over to the defendant's men and corrected by defendant's pleader, Basanta Babu, who was acting as his adviser. It was faircopied by a mohurir of defendant and the document was executed on the 4th December 1920, by the defendant and made over to the

plaintiffs who paid Rs. 11,000 out of the purchase-money. The document was presented at the registration office at Comilla for registration as the properties were situated within that district. A commission was issued to the Sub-Registrar at Dacca who went to the defendant's house, and before him defendant admitted execution of the document on the 10th December 1920, on which admission it was registered. The defendant went back to Bandar at the beginning of January 1921. When the plaintiffs went to Bandar with the balance of the purchase-money and desired to have the kobala executed, they were not allowed to see the defendant, and hence the suit. On behalf of the respondents it is contended that, although the onus of proving unsoundness of mind so as to invalidate a contract is on the party who alleges it, the respondents have succeeded in proving it as the lower Court has found. The question does not depend merely on belief or disbelief of the witnesses examined before the Court, but depends largely upon the inference to be drawn from the evidence. Most of the important witnesses were not examined before the Subordinate Judge. We are, therefore, in a similar position as the Subordinate Judge for deciding the matter.

The question we have to decide is the state of mind of the defendant at the time when he made the contract, i. e., the 4th December 1920, and we have to examine the evidence adduced by the parties from that point of view. The case for the defence is that, about the latter part of 1918, Kali Narain had a severe form of heart disease and he had rheumatism or paralysis in his lower limbs. Senile dementia had also set in with consequent loss of memory. He was, however, not actually incapable of transacting business till about September 1919, when he had a severe attack. After that it was evident that dementia had definitely set in. The evidence on which the learned advocate for the respondents mainly relies is as to the mental condition of Kali Narain at the end of November 1919, and as to his mental condition at the end of January 1921 and afterwards, from which he asks us to infer that the defendant was not competent to contract early in December 1920. There is no evidence worth consideration on behalf of the defence as to the state of mind of Kali Narain from December 1919 to the end of December 1920. It is urged that the proper inference from the evidence given is that the defendant was not of sound mind according to the meaning of the expression in S. 12, Contract Act. (After considering evidence the judgment proceeded). The all-important question is, as I have already observed, the state of the mind of the defendant at the time of the transaction in question. I am definitely of opinion on the evidence that at that time the defendant was of sound mind, quite capable of understanding the transaction and of forming a rational judgment as to its effect upon his interest.

This finding disposes of the question raised by the respondents' counsel before us, that Kali Narain being a person of weak intellect is entitled to special consideration. According to the general rules of English law, which have been applied in this country and extended to the case of pardanashin ladies, protection is given to persons whose disabilities make them dependent upon or subject them to the influence of others although nothing in the nature of fraud or coercion may have occurred. But in this case, even if the defendant is considered to be of such weak intellect, there was ample protection with reference to the transaction. There were his sons, two of his officers and his own lawyer. Disinterested third persons were also there. No advantage was taken of his alleged weakness but very good value was secured for the property. The question may be looked at from the point of view indicated in the case of a pardanashin lady by Lord Sumner in the recent case, in the Privy Council, of *Farid-un-nissa* v. *Mukhtar Ahmad* (1) where the onus was on the person claiming under the deed. His Lordship observes as follows:

> It must be a question whether, having regard to the proved personality of the settlor, the nature of the settlement, the circumstances under which it was executed, and the whole history of the parties, it is reasonably established that the deed executed was the free and intelligent act of the settlor or not. If the answer is in the affirmative, those relying on the deed have discharged the onus which rests upon them.

(1) A. I. R. 1925 P. C. 204=47 All. 703=23 O. C. 338=52 I. A. 342 (P. C.).

As I have already said, even if the defendant was of weak intellect there was full independent advice which would sustain the transaction, and I find no reason to doubt that the contract was his intelligent act. In that view I do not consider it necessary to discuss the numerous cases cited before us on the point

I shall next deal with the question of vagueness or indefiniteness of the contract. The value of the properties was fixed at Rs. 1,07,131-4-0. There is this provision in the bainapatra :

> The amount of consideration money is fixed at 33 times the net collection after deducting revenue cesses, etc., from the amount of gross collection of the properties described in the schedule below and deducting from the balance collection charges at 10 per cent. The amount of consideration is to vary in proportion if the amount of gross collection varies on seeing the papers, and both the parties shall abide by the same.

The law on the subject may be stated thus :

> In all sales it is evident that price is an essential ingredient, and that where it is neither ascertained nor rendered ascertainable the contract is void for incompleteness and incapable of enforcement. It is not, however, necessary that the contract should in the first instance determine the price. It may either appoint a way in which it is to be determined, or it may stipulate for a fair price. Fry on Specific Performance, 6th edition, Ss. 353, 354.

I may also refer to the case of *New Beerbhoom Coal Co.* v. *Bularam Mahata* (2), where the Courts in India refused specific performance of a contract to grant a lease of certain lands "at a proper rate." The High Court affirmed the decision of the trial Judge on the ground that it was impossible to determine what was "a reasonable rate." Their Lordships of the Privy Council observed on this question :

> There might have been considerable difficulty in fixing the rate; but difficulties often occur in determining what is a reasonable price or a reasonable rate, or in fixing the amount of damages which a man has sustained under particular circumstances. These are difficulties which the Court is bound to overcome.

In the present case the price was settled in a definite manner and provision was made for its alteration if any ground was made out for alteration. It is urged that in this case the revenue payable for a portion of a touzi cannot be apportioned with reference to the revenue payable for the entire touzi. It is true in one sense, as any apportionment made by the vendor and purchaser will not be binding on Government. But when the vendor tells the purchaser that he would have to pay a certain amount of revenue for the portion purchased and the purchaser accepts it, I do not see any difficulty in the matter. That agreement would be binding on the parties. If the vendor asks for a larger sum, the net profits would diminish ; if a smaller sum, it would increase. The plaintiffs say that the revenue payable was settled according to the amount in printed notice Ex. 1. It is, however, urged by the respondents that it has not been proved that the notice was issued under the authority of Kali Narain. But in fixing the price in the bainapatra the collections and the revenue must have been settled somehow. The defendants do not say that it was with reference to any other papers. They do not also say that the net collections are different or that the price calculated at 33 times the net income would be different. I am unable to see that there is any vagueness in the contract. It is argued that it does not appear that the price of the third item in the bainapatra was taken into account. The evidence of Chandra Kumar Chakrabarty (at p. 103) shows that it was done, and he also states that certain collection papers were shown to them about the properties sought to be sold. That evidence is not contradicted. I therefore hold that the price was fixed with reference to the net income as shown by the defendant.

Another argument is that the contract was to execute a kobala " containing necessary stipulations " and it is urged that such a contract is not capable to specific performance, and the cases of *Rummens* v. *Robiins* (3) and *Hyam* v. *Gubbay* (4) are cited in support of the contention. In the first case the Vice-Chancellor held that there was no concluded contract and that was also the finding of the majority of the Court in the latter case. But here it cannot be questioned that there was a concluded contract. Reference may be made to *Harichand Mancharam* v. *Govind Lax-*

(2) [1880] 5 Cal. 932=7 I. A. 107=7 C. L. R. 247=3 Suther. 787=4 Sar. 145 (P. C.).

(3) [1865] 3 De. G. J. & S. 88=13 W. R. 979=11 Jur. (N. S.) 631=14 L. T. 717.

(4) [1916] 20 C. W. N. 66=32 I. C. 53.

*man* (5). If a contract is framed in general terms the Court will carry it into effect where the law will supply the details: Fry on Specific Performance, S. 368. For example, where a contract for lease was "to contain all usual covenants and provisions" or the terms were "the usual public-house contract" the Court gave effect to the contract. Here the expression "necessary stipulations" evidently means the stipulations for sale implied under the law and contained in the Transfer of Property Act. On the whole I do not think that there is any vagueness or indefiniteness in the contract.

The next question is one of hardship and whether we should decree specific performance in the exercise of our discretion. Mr. Sircar refers to S. 22 (1), Ill. (d), and the case of *Twining* v. *Morrice* (6) on which the illustration is based. It is argued that the agents employed by Kali Narain to carry on the negotiations did not try to obtain the best value. It is not sufficient that the proper value was obtained but the best value should be secured in order to decree specific performance. The Majidpur Babus were staying at Dacca and the agents did not inform the Babus that the plaintiffs had offered 33 years' purchase. If they had done so the Babus might have at once offered a higher price, as they subsequently offered 40 years' purchase (which was really 37 years purchase as three years purchase-money was to go to the amlas). Even if the fact were so I do not think the principle applies. In the case cited the purchaser did an act, however innocently, by asking the seller's attorney to bid for him, by reason of which the vendor was placed at a disadvantage and the property was knocked down at a low price. Here the purchasers were strangers who were only offering the price they were prepared to pay. They did not do anything to induce the agents of Kali Narain to get the property for them at a low price. They were negotiating directly with Kali Narain. If Kali Narain closed the bargain with them they were not to blame. But the fact is that the Majidpur Babus did not at once offer to pay any higher price on hearing about the bainapatra. They tried at first to share the property with the plaintiffs or to buy them off. It was only after some days, when they failed in their attempt, that they offered 35 years' purchase and then 40 years' purchase. If specific performance is not allowed to a purchaser on the ground that another person offered a higher price after the contract was concluded, then I think in no case can specific performance be allowed to a purchaser. Because, in the majority of such cases, the vendor is unwilling to perform the contract as he expects a higher price. Then it is urged for the respondents that it is hard that the defendants should be compelled to sell at the price which did not take into consideration the khas lands, the grass lands, and the bazar. The evidence with regard to these is only that of Ananda Charan who is now the manager. There is no corroboration even in the evidence of Krishna Kumar who used to manage the property. If the lands had produced any income they must have been entered in the papers of the zamindari. But no papers have been produced. I have no hesitation in rejecting the evidence of this witness. Besides, when a zamindari is sold, the usual practice is to take the income only into consideration. Moreover,

> if the contract has been entered into by a competent party, and unobjectionable in its nature and circumstances, specific performance is as much a matter of course and, therefore, of right, as are damages. The mere hardship of the results will not affect the discretion of the Court: Fry, S. 46 see; also S. 422.

The case of *Davis* v. *Maung Shwe Go* (7), cited by the appellants, may also be referred to in this connexion. Their Lordships observe in answer to the contention that, having regard to the onerous character of the bargain specific performance should not be allowed in the exercise of discretion:

> In the absence of any evidence of fraud or misrepresentation on the part of the plaintiff which induced the defendant to enter into the contract, their Lordships see no reason to accede to the argument. The bargain is onerous, but there is nothing to show that it is unconscionable. The defendant knew all along that a lakh was the plaintiffs' limit; it is in evidence that he had frequently urged the defendant's daughter to advise him to sell the land if he was getting a higher offer. It is difficult to say under the circumstances that he took an improper advan-

(5) A. I. R. 1923 P. C. 47=47 Bom. 335=50 I. A. 25 (P. C.)

(6) [1788] 2 Bro. C. C. 326=29 E. R. 182.

(7) [1911] 38 Cal. 805=11 I. C. 801=38 I. A. 155 (P. C.).

vtage of his position or the difficulties of the defendant.

The present case is much stronger, as the evidence shows that the defendant secured a very good value for the property. Under these circumstances, I am unable to hold that there was any hardship, or that there is any ground for not decreeing specific performance in the exercise of our discretion. In my judgment, there would have been no question about selling the properties to the plaintiffs if the Majidpur Babus who appear to be influential zemindars, had not offered a higher price after failing to buy off the plaintiffs or getting a share of the properties from the plaintiffs by paying a proportionate share of the price for which the plaintiffs had contracted to purchase. The defendants have not shown that the net income of the property is higher than what is stated by the plaintiffs, and there are no materials on record on which it may be held that the purchase-money should be more than what is stated in the bainapatra. It should, therefore, be held that the price given in that document is the proper price.

On these grounds, I would set aside the judgment and decree of the Subordinate Judge and decree specific performance of the contract embodied in the bainapatra dated the 4th December 1920.

The appeal is decreed with costs in both Courts. The cross-objection is dismissed without costs.

**Roy, J.**—(After stating the facts as given in the judgment of B. B. Ghose, J. his Lordship proceeded). The simple question for decision now is whether specific performance should be enforced. The evidence is voluminous. The evidence of Babu Ananda Chandra Roy alone runs into over 220 printed pages. He was examined on commission. The scandalous length of the examination of this witness and of several others reflects great discredit on the members of the Dacca Bar concerned, when it is acknowledged that considerable portions of this evidence is entirely irrelevant.

Mr. Chakravarty, for the plaintiffs, contends that the learned trial Judge has not appreciated all the circumstances of the case as touching the plaintiffs and that the view taken by him of the evidence is grievously wrong. The learned Subordinate Judge does not seem to have distinguished the inconsistent pleas set up. He has, after a general examination of the circumstances of the case, come to these conclusions:

(1). that Kali Narain did not contract to sell the properties to the plaintiffs;

(2). that his mind was much enfeebled and impaired by age and disease, and that Kali Narain was quite incompetent to enter into the contract referred to in the plaint and was incapable of understanding the terms of the bainapatra and of forming a rational judgment of its effect upon his interest.

(3). That the bainapatra had been secured by the undue influence and unfair means of Satis Kabiraj (Kali Narain's son-in-law) and without Kali Narain's understanding its contents, and without his obtaining proper advice. Mr. Sircar tries to support the decision of the trial Court by arguing that, regard being had to the condition of Kali Narain before and after the bainapatra, an inference may be drawn that Kali Narain had not that soundness of mind which is contemplated under S. 12, Contract Act, and that, at any rate, it is proved that Kali Narain was weak in mind at this time and that specific performance of the contract should be refused on this ground as also because the full value of the property was not obtained. The main argument of Mr. Sircar, if I have understood him properly, is that, regard being had to all the circumstances of the case, the Court should exercise the discretion it had and refuse enforcement of the contract. His second ground is that the contract is void for uncertainty.

The case for the defence was that Kali Narain was of unsound mind at the time the document was executed, viz. 4th December 1920. The position taken by Krishna Kumar Sen, the second son who is really the contesting defendant, and by some of the other witnesses, is that Kali Narain's mind was gone by the end of 1325 B. S., that is to say by April 1919. This is Krishna Kumar's statement on p. 139 of part 1 of the paper book:

> From the latter part of 1325 onwards till his death my father had no capacity to understand the terms of a document and why the deed was being executed and its effect upon his interests.

Mr. Sircar contends that on the evidence it should be held that Kali Narain's

incapacity dated from towards the end of 1919. I think it would be convenient to follow the learned Subordinate Judge in his discussion of the various incidents. (His Lordship then dealt with evidence and proceeded.) Within a few days of Kali Narain's arrival at Dacca, and while he was staying with his son-in-law, Satis Kabiraj, Kali Narain executed a will. We are not concerned actually with the validity of the will, but it has some bearing on the case. By this will (there was a previous will as it appears) Kali Narain made a provision of Rs. 150 a month for his wife for her life and he gave each of his two daughters (Satis Kabiraj's wife and Kadambini) Rs. 15 a month for their life and on their death Rs. 5 a month to each set of sons by these daughters. Kali Narain's income is given as between Rs. 12,000 to Rs. 15,000 a year. Kadambini died at Dacca. The provisions made in the will by themselves do not go to show that Kali Narain was doing anything violent to the detriment of his sons. We learn from the pleader, Surendra Nath, who went to Bandar to his rescue, that Kali Narain told him that he wanted to execute a will at an early date. By the will, Nirmal Kumar Gupta, Professor, Jagannath College, was appointed one of the executors. He has deposed. He is a relative and he tells us how Kali Narain appealed to him also to save his estate, and he went and saw Ananda Babu and consulted him. The learned Subordinate Judge on this point says that it is not at all unlikely that the wife and son-in-law worked Kali Narain up to a state in which Kali Narain should say that he wanted to execute a will, but, at the same time, comes suddenly to the conclusion that Kali Narain had no testamentary capacity in December 1919. As was observed by their Lordships of the Privy Council in *Sayad Muhammad* v. *Fateh Muhammad* (8) undue influence and incapacity are totally different things. Nothing can be said against this Professor and the learned Subordinate Judge can find nothing against him except that Kali Narain's wife apparently did all the talking. The Professor, however, deposes that Kali Narain joined in the conversation from time to time. Both he and Ananda Roy gave positive evidence of the capacity of Kali Narain. It is established beyond any doubt that Kali Narain wished to execute a will and had a mind. Whether there was any undue influence with regard to the will it is not for us to consider here. (After considering evidence his Lordship proceeded.) These proceedings lead to two clear inferences: One is that no one, not even the son Krishna Kumar, questioned the capacity of Kali Narain to sell his property; the second is that there was no controverey raised about the net profits of the property which had been ascertained or could be ascertained. The only question was how many years' purchase was to be paid by the purchaser.

This leads us to the question of the adequacy of the price. Mere assertion that 50 years' purchase could be had, will not do. The assertions come from interested parties or from a cultivator, who was produced to depose what a zemindari can fetch. Ordinarily 33 years' purchase is a high price and that is the opinion of Ananda Babu himself, a great landlord apparently. Mr. Sircar referred to the evidence of Annoda, the present manager, that a bazar had been established and the income derivable from it had not been taken into account or that the khas lands were ignored and so forth for his argument that the whole income had not been taken into consideration. We cannot rely only upon Annoda's evidence. The collection papers and other papers were available and could have been produced. It is common ground that the sale was to be on so many years' purchase of the sthit and it is well understood what the sthit or annual profits connote. The sthit was given in the notice and Chandra Kumar's evidence is that he examined the talab baki. If there was anything wrong in the notice it could have been shown to be wrong. It was argued that Ananda Babu's evidence shows that he did not understand that 10 per cent. would be deducted for collection charges. He was labouring under an error and he himself says he may have been mistaken. The net profit must be the profit after the collection charges.

It was contended that Satis Kabiraj did not get the full value of the property as he did not inform the other intending purchasers. There was Rai Mohan Poddar, but he was lukewarm and made

(8) [1895] 22 Cal. 324=22 I. A. 4=6 Sar. 515 (P. C.).

no offers. He wanted to be informed about the offers made by others early in 1920, but made no further offer. The Majidpur Babus were on the scene, but it is obvious that they made no offer approaching the plaintiffs till after the bainapatra. Rohini Bhattacharjya, the pleader examined for the defence, was pressed on the point and he deposed that he could not say if they had made a better offer before the bainapatra.

The plaintiff Guru Charan says that the Majidpur Babus offered 32 times. Well, he was told that and it was by telling him this that Kali Narain's wife got the plaintiffs to go up one more point. There will come a time when haggling must cease and the evidence does not show that the Majidpur Babus were willing to go any further. Their first move after the bainapatra was to try to get share in the property. A good deal of mud has been thrown on Satis Kabiraj, the son-in-law. Rohini Bhattacharjya took him to task for getting this contract through and his reply was:

> Have I done anything wrong? Where are purchasers available for such a large property?

Strenuous efforts were made to show that Satis Kabiraj had taken brokerage. The attempt failed. It seems unlikely that he got much since the sale was not concluded. In the second place, it appears that a brokerage has the sanction of custom. Ananda Babu says so and the Majidpur Babus were willing to give three years' net profit to the amlas.

There is nothing to show that in this transaction Satis Kabiraj was doing anything detrimental to the interests of Kali Narain. In *Rowland* v. *Chapman* (9) the fact that the agent took a secret commission from the vendor was held not to give a right to rescission if the amount of commission is such that his duty did not conflict with his interest.

It is clear, therefore, that the price obtained was adequate. The transaction was made openly. The evidence establishes sufficiently that Kali Narain was in a state of mind which showed that he knew what he was doing and that the act which he did was one which he intended to do and that he was capable of understanding the nature and the consequence of the act which he had done.

(9) [1901] W. N, 158.

1927 C/113 & 114

This really disposes of the matter. It seems hardly necessary to refer to the evidence of the Civil Surgeon, Colonel Macgilvie, who examined Kali Narain on the 23rd and 26th April 1922, and found his mind a blank. Another retired Civil Surgeon, Kumar Bhabendra Narain, examined Kali Narain on the 17th, 18th and 19th April 1922, and he found that Kali Narain had still some mind left. This was nearly 18 months after the bainapatra. Mr. Sircar's contention was that, regard being had to the evidence of Colonel Macgilivie of the state of Kali Narain's mind in April 1922, regard being had to the observations of the Subordinate Judge who examined Kali Narain personally on 14th September 1921, and regard being had to the testimony of Colonel Newman who examined Kali Narain on 24th and 26th January 1921, and seeing that senile dementia is a progressive disease, it is a legitimate inference that Kali Narain was of unsound mind at the time of the contract. Mr. Sircar referred also to certain passages in the evidence of Guru Charan and his man Chandra referred to by the Subordinate Judge. They are plaintiff and his man, and they were probably apprehensive of making any admission to the effect that Kali Narain's condition was worse when the Subordinate Judge saw him, in the same way as Krishna Kumar and his men would have us believe that by the end of 1325 B. E. Kali Narain had become an imbecile. It is idle to speculate what Kali Narain's mental state might have been if this evidence is followed back, when we have independent positive evidence of Kali Narain's capacity fortified by the circumstances of the case. A word has to be said about Colonel Newman's evidence since he examined him within two months of the deed. This doctor treated Kali Narain's wife when she had apoplexy. He could have seen Kali Narain only casually at the time, yet he ventures to give an opinion and his later examination suffers from the defect that he had been told that Kali Narain had sold property much below its market value, and he gave his evidence accordingly. We cannot place in such circumstances any great reliance on his evidence. It is argued that the fact that Kali Narain resiled from the contract soon after is an indication at least that he is easily open to influence or persuasion.

Men do change their minds. Law was made to redress wrongs when a contract is violated. The fact that a man has changed his mind is not a ground for thinking that he was of unsound mind when he made the contract.

The second ground is that the contract is vague for uncertainty. There does not seem to have been anything vague about the terms. The net income was taken from the notice and the talab baki, and the settlement records have been produced which show the correctness of the figure within a few rupees. It was urged that there is nothing to show how many years' net income was taken into calculation. The plaintiff accepted, as I said before, the figure given by the vendor or his people. There was a clause that if there was any variation shown by the actual production of collection papers in the sthit, the purchase-money would be calculated accordingly. It gave an option to the defence to show that the sthiti was more. They have not exercised that option. It is said that in the notice only Touzi No. 304 of the Dacca Collectorate appears, but in the bainapatra two other properties, a sikimi taluk and another touzi of the Tipperah Collectorate, viz. touzi No. 1706, are included. It is acknowledged, however, that joar panchkitta is a compact property and it is not shown that the properties mentioned in the contract are outside joar panchkitta. Kali Narain seems to have bought back a share of taluk within the mahal, and touzi No. 1706 bears a revenue of Rs. 12 only. Since Kali Narain was selling all he had in joar panchkitta it is intelligible how these properties came to be mentioned in the bainapatra. Then again it was urged that it is not shown how the revenue was apportioned. People do sell parts of touzis and the vendor makes the estimate of the proportionate revenue on the basis of the proportion of collections. This was the method followed in the notice. The purchaser has accepted it. It is not shown that the apportionment was wrongly made.

Mr. Sircar has discussed a number of cases. This case is pre-eminently one for decision on facts, and the cases referred to do not appear to us to be of any great assistance. The cases were quoted for the purpose of showing that the Court can exercise a greater discretion when it is a suit for specific performance and not merely for rescission and for the purpose of establishing that the Courts have interfered in cases of proved weak intellect. An allied theory was referred to in the observations of the Court in the case of *Monohar Das* v. *Bhagabati Dasi* (10), that in the case of a pardanashin lady the Court will give the same protection as the Court of Chancery does to the weak, ignorant and infirm; and the English cases mentioned therein were cited. Whether it is a case of rescission or specific performance it is clear, however, that the Court interferes only when some advantage is taken of the executant. I will refer to a few of the cases cited. The case of *Blachford* v. *Christian* (11) was referred to. The transaction was set aside because the deed was obtained by imposition from an imbecile old man. The cases in *Baker* v. *Monk* (12) and *Clark* v. *Malpas* (13) were quoted. The former was a case to set aside a deed from a lonely, aged woman in the lower rank of life without her having any consultation with anyone else, and the latter was a case where the purchase was made at an undervalue and made with great precipitation. The case of *Willon* v. *Willon* (14), which was quoted was one of combined effect of imbecility and ignorance and though there was no fraud it was a case of surprise, neither party understanding the effect of the transaction. On the other hand, the sanctity of contract is always respected. The discretion of the Court is not to be arbitrary but judicial, and when the contract has been entered into by a competent party and is unobjectionable in its nature and circumstances, specific performance is a matter of course and, therefore, of right, as are damages: Fry, S. 46. The principle has found a place in S. 22 of our Specific Relief Act.

Mr. Sircar quoted Ill. (d), sub-S. (1), S. 22, and he formulated his proposition thus: if the agent of the vendor does not act as to get the best price, specific performance ought not to be allowed. Mr. Sircar's contention was that Satis Kabiraj could have got a better price. The

(10) 1 B.L.R. O.C.J. 28.
(11) [1829] 1 Knapp. 73=38 R.R. 22.
(12) [1864] 33 Beav. 419=146 R.R. 361=10 L.T. 86.
(13) [1862] 31 Beav. 80=4 De. G. F. & J. 401 =8 Jur. (N. S.) 734=10 W. R. 676.
(14) [1810] 16 Ves. Jun. 72.

illustration mentioned above is taken from the case of *Twining* v. *Morrice* (6). There the solicitor of the vendors honestly and by inadvertence offered and bid at an auction which was taken as a bid for the vendors and considered as a puff. The sale was immediately chilled and specific performance was refused because the Court was not convinced that a better price would not have been reached. Here we have the case of a private sale. Satis Kabiraj's conduct has been the subject of attack because he did not inform other intending vendors about the terms offered by the plaintiffs. We know that other people made better bids or said they would have if they had known, as in the case of Rai Mohan Poddar, only after the event. Haggling had been going on and Kali Narain's wife and Satis seem to have got a very handsome price from the plaintiffs.

The case of *Clowes* v. *Higginson* (15) was referred to in connexion with the contention that khas lands, etc., had not been taken into account. In the case quoted there was controversy whether certain timber was included in the contract or not and suits brought by the vendors to resile from the contract and by the purchaser for specific performance of the contract were both dismissed because the parties were not agreed as to the actual terms. The contract in this case was on the sthit or net income and anyone connected with the zamindari knows that the sthit includes all available income. The oral evidence produced cannot be accepted when the defendants could have easily produced their books.

The contract contemplated a sale-deed "containing necessary stipulations" and the contract has been assailed as being indefinite. Learned counsel has quoted the case of *Rummens* v. *Robins* (3) which was cited by Jenkins, C. J., in *Hyam* v. *Gubbey* (4). The decision in these cases proceeded upon the footing that there was no concluded contract. In *Hampshire* v. *Wickens* (16) the power of the Court to enforce a contract to accept a lease

to contain all usual covenants and provisions,

was admitted and as observed in *Harichand Mancharam* v. *Govind Laxman Gokhale* (5), the provision meant no more than that the kobala would be put into proper shape and, in legal phraseology, with any subsidiary terms that the lawyers might consider necessary for insertion in a formal document.

This brings me to the end. The question for decision, as I have said, is simple and the evidence and the circumstances of the case can lead but to one conclusion, viz. that Kali Narain, when he made the contract, was capable of understanding it and forming a rational judgment as to its effect upon his interest. Kali Narain was, of course, old and infirm, but if there is any suspicion that there was any weakening of his intellect, there is the fact that he made the contract with the advice of his well-wishers and in presence of a host of witnesses. The only person not consulted is Krishna Kumar, the contesting defendant, and he was the son from whom Kali Narain had to run away. The matter is of some importance. People must get old including owners of property. They continue to do business till they die. With increasing old age there must be loss of vigour and even mental energy and there may come a time when extreme old age has brought a vacuity of mind, but all transactions made by a man before his mind became a blank cannot be set aside. It must be shown clearly that when any particular transaction is made there is that infirmity of mind which disabled the man of old age from understanding what he is doing. The defence have failed to make out such a case and, as I have said, the plaintiffs have been able to show that, at the time when Kali Narain executed the bainapatra he was able to understand business matters and to know what he was doing. The plaintiffs, who were strangers and negotiated in good faith and paid earnest money, are entitled to specific performance. It cannot be said that they could or did take any advantage in the bargain made openly and in consultation with the vendor's numerous friends. For the above reasons, I agree with my learned brother in decreeing the appeal with costs in both the Courts.

R.D. *Appeal decreed.*

(15) [1813] 1 Ves. & B. 527=12 R.R. 284.
(16) [1878] 7 Ch. D. 555=47 L.J. Ch. 243=26 W.R. 491=38 L.T. 408.

## A. I. R. 1927 Calcutta 900

CUMING AND ROY, JJ.

*Samsannessa Bibi* and *another*—Plaintiffs—Appellants.

v.

*Rahim Pramanik* and *others*—Defendants—Respondents.

Appeal No. 832 of 1925, Decided on 8th August 1927, from the appellate decree of the Sub-Judge, Nadia, Krishnagar, D/- 16th January 1925.

(a) *Landlord and Tenant—Whether one of the several tenants can be regarded as a representative of the rest is a question of fact.*

Whether one of the several tenants can be regarded as a representative of the rest must depend upon the circumstances of each case. Such a question is largely, if not essentially, a question of fact. Mere registration of one tenant does not entitle him to become the representative of the non-registered tenants: 17 *C. W. N.* 833, *Foll.* [P 900 C 2, P 901 C 1]

(b) *Landlord and Tenant—At the time of sale of tenancy, interests of non-registered tenants must also be considered.*

A landlord may look for his rent from only the registered tenant, but when he proceeds to sell the tenancy it must be considered whether the registered tenant represents the interests of non-registered tenants also. [P901 C 1]

*Radha Benode Pal, Bhupendra Kumar Basu* and *Jitendra Mohan Banerjee*—for Appellants.

*Nasim Ali* and *Ramesh Chandra Pal*—for Respondents.

**Roy, J.**—The facts giving rise to this appeal are these: There was a tenure standing in the name of Chiniraddin under the Saha Babus. The family acquired the tenure in the lifetime of the father but Chiniraddin was the only recorded tenant in the books of the landlord. After the death of the father, which took place in 1314 B. E., the widow and the four sons succeeded to the tenure and realized rents from the tenants in respect of the separate shares. The landlords sued Chiniraddin for arrears of rent due for the years 1912-15 and, in execution of the decree they obtained, the tenure was purchased by the plaintiffs, who are the two widows of Basiraddin, a brother of Chiniraddin. The widows took delivery of possession through Court in 1917 but obviously all the heirs still remained in possession, for, the settlement operations began in 1918 and in the finally published record-of-rights all the heirs are recorded to be in possession. The Saha Babus brought a damage suit in 1918, and in that suit they made all the heirs parties. It appears that there was a stipulation in the lease that the tenure-holder would pay rent for the Saha Babus to their superior landlords but the tenure-holders did not and this damage suit was brought in respect of the same years for which they had previously brought a rent suit. The plaintiff brought this suit and asked for enhancement of rent on certain grounds. The rate of rent was not disputed but the tenant raised the question that the plaintiffs had, by their purchase, acquired only the fractional interest of Chiniraddin and were not entitled under S. 188, Bengal Tenancy Act, to sue for enhancement. It is in this way the question has arisen which required our decision, viz,, whether the plaintiffs have got 16-annas interest in the tenure or whether they have only acquired the 4¼ annas interest of Chiniraddin. The trial Court held that as Chiniraddin was the only recorded tenant and as after the father Chand Miah's death the different co-sharers did not register their names in the landlords' sherista, Chiniraddin represented all the co-sharers to the landlords and the co-sharers are bound by the results of the rent suit and he gave the plaintiffs a decree. The learned Munsif quoted cases of *Jeo Lal Singh* v. *Gunga Pershad* (1), *Nitayi Behari* v. *Govinda Saha* (2) and *Rajani Kant* v. *Uzir Bibi* (3). There was an appeal by the tenant-defendant and the lower appellate Court came to the conclusion that in the circumstances of the case Chiniraddin did not represent the tenure at all and the plaintiffs as co-sharer tenure-holders are not competent to sue for enhancement of the rent. He gave the plaintiffs a decree for their share of rent (as derived from Chiniraddin). The plaintiffs have come up here from this decision and the argument of Dr. Pal, appearing for them is in effect that the lower appellate Court has made an error in deciding the point at issue.

The question, however, whether one of several tenants can be regarded as a representative of the rest must depend upon the circumstances of each case; such a question is largely, if not essen-

(1) [1884] 10 Cal. 996.
(2) [1899] 26 Cal. 677.
(3) [1903] 7 C. W. N. 170.

tially a question of fact : *Chamatkarini Dasi* v. *Friguna Nath Sardar* (4). It seems to me, therefore, that we are bound by the finding of fact by the lower appellate Court in this case. It might be possible to disturb this decision if it could be shown that it is based on an erroneous conception of the law or the evidence.

But there is only one mistake of fact which does not make any real difference in the case. The learned Subordinate Judge was of opinion that the landlords brought the damage suit first, and then, the rent suit, and he was of opinion that the landlords were not entitled subsequently to sue Chiniraddin alone. As a matter of fact, the rent suit was brought first but their conduct in subsequently joining all the heirs, gives rise to the inference that they knew all along who were the actual tenure-holders. It cannot be said that they did not know ; for the tenure comes from the days of Chand Miah and the heirs are in possession, and any slight enquiry would have revealed the facts. A landlord, it may be conceded, may look for his rent from only the registered tenant but when he proceeds to sell the tenancy it has to be considered what really passed by the sale. The learned vakil has referred to the cases cited by the Munsif. In the particular circumstances of these cases it was held that there was representation. It was not laid down anywhere, as far as I know, that the recorded tenant represents all the cosharers. It was said in *Ashok Bhuiyan* v. *Karim Bepari* (5) that there is no law rendering it obligatory on tenants to get their names recorded in the landlords' sherista for the purpose of perfecting their titles. *Ashok Bhuiyan's* case (5) was considered in the case of *Jagattara Dassya* v. *Daulati Bewa* (6) and it was pointed out therein that the distinction between tenures and raiyati holdings under the Bengal Tenancy Act has been largely obliterated. With due respect, I venture to go a little further and point out that there is no law that on the death of a tenure-holder all the heirs are bound to register their names in the landlord's office. The only penalty for non-registration in the case of a permanent tenure-holder is provided in S. 16 which lays down the bar to his recovering rent from his tenant. In *Jagattara's* case (6) it was said that the decision in *Ashok Bhuiyan's* case (5) lays down no more than this : that a landlord is not justified in treating the registered tenant of a raiyati holding as the sole tenant merely because his co-sharers in the holding are not registered ; and it was also decided that there is nothing in that case to prevent the whole body of tenants of a raiyati holding electing to treat one of their number as their representative in their dealings with the landlord ; the fact that only one tenant is registered is merely an item in the evidence on the question whether he is or is not the representative qua the landlord. The case of *Afraz Molla* v. *Kulsumunnessa Bibi* (7) held that the mere fact that a tenant's name is not registered " cannot prejudice her rights." The doctrine of representation is grounded really on the principle of estoppel as was pointed out in *Raja Koer* v. *Ganga Singh* (8). It is unnecessary to quote any more cases. The rulings cited by the Munsif have been discussed in the cases I have mentioned. The mere fact that Chiniraddin's brothers were not registered in the landlord's office is not enough to show that they held out Chiniraddin as their representative in their transactions with the landlord. Chiniraddin was merely a benamidar for his father and on the father's death, Chiniraddin was a benamidar for the other cosharers for their shares. All the cosharers were in possession and the landlords, it may be taken from the circumstances of the case and from their subsequent conduct, were aware of the real state of things. There was, therefore, no representation. In my opinion, therefore, the decision of the lower appellate Court should be upheld and the appeal dismissed with costs.

**Cuming, J.**—I agree that the appeal should be dismissed.

N.D. *Appeal dismissed.*

---

(4) [1913] 17 C. W. N. 833=19 I. C. 989.
(5) [1905] 9 C. W. N. 843.
(3) [1910] 37 Cal 75=2 I. C. 695=13 C.W.N. 1110.

(7) [1903] 4 C. L. J. 68=10 C. W. N. 176.
(8) [1909] 13 C. W. N. 750=1 I. C. 197=10 C. L. J. 201.

## A. I. R. 1927 Calcutta 902

CUMING AND MUKERJI, JJ.

*Mt. Latifa Khatun* and *another*—Plaintiffs—Appellants.

v.

*Tofer Ali* and *others* — Defendants—Respondents.

Appeal No. 40 of 1925, Decided on 2nd June 1927, from the appellate decree of the 1st Sub-Judge, Chittagong, D/- 25th September 1924.

(a) *Limitation Act, Art.* 45—*No contest or decision on investigation—Suit for confirmation of possession—Art.* 45 *does not apply.*

The "award" contemplated by Art. 45 presupposes a contest between the parties and a decision after proper investigation into the points at issue. Where there is nothing to indicate that there was any contest or a decision on any investigation, but the only object of the suit is that the plaintiffs may be confirmed in their possession of the lands, if they succeed in it, and the settlement by the revenue authorities, in so far as it determined the amount of the revenue payable in respect of the disputed property, would in no way be affected, the only result being that the plaintiffs would in that case, obtain the benefit of the settlement which a third person obtained from the Government, Art. 45 does not apply : 6 *W. R.* 317 ; 11 *W. R.* 389 ; 3 *C. W. N.* 99 and *A. I. R.* 1922 *Cal.* 345, *Ref.* [P 903 C 2P 904 C 1]

(b) *Bengal Alluvion and Diluvion Regulation* (11 *of* 1825), *S.* 4—*Portion not settled—Right to accretion is not affected.*

The true view of the law of alluvion is that physically land is added to land ; in point of right, the right to the land is *accretio* to the right to the old. [P 904 C 1]

The fact that no settlement of revenue is made of a portion cannot affect this *accretio* to the right, unless any question of limitation or adverse possession arises : *A. I. R.* 1924 *Cal.* 197, *Ref.* [P 904 C 1]

*Sarat Chandra Basak* and *Chandra Sekhar Sen*—for Appellants.

*Surendra Nath Guha* and *Paresh Chandra Sen*—for Respondents.

**Facts** :—One Gholam Ali held a ryoti holding in the Government khas mahal in the district of Chittagong. The holding lay by the side of the river Sanke. By the gradual recession of the river, lands were formed and accreted to the holding of Gholam Ali. In 1901-02 some of these accreted lands were settled with Gholam Ali. These lands appertained to cadastral survey plots 1658, 2006/4 and 1658/1 : vide Ex, G. The lands thus settled, though contiguous to Gholam Ali's holding, did not extend right up to the river, but a small tongue between the lands and the river was left out. This small tongue-shaped land is cadastral survey plot 2006/6. There were further accretions thereafter, and in 1904-05 there was another settlement with Gholam Ali of these additional lands which appertained to cadastral survey plots 2006/8 and 2006/12: vide Ex. G. 2. There were lands to the south of these two plots at the time lying between the said plots and the river, but they were left unsettled. Cadastral survey plot 2006/6 was also left unsettled as before. Similarly in 1909-10 there was a fresh settlement of the further accreted lands comprising cadastral survey plots 2006/16, 2006/17 and 2006/18: vide Ex. G-1. This settlement was made with one Ali Hossain and one Abdul Karim Choudhuri. The bandobasti kabuliyat executed in respect of this settlement was dated the 11th June 1911.

In the meantime, and before the settlement of 1909-10, Gholam Ali's interest in the properties was sold in an auction held in execution of a decree on a mortgage and was purchased by one Girish Mahajan on the 8th February 1909, who thereafter sold the same to the plaintiffs on the 1st April 1909. The lands of the settlement of 1901-02 are described in Sch. 2 of the plaint in the present suit, those of 1904-05 in Sch. 3 and those of 1909-10 in Sch. 1. The plaintiff's possession in these lands being disturbed or jeopardized he in 1913 instituted a suit, being title suit 480/76 of 1913, against Gholam Ali, Ali Hossain and Abdul Karim Choudhuri in respect of the lands of Schs. 1, 2 and 3. The suit was decreed in his favour in respect of the lands of Schs. 2 and 3 and he was allowed to withdraw his claim as regards the lands of Sch. 1 as the Secretary of State for India in Council was considered a necessary party for the determination of the said claim.

The present suit was thereafter instituted in respect of the lands of Sch. 1 In this suit Gholam Ali was the defendant 1; his sons were defendants 2 and 3; the defendants 4 to 10 were the heirs of Ali Hossain ; the Secretary of State for India in Council was impleaded as defendant 11, and Abdul Karim Choudhuri was defendant 12. The suit was for declaration of title and confirmation of possession.

**Mukerji J.**—(After stating the facts his Lordship proceeded.) The substance of the plaintiffs' claim was that Ali

Hossain or Abdul Karim Choudhuri did not take the settlement of the lands of Sch. 1 or possess or pay rent for the same, but that Gholam Ali took it in their names; that if this benami nature of the transaction was not proved, then the Government had no right to settle the said lands with Ali Hossain or Abdul Karim Choudhuri as the lands were accretion to the lands of Schs. 2 and 3 of which Gholam Ali had already obtained settlement in 1901-02 and 1904-05 respectively; and that the plaintiff having acquired Gholam Ali's interest in the original holding as well as the Schs. 2 and 3 lands, his title to the lands of Sch. 1 should also be declared and his possession therein confirmed.

The plaintiff and defendant 12, Abdul Karim Choudhuri, settled the dispute between them on compromise. The defence of the heirs of Ali Hossain was, besides a denial of the plaintiff's title under his purchase, that Gholam Ali did not take the settlement of the disputed lands in the name of Ali Hossain, that Ali Hossain had taken settlement from Government on his own account and had been in possession for upwards of 20 years. The position taken up by the Secretary of State was that the lands of Sch. 1 were accretion to those of Sch. 3 which again were accretions to the lands of Sch. 2, but that, when the lands of Schs. 2 and 3 were settled, the settlements were not made of all the lands that had accreted, but because an intervening strip of land between the lands settled and the river was left unsettled, Gholam Ali was not entitled to have the settlement of the land of Sch. 1, and consequently the plaintiffs had no title to the same.

The Munsif decreed the suit. From this decision appeals were preferred by some of the heirs of Ali Hossain and by the Secretary of State for India in Council. The Subordinate Judge who dealt with the appeals, allowed the same, and reversing the Munsif's decision dismissed the suit. The plaintiffs have thereupon appealed to this Court.

The Subordinate Judge, has, in effect, upheld the contention of the Government, and held that because in the settlements of 1901-02 and 1904-05 all the lands up to the river had not been settled with Gholam Ali, but a strip of land by the side of the river was left unsettled, Gholam Ali was not entitled to claim the lands of Sch. 1 as accretions 2 and 3. He has also held that the suit is barred as being governed by Art. 45, Limitation Act. Both these grounds have been challenged before us as unsound.

So far as the question of limitation is concerned, it appears from the written statement filed on behalf of the heirs of Ali Hossain that the limitation pleaded therein was 12 years from the date of the auction-sale, or three years from the date of the settlement with Ali Hossain or two years from Ali Hossain's taking possession. The only case as to limitation that appears to have been sought to be made out in the trial Court was Art. 142 or Art. 144 of the Limitation Act, and the finding of that Court on this question was:

> the statement of the defendant 4 and those of his witnesses regarding the alleged possession of the disputed land for 20 or 25 years is absolutely unreliable . . . It is sufficiently clear from the evidence that the plaintiffs are in possession of the land for five or six years. From all these facts and circumstances of the case I hold that the suit is not barred by limitation.

These findings do not appear to have been challenged before the appellate Court. At any rate they have not been reversed by that Court. The foundation of a case as to limitation under Art. 45 was laid in the written statement, but it is conceded that there are absolutely no materials on which such a case may be supported. It is well settled that the "award" contemplate, by Art. 45 Limitation Act, presupposes a contest between the parties and a decision after proper investigation into the points at issue: see *Nubo Kishen Roy* v. *Gobind Chunder Sein* (1); *Radha Pershad Singh* v. *Ram Jeewan Singh* (2); and *Kristo Moni Gupta* v. *Secretary of State* (3). There is nothing to indicate in the present case that there was any contest or a decision on any investigation. Moreover, as pointed out in the case of *Midnapur Zamindari Co., Ltd.* v. *Naresh Narain Roy* (4), there was no necessity for the plaintiff in a case like this to sue to set aside the award, if any, by the revenue authorities. The object of the present suit being that the plain-

(1) 6 W. R. 317.
(2) 11 W. R. 389.
(3) (1899) 3 C. W. N. 99.
(4) A. I. R. 1922 Cal. 345=49 Cal. 37.

tiffs may be confirmed in their possession of the lands, if they succeed in it the settlement made by the revenue authorities, in so far as it determines the amount of the revenue payable in respect of the disputed property, will in no way be affected, the only result being that the plaintiffs will, in that case, obtain the benefit of the settlement which Ali Hossain obtained from the Government. The decision of the Subordinate Judge on the question of limitation cannot be upheld.

On the question of Gholam Ali's title to the lands of Sch. 1 also, the view taken by the learned Judge, in my opinion, is erroneous. The true view of the law of alluvion (S. 4 of Regulation 11, 1825) is that

> physically land is added to land; in point of of right, the right to the new land is accretio to the right to the old; [per Rankin. J., in *Saudamini Dassya* v. *Secretary of State* (5).]

The fact that no settlement of revenue is made of a portion such as there was in the present case, cannot affect this accretio to the rights, unless any question of limitation or adverse possession arises. In the present case there was no refusal to take settlement on the part of Gholam Ali or of the plaintiff or his vendor or an abandonment of proprietary rights in lieu of malikhana such as arose in the case of *Saudamini Dassya* v. *Secretary of State* (5). Gholam Ali was, therefore, entitled to the lands of Sch. 1 as soon as they accreted and the plaintiff too was similarly entitled.

In my judgment the Subordinate Judge's decision cannot be supported. The appeal must, therefore, be allowed, the judgment of the Subordinate Judge set aside and that of the trial Court restored with costs of this Court as well as of the lower appellate Court.

**Cuming, J.**—I agree.

D.D. *Appeal allowed.*

(5) A. I. R. 1924 Cal. 197=50 Cal. 822.

## A. I. R. 1927 Calcutta 904

PAGE AND GRAHAM, JJ.

*Fakir Chand Mondal* and *another*—Judgment-debtors—Appellants.

v.

*Daiba Charan Parui* and *another*—Decree-holder and Judgment-debtor—Respondents.

Appeal No. 378 of 1926, Decided on 31st May 1927.

*Limitation Act, Art.* 182 (2)—*Decree on appeal on an application to set aside ex parte decree is not appellate decree.*

An application for execution was presented more than three years after an ex-parte decree was passed, add it was sought to be proved to be within time on the ground that limitation ran from the date of the appellate decree passed on an application of judgment-debtor who applied to set aside the ex-parte decree.

*Held*: that an application to set aside an ex-parte decree does not keep the decree open and is not to be regarded as an appeal from the ex-parte decree itself: 8 *Cal.* 248, *held wrongly decided*: 16 *Bom.* 123; 21 *Cal.* 387; 3 *P. L. J.* 119, *Foll.* [P 905 C 2]

*Mukunda Behary Mullik*—for Appellants.

*Manindra Mohan Bhattacharjee*—for Respondents.

**Page, J.**—This is an appeal from an order of the learned District Judge of Jessore, affirming an order of the learned Munsif of Bongaon. The material facts are simple, and can be stated concisely. The respondent brought a suit against the two appellants and a third person, and obtained an ex-parte decree against all the three defendants. No appeal has been preferred against that decree which was passed on the 2nd March 1922. On the 27th March 1922 the judgment-debtor other than the appellants applied under O. 9, R. 13 for an order setting aside the ex-parte decree. The application was dismissed on the 9th September 1922, and this judgment-debtor preferred an appeal against the order refusing to set aside the ex-parte decree, but this appeal was dismissed on the 29th January 1923. On the 27th March 1925 the respondent, as decree-holder, applied for execution of the decree against all the three defendants. That application for execution, having been presented more than three years after the decree was passed, was barred by limitation. The decree-holder, however, contended that he was freed from that bar in two ways: (1) because on the 25th February 1925 a sum of Rs. 5 had been paid by the judgment-debtors in part satisfaction of the decretal sum; (2) that inasmuch as the application of the judgment-debtor who applied to set aside the ex-parte decree was not finally dismissed until the 29th January 1923, and the terminus a quo for limitation is the date of that final decree, his application for execution was within time.

As regards the first point: there was a finding of fact by the learned Munsif ad-

verse to the judgment-creditor ; but on appeal, inasmuch as the learned District Judge was disposed to decide the appeal in the judgment-creditor's favour upon the second ground, he did not consider or decide the first ground upon which the judgment-creditor relied. We are not disposed to send back the proceedings in order that the learned District Judge may come to a finding upon the issue as to whether the Rs. 5 was paid as alleged because the evidence upon the record is sufficient and such that we feel that we are in a position to come to a conclusion ourselves upon that issue. The learned Munsif decided this issue against the judgment-creditor because he thought, having regard to the evidence that was adduced, that it could not reasonably be held that the judgment-creditor had established that the payment in question had been made. The parties were at arms' length ; there had been criminal proceedings between them ; and if this alleged payment of Rs. 5 had been made nearly three years after the decree was passed, in the circumstances, one would have expected that the judgment-creditor would have made or obtained some record of this payment signed by the debtors or one or more of them in order that he might be in a position to prove this payment for the purpose of saving limitation. It was admitted at the hearing before the learned Munsif that the judgment-debtor could read and write, and yet no record of the payment of this sum of Rs. 5. alleged to have been made by the hostile defendants in favour of the judgment-creditor, is to be found. On the other hand the judgment-debtors —each of them—denied having made the payment and upon that evidence the learned Munsif came to the conclusion that it was not proved that the payment had been made. After considering the evidence in this matter there can be no doubt that the decision at which the learned Munsif arrived was correct.

As regards the second ground : it is now well-settled law that where an appeal has been preferred from a decree the period of limitation commences from the date of the decree on appeal : *Abdul Alim* v. *Abdul Hafez* (1), *Gopal Chunder* v. *Gosain Das* (2). But what is meant by "decree on appeal ?" In my opinion, to that question there can be but one answer. It means "decree on appeal from the decree to obtain execution of which the application is made." Now, can it reasonably be contended that the decree of the 29th January 1923 was passed on appeal from the decree to execute which the application was made ? Clearly not. The appeal which the respondent prays in aid in support of his application for execution was not from the decree passed in the suit, but from an order refusing to set aside that decree under O. 9, R. 13. In my opinion, the matter is clear upon principle. But it is also concluded by authority : see *Jivaji* v. *Ramchandra* (3), *Baikunta Nath Mittra* v. *Aughore Nath Bose* (4), *Rai Brijraj* v. *Nauratan Lal* (5). The learned vakil, on behalf of the respondents, relied upon the decision of this Court in *Lutful Huq* v. *Sumbhudin Pattuck* (6). In that case there was an application by the judgment-debtor to revive a suit which had been decreed ex parte against him. The lower appellate Court determined the case upon the footing that the judgment-creditor had been prevented from executing his decree by reason of a stay order that had been passed by that Court, but the learned Judges who determined the suit in the High Court observed :

> The application to revive the suit really kept the decree open, and that decree did not become final until the order of the appellate Court was passed on the 19th December 1877.

If it could reasonably be held that an application to set aside an ex-parte decree "really kept the decree open," that case would be an authority which would conclude the matter in favour of the respondent. But, in my opinion, an application to set aside a decree does not "keep the decree open," and is not to be regarded as an appeal from the ex-parte decree itself. The case of *Lutful Huq* v. *Sumbhudin Pattuck* (6) has been dissented from by the Patna High Court in the case of *Rai Brijraj* v. *Nauratan Lal* (5), by the Bombay High Court in the case of *Jivaji* v. *Ramchandra* (3) and the ratio of the judgment in that case is inconsistent with the decision of this Court in the case of *Baikunta Nath Mittra* v. *Aughore Nath Bose* (4). In my opinion,

(1) A. I. R. 1927 Cal. 89=53 Cal. 901.
(2) [1898] 25 Cal. 594=2 C. W. N. 556 (F. B.).
(3) [1892] 16 Bom. 123.
(4) [1894] 21 Cal. 387.
(5) [1918] 3 Pat. L. J. 119=44 I. C. 575.
(6) [1882] 8 Cal. 248=10 C. L. R. 143.

the case of *Lutful Haq* v. *Sumbhudin Pattuck* (6), was wrongly decided, and cannot now be regarded as law.

For these reasons, the orders of the learned District Judge and of the Munsif in this case are wrong, and the appeal must be allowed. The order of this Court is that the orders appealed from will be discharged and the judgment-creditor's application for leave to execute the decree of the 2nd March 1922 will be dismissed. The appellants will have their costs in all the Courts, the hearing-fee in this Court being assessed at two gold mohurs.

**Graham, J.**—I agree.

N.D. *Appeal allowed.*

---

## A. I. R. 1927 Calcutta 906

CUMING AND CAMMIADE, JJ.

*Dwarkanath Mandal* and *another*—Plaintiff—Appellants.

v.

*Sreegobinda Choudhuri*—Defendant—Respondent.

Appeal No. 296 of 1925, Decided on 20th July 1927, from the appellate decree of the Second Sub-Judge, Pabna, D/- 20th September 1924.

*Contract Act, Ss. 59 and 60—Costs—Reversal of decree in part does not entitle the defendant to recover costs unless the Court directs to that effect—Defendant appropriating amount as such costs—Amount is not lawful debt—Civil P. C., S. 35.*

Where only portion of a decree is set aside as against the defendant, and the remainder of the decree is not appealed against and remains good, then unless there is an express order by the appellate Court allowing the defendant to recover costs incurred by him in the first Court it must be held that these costs cannot be recovered, and as such did not constitute lawful debt within the meaning of Ss. 59 and 60. and the defendant is not entitled appropriate any amounts paid by plaintiff towards them.

[P 907 C 1]

*Atul Chandra Gupta* and *Jitendra Kumar Sen Gupta*—for Appellants.

*Krishna Kamal Moitra*—for Respondent.

**Cammiade, J.**—This appeal is by the plaintiffs in a suit for damages for money said to have been twice recovered from them by the defendant. The facts of the case are as follows : The plaintiffs held three different tenancies under the defendant. Three suits for rent were instituted for arrears of these tenancies and decrees were obtained in these suits. The total amount due under these decrees was Rs. 495 odd. The plaintiffs then sued the defendant and two other persons for recovery of possession of two of these tenancies and for mesne profits and obtained a decree in the first Court, namely, in the Court of the Subordinate Judge and the defendant who is the respondent before us appealed. The decree of the lower Court was varied by this Court only on the question of the liability of the present defendant to the mesne profits granted under the decree. The relevant portion of that decree is as follows :

> It is ordered and decreed that the decree of the Court below, dated the 14th August 1917, in so far as it makes defendant 3 (the present respondent) liable for the amount of mesne profits allowed to the plaintiff be set aside and in lieu thereof it is ordered and decreed that the suit of the plaintiff against defendant 3 in respect of such profits be dismissed. And it is further ordered and decreed that the plaintiffs-respondents do pay to the defendant-appellant the sum of Rs. 925-13-0, being the amount of costs incurred by him in this Court with interest, etc.

The decree of this Court was dated the 5th March 1919. The plaintiffs made three payments between the 11th July and the 1st November totalling Rs. 740, and again on the 18th March 1920, they paid Rs. 825, and they made a further payment of Rs. 95, on the 24th June 1920. The defendant appropriated the sum of Rs. 777-7-0, to himself as due to him on account of costs in the first Court in the suit for possession which had been instituted against him by the plaintiffs. The plaintiffs dispute the defendant's right to recover this money. The defendant then executed his decrees for arrears of rent and recovered a sum of Rs. 593, odd. The plaintiffs, therefore, sued for recovery of this amount together with damages making a claim for Rs. 820. The Court of first instance decreed the suit in part for Rs. 593, odd together with interest at the rate of 1 per cent. per month to run from the dates of the realization of the sums which make up the total of Rs. 593 odd. The lower appellate Court reversed the decree of the first Court holding that the sum of Rs. 777-7-0, was due to the defendant as the result of the decree of this Court dated the 5th March 1919.

The main question for decision in this appeal is whether or not under the decree above referred to the amount of Rs. 777-7-0 was due to the defendant. The ground on which the learned Subordinate Judge has proceeded, which is also the ground on which his decision is supported, is that the decree of the first Court was reversed as against the defendant and that by implication the costs incurred by the defendant in the suit were recoverable by him. This contention is not maintainable. The suit was not merely for recovery of mesne profits. It was also for recovery of possession on declaration of title. If the entire decree had been reversed in that case it would follow by implication that the defendant in the suit would be entitled to recover the costs incurred by him in defending the suit. In the present case only that portion of the decree which related to mesne profits was set aside as against the defendant. The remainder of the decree was not appealed against and remained good. In such circumstances unless there is an express order by the appellate Court allowing the defendant to recover costs incurred by him in the first Court it must be held that these costs could not be recovered. Therefore, the amount of of Rs. 777-7-0, which the defendant appropriated to himself as money due to him was not a lawful debt within the meaning of Ss. 59 and 60 Contract Act, and it is not open to the defendant to appropriate this sum to himself as money legally due to him.

Accordingly the judgment and decree of the lower appellate Court are reversed and those of the Court of first instance restored with costs throughout.

**Cuming, J.**—I agree.

N.D. *Appeal allowed.*

---

## A. I. R. 1927 Calcutta 907

CUMING AND CAMMIADE, JJ.

*Nripendra Bhusan Roy* and *others*—Defendants—Petitioners.

v.

*Raja Pramatha Bhusan Deb Ray*—Plaintiff—Opposite Party.

Civ. Rev. No. 857 of 1927, Decided on 26th July 1927, from an order of the Sub-Judge, Jessore, D/- 28th June 1927, in Rent Suit No. 2 of 1927.

*Civil P. C., O. 26, R. 15—The rule does not prevent the Court from making any terms that it chooses as a condition precedent to the granting of the prayer for local investigation.*

Rule 15 only provides that the Court may, if it thinks fit, order that the party requiring investigation should deposit the necessary expenses for the investigation. But it does not prevent the Court from making any terms that it chooses as a condition precedent to the granting of the prayer for local investigation. [P 908 C 1]

*Jogesh Chandra Roy* and *Nakuleswar Mukerji*—for Petitioners.

*Braja Lal Chakraburti* and *Prafulla Kamal Das*—for Opposite Party.

**Judgment.**—The facts of the case in which this Rule has been granted are briefly these: The plaintiff-opposite party on the 12th January 1927 filed a suit for rent against the present petitioners. The amount claimed in this suit was Rs. 12,394 odd, being the balance of the rent due for one year and eight months only. The area of the demised land which comprises some 24 mouzas is about 5,000 bighas. The defendants-petitioners appeared on the 17th February. After various adjournments they finally filed their written statement on the 30th April. Then on the 28th June the defendants filed an application for a local investigation. It was apparently a part of their defence that they had been dispossessed by the plaintiff from a portion of the demised land and hence they were entitled to total suspension of rent. It will also appear that the area of the land from which the alleged dispossession took place is some 100 bighas. The learned Subordinate Judge apparently was not satisfied that the application for local investigation was bona fide and he recorded the following order:

It is doubtful whether the comparison of the thak will benefit the defendant. Local enquiry for that will take time. If the defendant wants to do that, he must deposit the amount of the claim and plaintiff will be able to withdraw ¾ths of the amount before decree. If this is done within ten days local inquiry may be ordered.

Mr. Roy for the petitioners contends that the Judge had no power to order that the defendants must deposit the amount claimed and the plaintiff would be able to withdraw ¾ths of the amount so deposited. He contends that O. 26, R. 15 only allows the Court to order that the party desiring local investigation should deposit the amount of the costs of the local investigation. O. 26, R. 15, however, is not exhaustive. It

only provides that the Court may, if it thinks fit, order that the party requiring investigation should deposit the necessary expenses for the investigation. But it does not prevent the Court, if it thinks fit, from making any terms that it chooses as a condition precedent to the granting of the prayer for local investigation. That it is so open to the Court, is clear from O. 26, R. 9. If it is open to the Court to refuse a local investigation, then clearly it would be open to the Court to determine that the local investigation should only be granted on certain conditions. Clearly it is open to the petitioners, if dissatisfied with the conditions, not to proceed any further with the local investigation. They are now in no way in worse position than if the Court had at once refused to grant the investigation at all. In fact they are in a better position, because if they now comply with the conditions they can have now the local investigation desired. They are not obliged to comply with the conditions if they do not want to.

Looking at the facts of the case, it seems to us that the conditions imposed are really not unreasonable. The suit was filed so long ago as the 12th January 1927. The petitioners appeared on the 17th February. They then delayed more than what is ordinarily normal period before they filed their written statement. Even when they filed written statement they did not apply at once for a local investigation but apparently waited until the land had gone under water and the relaying of thak map would be impossible. The result, of course, would be that the trial of the suit would be delayed for some time. Further it would seem that the amount of land alleged to be dispossessed, is roughly some 100 bighas. The proportionate rent of which would be Rs. 150 out of the total amount claimed, namely, Rs. 12,394. In the circumstances of this case we are of opinion that it was open to the learned Judge to impose the conditions that he did before granting local investigation and the conditions imposed in the circumstances of the case are not unreasonable. It is not easy to see how the matter came within the purview of S. 115, Civil P. C.

The Rule is, therefore, discharged with costs. Hearing-fee seven gold mohurs.

Let the record be sent down without delay.

N.D. *Rule discharged.*

---

## * A. I. R. 1927 Calcutta 908

PAGE, J.

*Debendra Lal Khan*—Plaintiff.

v.

*F. M. A. Cohen*—Defendant.

* Orig. Civ. Suit No. 1673 of 1925, Decided on 25th February 1927.

* (a) *Transfer of Property Act, S. 114—Forfeiture on non-payment of rent—Court should exercise discretion in tenant's favour, where interest of third party has not intervened and where tenant's conduct justifies his continuance.*

Under S. 114 the Court is invested with a discretionary power to grant relief which it may or may not exercise in favour of the tenant. In exercising this discretion a Court in India, is not bound by the practice of a Court of Chancery in England. But the Courts in India in exercising the discretion intrusted to them under S. 114, in the absence of any special circumstances, should adopt the rule that prevailed in the old Courts of Chancery, and subject to any equities that may have arisen between the date of the forfeiture and the application for relief, e. g., where the landlord during that period has re-let the premises to other persons, or otherwise has dealt with them, or where the conduct of the tenant qua tenant has been such that it would be unreasonable that the landlord should be compelled to keep him as a tenant, the Court, provided the tenant complies withthe conditions laid down in S. 114, ought to exercise its discretion in the tenant's favour, and grant him relief. [P 910 C 1]

(b) *Transfer of Property Act, S. 108—Covenant to repair in general terms—It applies to new buildings erected on the premises.*

The general rule of law with respect to the construction of covenants to repair is that where the covenant to repair is in general terms to keep the premises in repair, the covenant will attach to new buildings that subsequently are erected upon the demised premises during the currency of the term. On the other hand, where the covenant to repair refers to certain specific property that is demised, such as "the said buildings" or "the said houses," then unless the additional buildings in fact became part of the specific buildings which the tenant covenanted to repair, the covenant will not extend to such new and separate erections. *Doe d. Worcester Trustees* v. *Rowlands* (1840) 9 *C.* & *P.* 734: *Cornish* v. *Cleife* (1864) 3 *H.* & *C.* 446; and *Smith* v. *Mills* (1899) 16 *T. L. R.* 59, *Ref.* [P 910 C 2]

Whether or not a covenant to repair extends to any particular property depends upon the terms of the covenant and the facts proved in the case under consideration. [P 911 C 1]

*A. N. Chaudhuri* and *Sudhis Ray*—for Plaintiff.

*A. K. Ray* and *B. C. Ghose*—for Defendant.

**Page, J.**—This is a suit brought to recover possession of a block of buildings lying at the corner of Wellington Street and Dhurrumtolla Street in Calcutta. I shall refer to the buildings generally as No. 149-1, Dhurrumtolla Street, the parcels being set out in the lease in suit.

On the 3rd August 1906 the predecessor of the plaintiff let the said premises to one Sassoon Ezra Cohen (through whom the defendant claims title) for a term of 50 years. The rent reserved was Rs. 416-10-8, payable on the 25th day of each month succeeding the month for which it became due. The lessee covenanted inter alia that he

will at all times during the said term keep the said premises in good and substantial repair and the same in good and substantial repair deliver up to the lessor his heirs or assigns at the expiration or sooner determination of the said term.

The lessee further covenanted that he would repair the said premises within two months after a notice in writing of the necessary repairs was served upon him by the landlord. No such notice was given, but it was conceded by the defendant that the covenant to carry out specific repairs after notice was an independent covenant, and did not restrict or effect the defendant's liability under the general covenant to repair. It was further provided that

If the said monthly rent, Rs 416-10-8 or any part thereof shall be in arrear for the space of three months next after any of the days whenever the same ought to be paid as aforesaid, whether the same shall or shall not have been legally demanded, or if there shall be any breach or non-observance by the said lessee, his executors, administrators, or assigns, of any of the covenants hereinbefore on his or their part contained, or the lessee becoming insolvent, then and in any of the said cases, it shall be lawful for the said lessor, his heirs or assigns, at any time thereafter, into or upon the said demised premises or any part thereof, in the name of the whole to re-enter and the same to have, repossess and enjoy as in his or their former estate, and to hold the same free and discharged from the covenants and agreements herein contained and to hold the said lessee liable for all loss and damages that may be sustained by the said lessor for such breach of covenant on the part of the said lessee.

The plaintiff based his cause of action in ejectment upon a breach of : (i) the covenant to pay rent ; (ii) the general covenant to repair.

It was conceded by the defendant that before action was brought he had committed a breach of the covenant to pay rent, and that, although on the 16th June 1925 the Official Receiver of the High Court ( who was then in possession of the premises pursuant to a decree which had been obtained in a mortgage suit against the defendant ) sent to the solicitor of the plaintiff a cheque for Rs. 2,500 in payment of arrears of rent from August 1924 to January 1925, the full rent that was in arrear prior to the filing of the suit on the 17th June 1925 was not tendered until the 23rd June 1925. The plaintiff refused to accept the rent tendered on the 16th June 1925, and also that tendered on the 23rd June 1925, upon the ground that he had given notice to the defendant on the 15th June 1925 that the tenancy stood determined, and that he required possession of the premises to be delivered to him.

In these circumstances, the defendant admitted that a forfeiture of the lease for non-payment of rent had occurred. He seeks relief from the forfeiture, however, under S. 114, Transfer of Property Act, 1882, and he has deposited in Court the amount of the rent due up to the date of the written statement which was filed on the 4th August 1925, and has offered to pay interest upon the rent in arrear and the full costs of this suit. The defendant has not paid or tendered formally to the lessor " at the hearing of the suit " the sum fixed under S. 114, but I will assume for the purpose of my judgment that he has brought himself within S. 114, and that the Court is at liberty to grant the defendant relief according to the terms of that section.

Now, it is to be observed that under S. 114 the Court is invested with a discretionary power to grant relief which it may or may not exercise in favour of the tenant. Learned counsel for the defendant has urged that if the sum required under the section has been paid or tendered to the lessor at the hearing of the suit the Court has no discretion in the matter, and must grant relief to the tenant. The old rule in equity is stated concisely by Lord Esher, Master of the Rolls, and Rigby, L. J., in *Newbolt* v. *Bingham* (1). Lord Esher in that case observed that :

If, at the time relief is asked for, the position has been altered, so that relief could not be given without causing injury to third parties, I think that the case that was cited to us [*Stanhope* v. *Haworth* (2)] applies. But if at the time

(1) [1895] 72 L. T. 852=14 R. 526.
(2) [1836] 3 T. L. R.

of the application, the position is not altered, so that no injustice will be done, I think, if the conditions mentioned in the section are complied with, that, according to the settled practice in equity, there is no longer a discretion in the Judge, but that he ought to make the order. It does not matter whether it is called discretionary or not if the discretion ought always to be exercised in one way. If the conditions are complied with, and no interests of third parties have intervened there is no longer any real discretion in the matter.

And Lord Justice Rigby added that :

It was the settled practice of a Court of Equity to grant relief against forfeiture for non-payment of rent on payment of all rent in arrear and costs. Of course, the Court was not absolutely bound by its practice where it would not do justice and if some new interest had been created before the application, the Court would refuse to interfere. That was not done to put the landlord in a better position, but because rights of third parties had intervened.

Now, in exercising the discretion with which it is invested under S. 114 a Court in India is not bound by the practice of a Court of Chancery in England, and I am not disposed to limit the discretion that it possesses. "Those who seek equity must do equity," and I do not think merely because a tenant complies with the conditions laid down in S. 114 that he becomes entitled as of right to relief. But, in my opinion, the Courts in India in exercising the discretion intrusted to them under S. 114, in the absence of any special circumstances should adopt the rule that prevailed in the old Courts of Chancery, and, subject to any equities that may have arisen between the date of the forfeiture and the application for relief, e.g., where the landlord during that period has re-let the premises to other persons, or otherwise has dealt with them, or where the conduct of the tenant qua tenant has been such that it would be unreasonable that the landlord should be compelled to keep him as a tenant, the Court, provided the tenant complies with the conditions laid down in S. 114, ought to exercise its discretion in the tenant's favour, and grant him relief.

I now proceed to consider the position of the tenant under the general covenant to repair into which he has entered. At the time when the premises in suit were demised to Sassoon Cohen the premises consisted of

All that upper room brickbuilt house and messuage, together with the piece or parcel of land thereunto belonging containing by estimation rent free one bigha be the same a little, more or less, and situate between the boundaries thereafter set out in the lease.

After Sassoon Cohen had obtained possession under the lease he proceeded to erect the buildings in respect of which it is now contended that a breach of the covenant to repair has been committed upon the parcel of land adjoining the two-storeyed brick house. The new buildings that were erected facing Durumtolla Street were one-storeyed structures contiguous and joined to the original house, and I am satisfied from the evidence of Sassoon Cohen that the effect of the additional work of construction that he carried out on the premises was merely to increase the area of the two-storeyed building that was upon the premises at the time when the lease was granted. With reference to the additional structures that he erected Mr. Cohen was asked certain questions in the course of his examination :

How long did it take you to construct this building ?—3, 7 or 8 months.

The new rooms which you allege you built they were all made part of the premises of the two-storeyed building ?—Joined to it.

And made part of the same premises ?—Yes.

Sassoon Cohen further stated :—

Did you have to bond these new buildings on to the old buildings ?—Yes.

You made them part of the old building ?—I joined them together.

After you completed the building, the buildings became one whole building ?—Yes, the front portion.

Now, the general rule of law with respect to the construction of covenants to repair is that where the covenant to repair is in general terms to keep the premises in repair, the covenant will attach to new buildings that subsequently are erected upon the demised premises during the currency of the term. On the other hand, where the covenant to repair refers to certain specific property that is demised, such as "the said buildings" or "the said houses," unless the additional buildings in fact became part of the specific buildings which the tenant covenanted to repair, the covenant will not extend to such new and separate erections : *Doe d. Worcester Trustees* v. *Rowlands* (3), *Cornish* v. *Cleife* (4), *Smith* v. *Mills* (5).

Upon the evidence in this case I am clearly of opinion that the new buildings

(3) [1840] 9 C. & P. 734.
(4) [1864] 3 H. & C. 446=11 Jur. (N. S.) 181=34 L. J. Ex. 19=13 W.R. 339=11 L.T. 606.
(5) [1899] 16 T. L. R. 59.

fall within the ambit of the covenant to repair, both because of the general terms in which the covenant is couched, and also because, even if the covenant to repair was restricted to the upper room brickbuilt house, the new structures were an addition to and became part of the building that was specifically demised, and to which the covenant to repair attached. Whether or not a covenant to repair extends to any particular property depends upon the terms of the covenant and the facts proved in the case under consideration. Notwithstanding the general terms of the covenant to repair learned counsel for the defendant has contended, however, that upon a true construction of the lease the additional erections were not within the covenant to repair; and in support of his argument he relied upon the provisions of the lease that gave permission to the tenant to make such additions and alterations to the demised premises.

In my opinion, the provisions in the lease to which he refers were not introduced for the purpose for which he cited them. If a tenant makes additions or improvements upon the premises it is provided under S. 108, Transfer of Property Act, that he is entitled to remove them during the currency of the term. In my opinion, the special provisions introduced into this lease with respect to the additions and alterations which the tenant was at liberty to make to the premises were inserted for two purposes: (i) in order to avoid the provisions of S. 108, Transfer of Property Act, and (ii) in order that it should not be open to the defendant, in the event of some part of any additional premises that he might erect being destroyed in the manner set out in the lease, to escape a proportionate payment of rent so long as the additional structures were not rebuilt or repaired. In my opinion, therefore, the general covenant to repair extended to the whole of the block including the additions thereto carried out by Sassoon Cohen.

The issue, therefore, that remains to be considered is one of fact: Did the defendants at all times during the term keep the premises in good and substantial repair? Now, the test as to whether any particular renovation amounts to repair or not, in my opinion, is

whether the act to be done is one which in substance is the renewal or replacement of defective parts, or the renewal or replacement of substantially the whole: per Buckley L. J. in *Lurcott* v. *Wakeley* (6). See also *Anstruther-Gough-Calthorpe* v. *McOscar* (7).

(The judgment then discussed the evidence and, holding that the plaintiff was entitled to a declaration that the lease had been determined and to a decree for possession, decreed the suit.)

D.D. *Suit decreed.*

(6) [1911] 1 K. B. 905=80 L. J. K. B. 713=104 L. T. 290=55 S. J. 290.
(7) [1924] 1 K. B. 716.

---

## A. I. R. 1927 Calcutta 911

CUMING AND CAMMIADE, JJ.

*Sali Bewa*—Plaintiff—Appellant.

v.

*Ajijuddin Shaikh* and *others*—Defendants—Respondents.

Appeal No. 150 of 1925, Decided on 27th July 1927, from the appellate decree of the Addl. Sub-Judge, Khulna, D/- 16th May 1924.

*Bengal Tenancy Act, S. 29—Additional consideration passing from landlord—Original rent can be enhanced.*

The plaintiff had an old tenancy in his possession and there was another tenancy with regard to which there was a dispute between the plaintiff and the defendant. The plaintiff executed a kabuliyat which was made up of two parts—one relating to the tenancy originally held and the other regarding which there was a dispute. According to the kabuliyat the rental of the portion of the new tenancy was increased. The suit was brought on the ground that the enhancement of rent of even a portion of the new tenancy was the violation of the provision of S. 29.

*Held*: that it is sufficient that it should appear that some further consideration has proceeded from the landlord to justify an addition to the original rent. A new contract was entered into between the parties for the original consideration and for additional consideration, and the parties were free to enter into it on any terms they pleased. There is no violation of the provision of S. 29. [P 912, C 2]

*Sarat Chandra Basak* and *Mukunda Behary Mullick*—for Appellant.

*Jadunath Kanjilal* and *Subodh Chandra Dutt*—for Respondents.

*Biraj Mohan Majumdar*—for Deputy Registrar.

**Cammiade, J.**—This is an appeal by the plaintiff in a suit in which she prayed for a declaration that a kabuliyat

executed by her in Baisakh 1316 was void as having been obtained by undue influence and coercion and also had been in contravention of the provision of S. 29, Bengal Tenancy Act. The plaintiff also prayed that a decree for arrears of rent obtained against her on the basis of the kabuliyat in Rent Suit No. 959 of 1919 be declared fraudulent and void and be set aside. The first Court gave the plaintiff a decree granting the reliefs prayed for. The learned Court of appeal below reversed this decree. The learned Court of appeal below found on the admission of the plaintiff that her story of coercion in connexion with the execution of the kabuliyat was untrue and that the matter has not been pressed in appeal. The only matter which has really been pressed is the question whether or not the kabuliyat offends against the provision of S. 29, Bengal Tenancy Act. As regards the liability of the decree for rent to be set aside it is admitted by the learned advocate appearing for the appellant that he cannot support that contention, as it is based on nothing more than the contention that the kabuliyat is void and that is a question of the merits of the suit for rent. The facts in regard to this kabuliyat are as follows :

There was admittedly a tenancy standing in the name of one Gour Biswas, father-in-law of the plaintiff. There is nothing to show how the plaintiff came to possess it but still it is an indisputed fact that she did come to possess it. There was another tenancy with regard to which there was a dispute between the parties. The plaintiff alleged that this other tenancy had also belonged to Gour Biswas and had come to her by succession. The landlord who is the defendant in the suit asserted that that tenancy had belonged to one Raso Bewa and that he had had that tenancy sold in execution of a decree for rent and had purchased it himself. The plaintiff has admitted in her deposition that there was a dispute between her and the defendant regarding the rights to this second tenancy and she had admitted that in settlement of dispute between her and the defendant she executed the kabuliyat of Baisakh 1316. The grounds on which it is asserted that the kabuliyat offends against the provision of S. 29, Bengal Tenancy Act, is that the rental of the tenancy created by this kabuliyat is made up of two parts: one relating to the tenancy originally held by Gour Biswas and the other relating to the tenancy regarding which there was a dispute. The plaintiff alleges that the area of the first tenancy was originally 18 bighas and the rental Rs. 12-12-0 and odd. According to the kabuliyat the rental of this portion of the new tenancy was increased to Rs. 54 the area admittedly being 24 bighas at the present time. It has been contended that if the plaintiff's assertion is correct then the enhancement of rent of even a portion of the new tenancy is a violation of the provision of S. 29, Bengal Tenancy Act. It is urged that the learned Court of appeal below should have entered into the question of the original area and rental of the first tenancy. These contentions are without foundation. The kabuliyat created a new tenancy formed partly of the land comprised in the tenancy which had been held by the plaintiff and partly of the land which could not be found definitely to have been the land held by her as tenant. Unless it could be found definitely that both the tenancies, which together formed the new tenancy, had been held and enjoyed by the person who executed the kabuliyat it could not be said that the enhancement of the rent originally paid for any portion of the land comprised in the tenancy created by the kabuliyat constituted a violation of the provision of S. 29, Bengal Tenancy Act. It is sufficient that it should appear that some further consideration has proceeded from the landlord to justify an addition to the original rent. A new contract was entered into between the parties for the original consideration and for additional consideration and the parties were free to enter into it on any terms they pleased. There is no violation of the provision of S. 29, Bengal Tenancy Act.

The appeal, therefore, fails and is dismissed with costs.

**Cuming, J.**—I agree.

N.D. *Appeal dismissed.*

## A. I. R. 1927 Calcutta 913

RANKIN, C. J., AND MITTER, J.

*Rajani Kanta Banerjee* and *others*—Plaintiffs—Appellants,

v.

*Raj Kumari Dasi* and *another*—Defendants—Respondents.

Appeal No. 32 of 1925, Decided on 30th June 1927, from the appellate decree of the Additional District Judge, Faridpur, D/- 15th September 1924.

(a) *Registration Act, S. 17 (2) (vi)—Compromise granting permanent lease—Decree is not exempt from registration.*

A decree embodying a compromise, purporting to grant a permanent tenancy, is not exempt from registration, because that requirement is only foregone in cases coming within Cls. (b) and (c), S. 17: *A. I. R.* 1919 *P. C.* 79, *Foll.* [P 913 C 2]

(b) *Adverse possession—Tenant holding land under a permanent lease—Possession not disturbed for over 12 years—Right to permanent tenancy is not prescribed.*

It cannot be affirmed as a general proposition of law that a person, who is, in fact, in possession of land under a tenancy or occupancy title can, by a mere assertion in a judicial proceeding and the lapse of six or twelve years without that assertion having been successfully challenged, obtain a title as an under-proprietor to the lands: *A. I. R.* 1923 *P. C.* 118; *A. I. R.* 1923 *P. C.* 205 and *A. I. R.* 1924 *P. C.* 65. *Foll.* [P 914 C 1]

Where the tenant has a real right to be in possession, the mere fact that a claim was asserted by him to have an unlimited number of years in which their right to the lands would subsist is not a circumstance that enables them to prescribe a permanent tenancy as against their landlords. [P 914 C 2]

*Asita Ranjan Ghose* and *Satya Charan Pal*—for Appellants.

*Abinash Chandra Ghose*—for Respondents.

**Rankin, C. J.**—This is a case in which the plaintiffs sued for ejectment after service of a notice to quit. The Munsif did not try any issue except the issue whether the plaintiffs were estopped from bringing the suit for khas possession. The lower appellate Court dealt with the same question only.

The facts are shortly these: That the father of the defendants sold the suit land and certain other lands forming a jama to the plaintiffs' predecessors. The latter got possession of all the lands except the lands now in question. Thereupon it is said that after the expiry of 12 years the plaintiffs brought a suit for recovery of these very lands against the defendants' father. That suit was settled by a solenama and the effect of the solenama was that the defendants' father admitted the right of the plaintiffs to get possession of these lands but it was agreed that the defendants' father should be a tenant to the plaintiffs at a certain rent permanently. In that suit it may be mentioned that the claim of the plaintiffs was first of all for khas possession and, in the alternative, if that was not granted to them, for rent from the defendants' father. Now, in the present suit, the solenama containing the promise of the plaintiffs to let the defendants have these lands as tenants permanently, is set up as an answer to the plaintiffs' claim for khas possession and the learned vakil on behalf of the plaintiffs says that that solenama does not afford a defence because it was not registered as required by S. 17 (d), Registration Act.

The first question, therefore, is whether that solenama requires registration as being a lease. There can be no doubt that the intention of it was to operate as the grant of a tenancy to take effect at once and in my judgment there is no escape from the conclusion that it was a lease. That being so there is no escape from the further conclusion that it is not exempt as being an order or a decree of the Court, from the requirement of registration because that requirement is only foregone on the face of S. 17, Registration Act, in cases coming within Cls. (b) and (c), sub- S. (1), S. 17. This was clearly held by the Privy Council in the judgment delivered by Lord Buckmaster in the case of *Hemanta Kumari Debi* v. *Midnapur Zemindary Co.* (1).

Now, the present case is affected by the terms of S. 85, Bengal Tenancy Act which says:

> a sub-lease by a raiyat shall not be admitted registration if it purports to create a time exceeding nine years.

There can be no doubt that the jama purchased by the plaintiffs and to which the plaintiffs' right was recognised by the solenama was a raiyati holding. In these circumstances it being contrary to the policy of the law that a sub-lease exceeding nine years should be made by a raiyat by a grant there can be no question of specific performance being called in to cure the absence of registration and such cases as *Mahomed Musa* v. *Aghore Ku-*

(1) A. I. R. 1919 P. C. 79=47 Cal. 485=46 I. A. 240 (P. C.).

*mar Ganguli* (2), clearly afford no relief to the defendants.

In these circumstances, there is only one contention made on behalf of the defendants by way of further defence to the plaintiffs' claim for khas possession. It is said that whether or not this solenama was valid, the defendant has been in possession under it for a very long time paying the rent agreed upon by the solenama and, therefore, he being in possession claiming to have a permanent tenancy right, has under the decisions of this Court prescribed a limited interest and has a defence to the claim to khas possession. Now, that branch of the law has been considered by the Judicial Committee in more than one recent case. I would refer to the three recent cases. One is the case of *Mahomed Mumtaz Ali Khan* v. *Mohan Singh* (3). Their Lordships say:

> They are unable to affirm as a general proposition of law that a person who is, in fact, in possession of land under a tenancy or occupancy title can, by a mere assertion in a judicial proceeding and the lapse of six or twelve years without that assertion having been successfully challenged, obtain a title as an underproprietor to the lands.

The next case *Madhavrao Waman Saundal-Gekar* v. *Raghunath Venkatesh Deshpande* (4), is in the same volume at p. 255, and there at p. 264, Sir John Edge delivering the judgment of their Lordships said this:

> It is not necessary for their Lordships to decide in this case whether the answer of the Full Bench, limited as it must have been in the case of a stranger to the watan, setting up as a defence 12 years' adverse possession, was or was not correct, although they are constrained to say that it is somewhat difficult to see how a stranger to a watan can acquire a title by adverse possession for 12 years of lands, the alienation of which was, in the interests of the state, prohibited.

In the case of *Nainapillai Marakayar* v. *Ramanathan Chettiar* (5), it was laid down by their Lordships that

> No tenant of lands in India can obtain any right to a permanent tenancy by prescription in them against his landlord from whom he holds the lands.

The present is a case in which the defendants could not have been ejected by the plaintiff. It is quite true that the plaintiffs could have given notice to quit and thereby entitled themselves ex hypothesi to bring an action. The plaintiffs were not obliged to give notice to quit unless they wanted to do so. The result is that the plaintiffs were not in a position to get a decree for ejectment against the defendants. The defendant having a real right to be in possession, the mere additional fact that a claim was asserted to have an unlimited number of years in which their right to the lands would subsist is not a circumstance that enables them to prescribe a permanent tenancy as against landlords. There is no warrant for such doctrine in S. 28, Limitation Act, and it would appear from the decisions which I have cited that there is no validity in law in a case of this sort for any finding to the effect that there has been prescription of a right to a permanent tenancy. A case of estoppel is another matter.

These being the only points which were presented to us by the argument in this case it remains to direct that the appeal should be allowed. The decrees of the lower Courts are set aside and the case is sent back to the original Court for the determination of the issues which have been left undecided, that is to say, for the determination of issue 3 as regards the service of notice and, if necessary, issue 6.

The appellants are entitled to their costs in this Court.

**Mitter, J.**—I agree.

J.V. *Appeal allowed.*

(2) A. I. R. 1914 P. C. 27=42 Cal. 801=42 I. A. 1 (P. C.).
(3) A. I. R. 1923 P. C. 118=45 All. 419=50 I. A. 202=26 O. C. 231 (P. C.).
(4) A. I. R. 1923 P. C. 205=47 Bom. 798=50 I. A. 255 (P. C.).
(5) A. I. R. 1924 P. C. 65=47 Mad. 337=51 I. A. 83 (P. C.).

---

## A. I. R. 1927 Calcutta 914

MUKERJI AND MITTER, JJ.

*Sm. Gnana Dayini Debi*—Defendant—Appellant

v.

*Sm. Gunamoni Dasi* and *others*—Plaintiffs—Respondents.

Appeal No. 2235 of 1924, Decided on 16th June 1927, from the appellate decree of the 4th Sub-Judge, 24-Parganas, D/- 31st July 1924.

*Bengal Tenancy Act, S. 61—Deposit by tenant less than the amount due is valid if due to bona fide dispute as to amount.*

When the difference between the deposit under S. 61 and the amount due is small and this is due to a bona fide dispute as to the amount of the cess, then the deposit is valid under S. 61 and operates as an acquittance not for the whole amount due but for the amount of rent payable by the tenant and deposited in

the same manner and to the same extent as if the amount of rent has been received by the landlord: 15 *Cal.* 166; 19 *C. W. N.* 1143, *Foll.*; 18 *C. W. N.* 84, *Dist.* [P 916 C 1 2]

*Sarat Chandra Bose* and *Saraj Kumar Chatterjee*—for Appellant.

*Surjya Kumar Guha*—for Respondents.

**Mitter, J.**—This appeal arises out of a suit brought by the respondents against the appellant for arrears of rent. The plaintiffs-respondents claim rent at the rate of Rs. 133-4 annas odd and cesses at Rs. 15-13 annas odd per year. The rent suit was for the years 1324 to 1327 B. S. The defence of the defendant, now appellant, was that a part of the claim was barred by limitation as the defendant deposited rent for 1324 to Aswin kist 1326 B. S. in Court under S. 61, Bengal Tenancy Act, and the notices of the deposits were served on the plaintiff more than six months before the suit was filed and that consequently the claim for 1324 to Aswin kist 1326 B. S. was barred by the special limitation prescribed by Art. 2 Cl. A, Sch. 3, Bengal Tenancy Act, and that the claim for the cesses was excessive.

The Court of first instance gave effect to the plea of special limitation and dismissed plaintiffs' claim for the period 1324 to Aswin kist 1326 B. S. and gave a decree for the subsequent period, i. e., from Kartick 1326 to the end of 1327 B. S. The trial Court also gave a decree for cesses for the year 1324 to the Aswin kist of 1326 B. S. at the rate of Rs. 10-6 annas per annum and for the subsequent period at the rate of Rs. 15-13 annas per annum. He gave a decree for damages at the rate of 25 per cent. per annum on the amount of the claim allowed, i. e., on Rs. 223-9-18½ gandas and directed that against the claim of Rs. 223 and odd and the damages on the same at the rate of 25 per cent. per annum should be set off the amount deposited for rent from Kartick 1326 to Chaitra 1327 B. S.

Against this decision an appeal was preferred to the Subordinate Judge of 24-Parganas by the plaintiffs and a cross-appeal was preferred by the defendant. The appeal and the cross-appeal were both dismissed with costs.

A second appeal has been preferred on behalf of the defendant and two points have been urged on her behalf by her learned advocate. It is contended in the first place that cess should not have been allowed at the rate of Rs. 15-13-0 for the last six months of 1326 B. S. and the year 1327 B. S., as the defendant was not a tenure-holder but was a cultivating ryot within the meaning of the Cess Act. This argument is put in this way: It is true that the rent of the entire land exceeds Rs. 100 but a portion of the tenancy is situate within the municipal area and if the area within the municipality is taken into account the rent for the rest of the holding would be less than Rs. 100 and in such a case the cess would be valued on the footing that the defendant was a cultivating ryot and not a tenure-holder within the meaning of the Cess Act. To show that the Collector made deductions on account of the municipal area in the calculation of road-cess, plaintiffs adduced in evidence road-cess returns filed by them which contained a statement that the municipal area was excluded from consideration in the calculation of road-cess. It is argued that under S. 95, Cess Act, such returns cannot be admitted as evidence in favour of the plaintiffs who filed them. We think that there is considerable force in this contention. But it is not necessary to deal with this matter any further as this contention involves a claim for a small sum and we do not desire that this litigation should any further be prolonged. This decision on the question of cess, however, will be confined to the cesses for the years in suit and will not bar the agitation of the question in a suit for cesses for any future period.

It is contended in the second place that the deposit under S. 61 being a valid deposit, it should have been credited against the amount decreed, i. e., the sum of Rs. 223 and odd and on the difference between the two sums the Court should have awarded damages. The Courts below have held that the deposit was not a valid deposit as it fell short of the amount due for rent. The amount due according to the plaintiff was Rs. 223-9-18½ gandas. The amount deposited under S. 61 was Rs. 216-5-2½ gandas. It is said, therefore, that the decrees should have been on the difference, viz., Rs. 7-4 annas 16 gandas plus damages at the rate of Rs. 25 per cent. per annum on the same. We think that this contention would be sound if the deposit was a valid deposit within the meaning of S. 61. In the case of

*Sivdhar Roy* v. *Rameswar Singh* (1), Sir Comer Petheram, Chief Justice, held that the words in Ss. 61 and 62, Bengal Tenancy Act, have no relation whatsoever to the amount of rent justly due and payable but only to such rent as the tenant at the time of the deposit considers to be the rent due and payable. This view was adopted by Justice Sir Asutosh Mookerjee in the case of *Sasi Bhusan Dey* v. *Umakanto Dey* (2), where the learned Judge observed as follows:

But the provisions of S. 61 must be taken along with those of S. 62. Sub-S. 2 of S. 62 provides that a receipt given under that section shall operate as an acquittance for the amount of rent payable by the tenant and deposited as aforesaid in the same manner and to the same extent as if the amount of rent had been received by the landlord or the person entitled to receive it. This provision has obviously an important bearing upon the question raised before us. The legislature has provided that once a receipt has been given by the Court after a deposit has been made, the receipt operates as an acquittance, not for the whole amount due, but for the amount of rent payable by the tenant and deposited as aforesaid, in the same manner and to the same extent as if that amount of rent had been received by the landlord. The effect clearly is to make the amount deposited operate as a part payment of the sum actually due.

Our attention, however, has been drawn to the case of *Sati Prasad Garga* v. *Manmatha Nath Kar* (3), where the learned Judges took a view contrary to the two cases referred to. In that case the tenant, under S. 61, deposited a sum which was ultimately proved to be much less than the amount really due and it may be said that under the special circumstances of that case there was no bona fide deposit under S. 61 inasmuch as a sum of more than Rs. 2,000 was actually due and the tenant had deposited less than Rs. 1,000 and no suggestion appears to have been made that this was attributable to a bona fide dispute between the parties as to what was due at the time. In the present case, it is said the difference between the deposit and the amount due was indeed very small and it has been said that this was due to a bona fide dispute as to the amount of the cess. In the circumstances of the present case we hold that the deposit was a valid deposit within the meaning of S. 61 and operated as an acquittance not for the whole amount due but for the amount of rent payable by the tenant and deposited in the same manner and to the same extent as if the amount of rent had been received by the plaintiff.

The result, therefore, is that the decrees of the Courts below, except with regard to costs, are discharged and there will be a decree against the defendant for the sum of Rs. 7-4 annas 16 gandas with damages at the rate of 25 per cent. The aggregate sum will carry interest at the rate of 6 per cent. per annum. The defendant-appellant will have her costs in this appeal but the order of the Courts below with regard to costs in favour of the plaintiffs will stand.

**Mukerji, J.**—I agree.

N.D. *Decrees discharged.*

(1) [1888] 15 Cal. 166.
(2) [1914] 19 C. W. N. 1143=25 I. C. 171=20 C. L. J. 153.
(3) [1913] 18 C. W. N. 84=18 I. C. 442.

---

## A. I. R. 1927 Calcutta 916

CUMING AND B. B. GHOSE, JJ.

*Deven Mandal* and *others*—Plaintiffs—Appellants.

v.

*Dhurba Kumar Mandal* and *others*—Defendants—Respondents.

Appeal No. 2460 of 1923, Decided on 5th January 1926, from the appellate decree of the 3rd Sub-Judge, 24-Parganas, D/- 8th August 1923.

*Limitation Act, Art.* 11-*A*—*Execution of decree—Decree-holder obtaining symbolical possession—Application for khas possession—Objection, by defendants on the ground of lease, rejected—Suit is barred by Art.* 11-*A.*

In execution of a decree the decree-holder-plaintiff obtained symbolical possession against the judgment-debtors and wanted to remove certain huts which were on the land and to take khas possession; these huts were claimed by the defendants on the ground that they were on the land as tenants in their own right. The executing Court rejected the plaintiffs' application for khas possession on the finding that the defendants were on the land in their own right.

*Held*: that the suit fell within Art. 11 A and should be brought within one year from the date of the order. [P 917 C 1]

*Ramgati Sarkar*—for Appellants.

*Biraj Mohan Mojumdar* and *Jotindra Nath Sanyal*—for Respondents.

**B. B. Ghose, J.**—The only point involved in this appeal is whether the suit is barred by limitation. The trial Court made a decree in favour of the plaintiffs. On appeal by the defendants that decree was reversed by the Subordinate Judge who held that the suit was barred by one year's rule of limitation under article

11-A, Indian Limitation Act. What happened was this—the plaintiff obtained a decree against third persons in a previous suit. In execution of that decree they obtained symbolical possession against the judgment-debtors. They, however, wanted to remove certain huts which were on the land and to take khas possession. These huts were claimed by the defendants, who resisted the plaintiffs in taking possession on the ground that they were on the land as tenants in their own right. The executing Court rejected the plaintiffs' application for khas possession on the finding that the defendants were on the land in their own right. That order is dated the 28th February 1918. The present suit was brought on the 10th December 1919, that is. more than one year after the order was passed. The suit is evidently barred by article 11-A, Limitation Act.

The appeal must, therefore be dismissed with costs.

**Cuming, J.**—I agree.

R.D. *Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 917

PAGE AND GRAHAM, JJ.

*Rajendra Nath Mitra*—Defendant—Appellant.

v.

*Nagendra Kumar Bose*—Plaintiff—Respondent.

Appeal No. 577 of 1925, Decided on 18th July 1927, from the decree of the Addl. Sub-Judge, Khulna, D/- 22nd Dec. 1924.

*Contract Act, S. 218—Zamindar employing a naib and an under-naib has a cause of action against the latter for collections received by him and not paid to Naib.*

A zamindar employed a naib and an under-naib for collecting amounts due to him. The under-naib's duty was to collect the amounts and hand them over to the naib. The zamindar sued the under-naib to recover the amounts received by him but which were not handed over to the naib.

*Held* : that in law he received the money to the use of the plaintiff and as he failed satisfactorily to account for the manner in which he disposed of these moneys, the plaintiff's suit must succeed. [P 918 C 1]

*Kanjilal, Purno Chandra Chandra* and *Subodh Chandra Dutt*—for Appellant.

*Bijan Kumar Mukerji* and *Benode Lal Mukerji*—for Respondent.

**Page, J**—This is an appeal from a decree of the learned Additional Subordinate Judge of Khulna reversing a decision of the learned Munsif at Satkhira. The suit arises in this way. A zemindar employed one Rakhal Ghose as his naib and as his under-naib the appellant Rajendra Nath Mitra. Certain sums due from the collections out of which it appears that these servants of the plaintiff were paid, were not handed over to the plaintiff. During the period when Rakhal Ghose was the naib he was responsible for handing over all moneys received by him or which, with reasonable diligence, might have been so received. The duty of Rajendra was to hand over that part of the collection money which he received to the naib, and in a suit by the plaintiff against Rajendra it would have been a good answer that he had received the money, and that he had handed it over as it was his duty to do, to the naib. Now as regards Rajendra the plaintiff's case is founded upon a *furd* on adjustment of accounts. All the items in the *furd* except four in respect of which the plaintiff claims payment from Rajendra are in respect of a period during which Rajendra was acting as the naib in charge, and the learned Additional Subordinate Judge has found, and rightly found that in respect of the items in the *furd* admitted thereby to be due from Rajendra which related to the period during which Rajendra was the naib there was no defence to the plaintiff's suit.

However, Dr. Kanjilal has with great persistence argued that in respect of four of these items Rajendra is under no liability to the plaintiff because they related to a period when Rakhal Ghose was the naib and Rajendra was serving in the matter of collection in a position subordinate to Rakhal Ghose. As I understand the legal position it is this. It is found as a fact (and there is evidence to support it) that the sums representing those four items passed into the hands of Rajendra and if Rajendra had been in a position to prove that those sums had been duly handed over by him to the naib he would be under no further liability to the plaintiff. But that is just what Rajendra failed to do, and the finding of fact upon this matter is that although it is found that sums representing those four items were received by Rajendra there were no aquittance, no vouchers, or any other documents to show that he had handed those money

over to the naib in accordance with his duty. The result is that in law he had received those moneys to the use of the plaintiff and as he has failed satisfactorily to account for the manner in which he disposed of those moneys, in my opinion, in respect of those four items also the plaintiff's suit, which in legal phraseology is one for moneys had and received to the plaintiff's use, must succeed.

In my opinion, having regard to the findings of fact at which the lower Courts have arrived, the appeal is without substance and must be dismissed with costs.

**Graham, J.**—I agree.

N.D. *Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 918

DUVAL AND MITTER, JJ.

*Sm. Kumuda Kumari Dasi*—Defendant—Appellant.

v.

*Dilsook Roy*—Plaintiff—Respondent.

Appeals Nos. 1526 to 1529 of 1924, Decided on 24th November 1926, from the appellate decrees of the Addl. Sub-Judge. Howrah, D/- 17th June 1924.

*Evidence Act, Ss.* 32,9,11 *and* 13—*Recitals of boundaries of land not in suit in documents between third parties are inadmissible.*

Recitals of boundaries of lands other than those in suit, contained in documents between third parties who are strangers to the suit are not admissible and cannot be relied upon in evidence. *A.I.R.* 1926 *Cal.* 948, *Foll.* [P 918 C 2]

*Rupendra Kumar Mitter* and *Dharmadas Set*—for Appellant.

*Sarat Chandra Basak* and *Bijan Kumar Mukerjee*—for Respondent.

**Duval, J.**—These four appeals arise out of four suits brought by the plaintiff to eject certain persons as being tenant-at-will holding over after notices to quit. The plaintiff's case is that the lands in these suits are niskar lands of one Gopal Chandra Mitra and that they have come into the plaintiff's possession by various deeds of transfer. But they are homestead lands in which the defendants had no permanent right and, therefore, notices were served on them to quit and as the defendants have not removed, these suits have been brought. The defence is that these lands are not niskar lands at all but are mal lands of the Dighapatia Raj and are held at present under Kumar Sarat Kumar Roy of Dighapatia by the defendants as tenants.

The first Court gave a decree in favour of the plaintiff for ejectment and for certain other reliefs. The Subordinate Judge in a most elaborate judgment has confirmed the decision of the Munsif as to ejectment, confirming, but varying his order in respect of back rent claimed. In appeal to this Court three points are taken.

The first point which I would take up is, however, the only material one in this appeal. It appears that the learned Subordinate Judge came to his findings on a consideration of a very large amount of evidence, and among that mass of evidence which he considered were two Exs. 13 and 22. Ex. 13 was a kobala by which certain lands to the south of the lands now in suit were purchased by one of the predecessors of the plaintiff from the widow and the son of Debendra Sarkar and in that document the disputed land is described as belonging to Gopal Mitter. Similarly by Ex. 22 which is also a kobala and dated 10th June 1908 one Rameswar Khemaka purchased lands on the boundary of the disputed lands and there the disputed land is described as Gopal's niskar. Rameswar is examined in the case and he speaks of the lands he purchased as being adjacent to and bordering on the lands in suit; he says that the land in suit is Gopal Mitter's and he also supports his evidence by referring to his title deeds, his vendor being dead.

Now it is argued in accordance with a long series of rulings the last of which appears to be the case of *Braja Mohan Das Adhikary* v. *Gaya Prasad Karan* (1), that recitals of boundaries of lands other than those in suit, contained in documents between third parties who are strangers to the suit are not admissible and cannot be relied upon in evidence. No doubt there are some earlier decisions by which such documents have in certain cases been admitted, but so far as I can see the whole trend of the recent authorities of this Court is that documents of this description cannot be received as evidence in respect of lands to which they do not relate. The question, therefore, arises whether the admission or the consideration of these two documents by the learned Subordinate Judge has vitiated his decision. It is urged for the defence,

(1) A. I. R. 1926 Cal. 948.

however, that even though these two documents may not have been rightly admitted, apart from them the learned Subordinate Judge came to an independent decision that these lands were Gopal Mitter's which have been subsequently purchased by the plaintiff as the niskar lands. Now before he discusses the value of the kobala Ex. 13, he has said that the whole evidence shows that the disputed lands did belong to Gopal Mitter's and that Gopal's widow, Kakumoni used to realize rent from the defendants in respect of these lands After that he goes into a long disquisition as to the value of Ex. 13 and discusses its admissibility in evidence. So it is perfectly clear that he did put considerable value on the recitals in these two exhibits. In this view in my opinion this evidence might have seriously influenced the Subordinate Judge in coming to the decision he has arrived at. I consider, therefore, that it is necessary to set aside the judgment of the Subordinate Judge and to remand the case to that Court for rehearing after excluding these two exhibits from its consideration.

Two other points are raised with which I shall now deal. It is urged that the defendants summoned production from the Kundu Chowdhury Babus of a certain chitta of 1868. The chitta was produced but the learned Munsif refused to take it into evidence. It is urged that the chitta proved itself and it should have been received in evidence. But the learned vakil for the appellant has been unable to show us that there was any evidence to prove the chitta or what was its value and I do not think that we can say that its rejection was in the circumstances improper. It was merely produced on summons and so far as I can see no further proof was given in support of it, (not even as to who wrote it) in the first Court. I, therefore, consider there is no ground for ordering that in the rehearing of the appeal this document should be taken into consideration.

Thirdly, it appears that an application was made for leave to produce in the appellate Court a certain decree on the ground that this piece of evidence had only been discovered after the decision of the Munsif and before the case came up for hearing before the Subordinate Judge. The Subordinate Judge rejected this application. In my opinion he was perfectly justified in doing so. It was difficult in appeal to test the value of such a document at that late stage and, therefore, the Subordinate Judge was unable to accept it. In this point too I would uphold the decision of the Subordinate Judge.

The result then is that the decree of the Subordinate Judge is set aside and the appeals sent back to that Court for a retrial after taking into consideration the observations made above. Costs to abide the result.

Let the hearing be expedited in the lower appellate Court. Let the record be sent down at once.

**Mitter. J.**—I agree. I only desire to add that the two documents Exs. 13 and 22, which the appellant contends, are not admissible, are documents to which the present defendants were no parties. The inadmissibility of the documents depends on the general principle that if a party is not bound by the recital in an instrument to which he was no party, the document will not be allowed to affect his rights in any way. The general principle is well stated in a passage in Mr. Justice Woodroffe's well-known treatise on the Law of Evidence at p. 729. The learned author there says:

> A recital in a deed or other instrument is in some cases conclusive, and in all cases evidence as against the parties who make it, and those who claim under them and it is of more or less weight or more or less conclusive against them according to circumstances. It is a statement deliberately made by those parties, which like any other statement is always evidence against the persons who make it. But it is no more evidence as against other persons than any other statement would be.

As an authority for this proposition the learned author cites the well-known decisior of *Brojeshware Peshakar* v. *Budhanuddi* (2). That was the view which was accepted in this Court for a long time. The case of *Imrit Chamar* v. *Sridhar Pandey* (3), which laid down that recital of boundaries in the lease was admissible against a person not a party took the contrary view. There have been later decisions which have not accepted this latter view and the trend of the recent decisions is not to admit evidence which has been offered in the case and the reception which in evidence is objected to, viz. Exs. 13 and 22 either under S. 13, Indian Evidence Act,

(2) [1880] 6 Cal. 268=7 C. L. R. 6.
(3) [1911] 17 C. W. N. 108=13 I. C. 120=15 C. L. J. 7.

or under any other section of the Act. With reference to Ex. 22 it has been contended on behalf of the respondent that the executant of the document is dead, and if the recital is not admissible either under S. 9, 11 or 13, Evidence Act, it is at any rate admissible under S. 32 Cl. (3), Indian Evidence Act. But I fail to see how the statement that certain other lands lie on the boundary of the lands forming the subject-matter of the document can be regarded as having been made aginst the pecuniary or proprietary interest of the persons making it within the meaning of sub-S. (3), S. 32, Evidence Act. I am, therefore, inclined to follow the later decisions to which reference has already been made by my learned brother and, therefore, agree in the order of remand which he has just now made.

G.B. *Case remanded.*

---

## A. I. R. 1927 Calcutta 920

MITTER, J.

*Sudananda Moral* and *others*—Petitioners.

v.

*Rakhal Sana* and *others* — Opposite Party.

Civil Revn. No. 1113 of 1926, Decided on 15th February 1927, from the order of the Munsif, Khulna, D/- 11th August 1920.

(a) *Civil P. C., O. 47, R. 1—Ground for review must be one existent at the time of decree.*

A ground for review must, at any rate, be something which existed at the time of the decree and the section does not authorise review of a decree, which was right, on the happening of some subsequent event. Therefore, the mere reversal of the judgment which was put in as a piece of evidence in the suit that reversal having taken place subsequent to the decision of that suit is not a ground for review : 24 *Mad.* 1 (*P. C.*), *Foll.* [P 920, C 2]

(b) *Civil P. C., O. 47, R. 1—"Sufficient reason" must be analogous to those stated in the rule.*

"Sufficient reason" must be some reason analogous to the reasons which have been stated in O. 47, R. 1 : *A. I. R.* 1922 *P. C.* 112, *Foll.* [P 921, C 1]

(c) *Civil P. C., S. 151—S. 151 cannot be used to review when review has been forbidden by other provisions.*

It would be a patent misapplication by the Court of S. 151 of the Code, if the Court in the exercise of its inherent power assumes jurisdiction by way of review where it is expressly forbidden by the legislature to entertain such application : 45 *Cal.* 519, *Foll.* [P 921, C 1]

*Hemendra Chandra Sen*—for Petitioners.

*Upendra Kumar Roy* — for Opposite Party.

**Judgment.**—This rule was issued on the opposite party to show cause why the order of the Munsif of Khulna, dated the 11th August 1926, rejecting an application under O. 47, R. 1, Civil P. C., for review of a contested judgment should not be set aside. It appears that the judgment in the suit which was commenced by the plaintiff against the defendant for declaration of title to and recovery of khas possession of land as also for mesne profits was based on Ex. 1, which was a judgment of the Additional District Judge of Khulna which held that the plaintiff had no subsisting title to the disputed land. That judgment has to some extent been set aside by a decision of the High Court in the case of *Sadananda Mandal* v. *Kumar Jyotish Kanta* (1). It has been argued by Mr. Sen that as the judgment on which reliance was placed by the Munsif has been set aside by the High Court, a good ground has been made out for review of judgment. Mr. Sen has argued forcibly that even if a case for review has not been made out, the Court should interfere under its inherent power under S. 151, Civil P. C. I am not satisfied that the mere reversal of the judgment (Ex. 1) which was put in as a piece of evidence in the suit—that reversal having taken place subsequent to the decision of that suit—is a grouud for review. As was observed by the Judicial Committee in the case of *Kotaghiri Venkata* v. *Vellanki Venkata* (2) a ground for review must, at any rate, be something which existed at the time of the decree and the section does not authorise review of a decree, which was right, on the happening of some subsequent event. There can be no question that when the Munsif delivered his judgment on 11th December 1925 the High Court decision reversing the decision of the Additional District Judge of Khulna (Ex. 1) had not been passed ; consequently the case clearly falls within the rule laid down by the Judicial Committee in the case of *Kotaghiri Venkata* v. *Velanki Venkata* (2). Mr. Sen has further contended that

(1) A. I. R. 1926 Cal. 952.
(2) [1900] 24 Mad. 1=27 I. A. 197=10 M. L J. 221=7 Sar. 678 (P.C.).

if the High Court judgment is not a new matter within the meaning of O. 47, R. 1, Civil P. C,, the reversal of the judgment of the Additional District Judge is at any rate sufficient cause within the meaning of O. 47, R. 1. I am unable to agree with this contention. As has been laid down by the Judicial Committee in *Chhaju Ram* v. *Neki* (3) the words " sufficient reason " must be some reason analogous to the reasons which have been stated in O. 47, R. 1, Civil P. C. With regard to the contention that in any event this Court should interfere under S. 151, Civil P. C., I have only to state that it would be a patent misapplication by the Court of S. 151, Civil P. C., if the Court in the exercise of its inherent power assumes jurisdiction by way of review where it is expressly forbidden by the legislature to entertain such application : See *Kanai Lal* v. *Jatindar Nath* (4). All the grounds urged by the petitioners, therefore, fail. The result is that I discharge this rule with costs. I assess the hearing-fee at two gold mohurs.

G.B. *Rule discharged.*

(3) A. I. R. 1922 P. C. 112=3 Lah. 127=49 I. A. 144 (P. C.).

(4) [1918] 45 Cal. 519=22 C. W. N. 446=42 I. C. 711=26 C. L. J. 325.

## A. I. R. 1927 Calcutta 921 (1)

DUVAL AND MITTER, JJ.

*Azimuddin* and *another*—Defendants—Appellants.

v.

*Ali Hosan* and *others*—Plaintiffs—Respondents.

Appeal No. 1857 of 1924, Decided on 7th December 1926, from a decree of the Addl. Dist. Judge, Chittagong, D/- 5th May 1924.

*Landlord and tenant — Reduction of rent obtained after diluvion—Tenant does not relinquish his rights in his lands.*

**Mere getting reduction of rent for diluviated land does not amount to relinquishment of the tenant's rights therein in the absence of proof that he never intended to hold the land when reformed: 41 *Cal.* 683 (*P.C.*), *Foll.*** [P 921 C 2]

*D. L. Kastigir*—for Appellants.

*Narendra Kumar Das*—for Respondents.

**Judgment.**—**The plaintiff's case was that they held certain land part of which diluviated and that after diluvion a suit** was brought to restrain the landlord from realizing full rent and a decree was obtained for proportionate reduction of rent. That was in the year 1906. In 1916 the lands re-formed and it appears that the landlord subsequently let them out to the defendants. The plaintiff, however, denied that they had ever relinquished their right to the diluviated lands and brought a suit in 1921. Both the Courts have decreed the suit. There are certain findings of fact with which we are not concerned to prove title to the land and to prove that the suit is not barred.

The only point argued before us in second appeal is that as plaintiffs brought a suit after diluvion and got a decree for proportionate abatement of rent they had lost all rights to them. We do not think that the tenant obtaining reduction of rent is a circumstance which, in the absence of any overt act showing an intention to relinquish those lands, would amount to relinquishment of his rights in the diluviated lands for all times. This view is supported by the decision of the Judicial Committee in the case of *Arun Chandra Singh* v. *Kamini Kumar* (1) where it is held that it is necessary that it should be proved that apart from merely getting reduction of rent the landlords must also show that the tenants never intended to hold the lands again after they had re-formed. There is no evidence in the case to this effect and following that ruling the appeal must stand dismissed with costs,

J.V. *Appeal dismissed.*

(1) [1914] 41 Cal. 683=22 I. C. 317=41 I. A. 32 (P. C.)

## A. I. R. 1927 Calcutta 921 (2)

B. B. GHOSE AND ROY, JJ.

*Mohanta Ramnibash Chaubay*—Plaintiff—Appellant.

v.

*Jyoti Prosad Singh Deo Bahadur* and *another*—Defendants—Respondents.

Appeal No. 129 of 1925, Decided on 19th May 1927, from the decree of the Sub-Judge, Burdwan, D/- 30th April 1925.

*Evidence Act, S. 101—Party claiming land as revenue-free must prove his case by positive evidence of grant.*

**Title to exemption from revenue must be proved by the person setting up such title and it must be proved, not by inference but by positive proof ; by a grant to hold as revenue-free.**

At least such evidence should be available as would lead to the necessary inference that there was a grant : 4 *M. I. A.* 466, *Foll.* [P 922, C 2]

*Troilokhya Nath Ghose*, *Asita Ranjan Ghose*, *Prosanta Bhusan Gupta* and *Manmatha Nath Roy*—for Appellant.

*Sarat Chandra Bose*, *Kaurunamoy Ghose* and *Krishna Chaitanya Ghose*—for Respondents.

**Roy, J.**—The plaintiff has appealed from the decision of the learned Subordinate Judge dismissing his suit for a declaration that the entry in the record-of-rights in respect of Mouzah Chota Digari that it is a rent-free tenure held under the Pachete Raj, is wrong. The plaintiff brought the suit on behalf of the idol Raghunath Jiu and being a minor was represented by his aunt. The first and principal defendant is the Raja of Pachete. Defendant 2 is the former Mohanta who is said to have resigned his office of Mohanta on account of the infirmities of age and installed the present plaintiff in the guddee. The claim made on behalf of the idol is that Chota Digari is an independent revenue-free estate. The learned Subordinate Judge held that the plaintiff had failed to make out his claim and he thereupon dismissed the suit. The plaintiff has appealed.

The immediate circumstances leading up to the suit are as follows : The Raja of Pachete gave a prospecting lease to one Rasaraj Biswas in the mouzah in question in 1919. The Mohanta (who was the defendant 2) gave a lease to the same person in respect of the surface rights in Chota Digari. The patta was executed in presence of several relatives of the Mohanta and was drawn up under legal advice. It was admitted that the idol had a nishkar grant from the Raja and that the village apperfained to the latter's zemindari. After this patta the Raja gave a mining lease. A Coal company brought a suit against the Mohanta for specific performance of a contract and the Mohanta made the same admission in his written statement, though at the same time asserting that he had resigned and the plaintiff was the proper person to be sued. The record-of-rights in this area was finally published on 5th September 1921. The present suit was brought three months after. The plaintiff ostensibly resigned from his office after giving the patta mentioned above and installed his infant grandson as a Mohanta. The plaintiff seems to have been an infant in arms when he was made a Mohanta. The circumstances give rise to the inference that this proceeding was gone through for the purpose of getting rid of the Mohanta's statements and of trying a chance in litigation in the name of the minor Mohanta.

The learned Subordinate Judge has devoted some time in discussing the question of under-ground rights. No doubt the object of the suit is to establish eventually a claim for such rights but it is a question which does not arise in the suit and we do not propose to discuss it. The sole question is whether the entry in the record-of-rights is correct or not and we have to address ourselves to this question only. The Subordinate Judge again has laid considerable stress on the statement of the former Mohanta in the patta Ex. K-13 and has discussed whether it is binding on the plaintiff or not. The statements are admissions. They are not binding and may be explained away if the plaintiff is able to show his title independently and if he fails, they are important if they are consonant with the state of things which have existed for generations.

The plaintiff has no patta or sanad to show the right claimed. The onus probandi lies on him to establish his title to exemption from revenue not by inference but by positive proof, by a grant to hold as revenue-free. If authority was needed we might refer to the case of *Maharajadhiraj Rajah Mahtab Chand Bahadur* v. *The Bengal Government* (1). At least such evidence should be avilable as would lead to the necessary inference that there was a grant. There is no such evidence. The alleged grant again was not registered under the provisions of Reg. 19 of 1793. The inference is that no occasion arose then or subsequently to make the claim that the mouzah was held as a revenue-free estate. The estate was not registered as such in the books of the Collector under Act 7 of 1876.

The learned pleader has referred to Ex. 4 the kabuliyat given by the Rajah at the time of the Decennial Settlement to the Government and to the gorwara papers which apparently the Rajah filed in pursuance of his promise made in the kabuliyat to file a list of his mouzahs showing the distribution of the revenue and so forth. A point is sought to be made that Chota Digari is not mentioned

(1) [1850] 4 M. I. A. 466=1 Sar. 385 (P. C.).

and that, therefore, it was not taken into account in assessing the revenue. This kabuliyat came under discussion in the case of *Secretary of State* v. *Jyoti Prashad Singh Deo* (2) which terminated in the Privy Council. There certain Sarsikan papers were filed and the controversy arose whether the three Digwari villages concerned in that suit and not mentioned in the Sarsikan papers were assessed with revenue or not. The learned pleader refers to the controversy but is obviously in error in thinking that their Lordships of the Privy Council made any pronouncement on the subject. Their Lordships merely refer to the different findings of the District Judge (who happened to be myself) and of the High Court. The argument is irrelevant here, for the Digwari villages admittedly existed before the Decennial Settlement.

The plaintiff has not shown by any papers that his mouzah Digwari existed before the Decennial Settlement was made. On the contrary a point is made on behalf of the Raja by the production of papers of 1771 (Ex. 8). The Raja had been asked to file a list of baje-jamin or lakheraj lands within the zemindari ; these are the papers. Bara Digwari is mentioned but not Chota Digwari which is a contiguous village. Then, in 1865 there was a report of Achay Lal Munasarin of excess mouzahs of Pargana Shergarh and item 143 appears to be our present mouzah described as a khak or portion of some other mouzah. The argument is not unreasonable that the village came into existence subsequently. It is noticeable that the list of documents filed by the plaintiff does not go beyond 1208 (B. E.). There was a suit No. 75 of 1863 and the Mohanta filed his documents which are set out in the judgment of the sadar amin, Mr. DeCosta, and the earliest document mentioned therein is dated 1208 (B. E.).

It is on the judgment of the sadar amin in this suit that the learned pleader founds his case. The Rajah sued for possession but the suit was dismissed. The observation of the sadar amin that the Government may have a right to resume but not the Rajah, is of no greater weight than an argument leading up to his conclusion. It appears that the second issue in the suit was:

**whether the land exceeds 100 bighas and was acquired before 1790?**

and the finding was that the Mohanta or the idol had lakheraj debutter title from before 1790. It does not appear that this was an issue which was necessary for the disposal of the suit. Even if the finding is regarded as conclusive between the parties it does not carry the plaintiff any further. We cannot assume that it was a revenue-free grant and unless such assumption was made, the implication arising out of the area being over 100 bighas and giving the Government the right to assess revenue and keep it by virtue of S. 7, Reg. 19 of 1793 must fail. There was some confusion in the earlier days between rent and revenue—a matter which was elaborately dealt with by Sir Barnes Peacock in the Full Bench case of *Mohamed Akil* v. *Asadunnessa Bibi* (3). It is possible to think, however, that where the grant was clearly only rent-free, there was no necessity to make this confusion. The question whether the village was revenue-free or not did not arise in the suit and the observations of the sadar amin are only obiter dicta. It may be said that the claim that the village is a revenue-free estate was not definitely made till in this suit.

There are no materials before us to show that the grant was made before 1790. We have the statement of the father of defendant 2, who was the Mohanta at the time of the thak survey, viz.. in 1862 and he stated then, that the grant had been made by Nilmani Deo the then Rajah of Pachete. This was the year before the suit No. 75 of 1863. The decision in that suit could not alter the character of the tenure and the tenure remained subservient to the Rajah's zemindari and it was on that basis that the Rajah realized road-cess from the Mohanta from 1879. It is urged that the village was deemed a part of the estate of the Rajah only for the purposes of the Road Cess Act. There is no evidence to show that it was regarded otherwise on any other occasion. We have the statement of the father of defendant 2, made in 1861 and we have the statements of defendant 2, made recently. The judgment of the sadar amin is of no importance except to show that Rajah's claim to possession (described in the proceedings as "assumption") was dismissed. We have the fact that the

(2) A. I. R. 1926 P. C. 41=53 Cal. 533=53 I. A. 100 (P. C.).

(3) [1867] B. L. R. Sup. Vol. 774=9 W. R. 1 (F.B.).

Mohantas have been paying road-cess to the Rajah on the footing that the village is within his zemindari for half a century. It cannot be said, therefore, that the plaintiff's claim that the village is a revenue-free estate independent of the zemindari Pachete has any substance. We agree for these reasons with the findings of the learned Subordinate Judge and dismiss the appeal with costs.

**B. B. Ghose, J.**—I agree.

D.D. *Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 924

RANKIN, C. J., AND MALLIK, J.

*Sukumari Mitra*—Plaintiff—Appellant.

v.

*Kinu Mandal* and *others*—Respondents.

Appeal No. 380 of 1925, Decided on 14th January 1927, from the appellate decree of the Dist. Judge, Jessore, D/- 14th January 1925.

*Lease—Kabuliat—Construction.*

Where a kabuliat provided: "when you would measure the lands we shall pay rent, without any objection, for lands found out by your measurement, in accordance with the prevailing rate of tenants holding similar class of lands.

*Held*: that it means that if the landlord insists upon having a measurement he may do so and then when he does so the whole thing is to be reassessed on the basis of the prevailing rate for lands of the same plots; in other words the document is a contract by which the tenant goes on for the present at a fixed jama for a fixed land but there is a right in the landlord to alter that position and to claim prevailing rate for the actual amount of land in the tenant's possession. [P 925 C 1]

*Samarendra Kumar Dutt* and *Tarakeshwar Mitra*—for Appellant.

*Prafulla Kamal Das*—for Respondents.

**Rankin, C. J.**—In this case the question arises whether the plaintiff landlord is entitled to an enhancement as against the defendant of the rent of the tenancy. At the trial Court the plaintiff referred to a kabuliat but it was not until the case came before the Court of appeal that the kabuliat was laid before the Court; and in my judgment, the first question before us is to construe this kabuliat and find out what it means.

There are two clauses which require careful attention. It is quite clear that the tenant held for a jama under the landlord of Rs. 6-8 annas. It is quite clear that the rent had been changed and it is quite clear that the object of this kabuliat is to increase the rent by 14 annas to the sum of Rs. 7-6 annas; and what is stated is that this Rs. 7-6 annas is in respect of about 3 pakhis of land

as per boundaries of the different lots given below.

Now, if the document had stopped there that would have been a very plain case indeed. It would have been as clear a case as could be imagined of a kind that is generally known as a consolidated jama and it would have been quite hopeless for the landlord to expect to get an increase of rent for additional area without proving that the tenant was in occupation beyond the specific boundaries which were there laid down. Now, that is a fact which it seems quite probable was noticed by whoever drew up this document or assented to this document, and a little later in the document, after a reference to different kists, there comes this sentence (the whole dispute in the case to my mind is as to its meaning):

when you would measure the lands we shall pay rent, without any objection, for lands found out by your measurement, in accordance with the prevailing rate of tenants holding similar class of lands.

It seems to me that the Court has to ask itself—Does that mean that if at any time there is a measurement and the tenant is found to be cultivating lands outside the boundaries he is then to pay the agreed jama of Rs. 7-6 annas for his original area plus the prevailing rate for the additional amount, or does it mean that it is to be at the option of the landlord to have the whole thing measured and accurately ascertained and to have the jama fixed for the whole thing at the prevailing rate; in other words, superseding the arrangement as to Rs. 7-6 annas altogether. Now, it is not at all easy to make up one's mind as between those two constructions. The document to my mind is highly ambiguous, but it does seem to me that if you want to find out whether a tenant has gone beyond certain boundaries you would not do it in a case like this by measurement. At the time of this kabuliat no measurement was made. The reference is to boundaries and if you want to see whether the tenant strayed beyond those boundaries you will do that by comparing his present holding with the boundaries; but the measurement

would be of no service in this case for the purpose of ascertaining whether or not there is an excess. The only suggestion that could be made of that sort would be to see whether or not the land was more than about 3 pakhis of land. I think, on the whole, that the best construction of this document is to say that it means that if the landlord insists upon having a measurement he may do so and then when he does so the whole thing is to be re-assessed on the basis of the prevailing rate for lands of the same plots; in other words, I read this document as being a contract by which the tenant goes on for the present at a fixed jama for a fixed land but there is a right in the landlord to alter that position and to claim prevailing rate for the actual amount of land in the tenant's possession. That is certainly not a hard bargain because the landlord under that can get rent for no more than the tenant is actually occupying. What is more, he can get no higher rate than other tenants already pay. There can be no doubt whatever that that is a very reasonable bargain to make. In my judgment, that construction is rather more in agreement with the words used than the other possible construction. That being so and as the plaintiff cannot ask for more in this appeal than what he obtained from the first Court, the decree of the first Court ought to my mind to be restored.

Under this contract the prevailing rate is the prevailing rate at the time and consequently we do not really have to enquire whether there is any ground for saying that the commissioner took three years' average or did not take it. We are quite satisfied that Rs. 2-2 annas per pakhi is a good and valid finding with reference to the prevailing rate and not in any way unjust.

For these reasons I am of opinion that this appeal must succeed.

The judgment and decree of the lower appellate Court must be set aside and those of the Court of first instance restored and affirmed with costs here and in the lower appellate Court.

**Mallik, J.**—I agree.

R.D. *Appeal allowed.*

## A. I. R. 1927 Calcutta 925

PAGE AND GRAHAM, JJ.

*Monoranjan Mitra*—Appellant.

v.

*Fazlar Rahman* and *others* — Respondents.

Appeal No. 21 of 1926, Decided on 14th June 1927, from an order of the 1st Addl. Dist. Judge, Dacca, D/- 8th September 1925.

*Evidence Act, S.* 115 — *Pre-emption — Sale after notice that co-sharers have a right of pre-emption — Before commencement of sale co-sharer claiming his right without protest by purchaser — Purchaser cannot subsequently resist the claim of the co-sharer.*

Where the properties of an insolvent were sold after a notice that according to the terms of the Mahommedan Law, "the co-sharers of the said insolvent have and shall have the right of pre-emption," and the purchaser bid and before the sale commenced, the pre-emptor claimed his right of pre-emption without a protest by the purchaser.

*Held* : that in a suit by the pre-emptor claiming his right of pre-emption, the purchaser cannot resist the suit on the ground that the pre-emptor was not entitled to pre-empt under Mahomedan Law. [P 926, C 2]

*Bhupendra Kishore Bose* — for Appellant.

*Gunada Charan Sen, Jitendra Kumar Sen Gupta* and *Amulya Charan Sen*— for Respondents.

**Judgment**.—This is an appeal from an order of the learned Additional District Judge of dacca of the 8th September, 1925. The order is one the nature of which is not precisely defined. The receiver is an officer of the Court and he must act according to the order of the Court. Under S. 59, Provincial Insolvency Act, the receiver is entitled to sell the property of the insolvent subject to the provisions of that section. On the 24th August, 1925, there was a notification of the conditions of sale published in the panchayet, a local newspaper, and it was upon the terms and conditions of that notice that the appellant must be taken to have bought the property. That notification states that the insolvent's share in certain family property will be sold by public auction subject to the charges that were thereupon imposed. The notice proceeded :

according to the terms of the Mahommedan Law, the co-sharers of the said insolvent have and shall have the right of pre-emption.

In accordance with that notice the sale was held on the 8th September

and certain persons including the appellant bid at the auction. Before the sale commenced the respondent Fazlar Rahaman who is the brother of the insolvent claimed his right of pre-emption as a co-sharer. It is not disputed that he was a co-sharer. As the several lots were put up for sale the respondent asserted his right of pre-emption apparently without protest from the appellant. Eventually the lots sold realized Rs. 1,515 and the appellant was the highest bidder, although at the close of the bidding for each lot the respondent had asserted his right of pre-emption.

Thereupon, pursuant to the terms of the notification the receiver proceeded to give effect to the respondent's claim as pre-emptor. The respondent, however, was not anxious to pay the whole of the purchase money at once. He paid Rs. 1,350 forthwith and desired to have a short period, until the 12th September within which to pay the balance. Now, under S. 59 the receiver was not at liberty to accept consideration for the purchase by future payment without obtaining the leave of the Court, and he proceeded to obtain that leave forthwith, and the order complained of is an order under S. 59, of the Act giving leave to the receiver to accept a part of the consideration money at a future date upon the terms set out in the order. It was strongly contended by the learned advocate for the respondents that this order was not an order within S. 75, sub-S. (3) of the Act, because he contended that in substance it was merely a direction by the Court to one of its officers. There is much force in that contention, but it is unnecessary for us to express a definite opinion on the point because, in our opinion, there is no substance in the appeal.

The learned vakil who appeared for the appellant, and who if, I may say so, argued his points extremely well and confined his argument within a narrow compass, urged that according to the principles of Mahommedan Law the respondents had no right of pre-emption in the circumstances obtaining in this case. We resisted the temptation to embark upon what would have been the discussion of an interesting problem of law because we are of opinion that the appellant is bound by the terms of the contract into which he entered, and, in our opinion, one of the terms of the contract of sale into which he entered was that the co-sharers of the insolvent should be entitled if the sale took place to pre-empt the property sold. That, we think, is clear from the notification of sale itself which provide that

> the co-sharers of the said insolvent have and shall have the right of pre-emption.

It is a matter of no moment whether according to the rules of Mahommedan Law they would be held to have a right of pre-emption, because the appellant has contracted that if he bought the property the co-sharers should have a right of pre-emption. Now, the property was sold, and we think that, the appellant had no cause of complaint if after the sale had taken place the co-sharers exercised the right of pre-emption under the terms of the contract to which the appellant had agreed. This case is to be determined upon the words of the contract to which the appellant was a party. It is clear that the right of pre-emption which was given to the respondent under the contract was one that he was entitled to exercise : see *Gandy* v. *Gandy* (1) and *Jiban Krishna Mullik* v. *Nirupama Gupta* (2).

In our opinion there is no substance in this appeal which must be dismissed with costs ; the hearing-fee being assessed at three gold mohurs to the respondent Fazlar Rahman, and two gold mohurs to the receiver.

R.D. *Appeal dismissed.*

(1) [1885] 30 Ch. D. 57 = 54 L. J. Ch. 1154= 33 W. R. 803=53 L. T. 306.
(2) A. I. R. 1926 Cal. 1009 = 53 Cal. 922.

---

## A. I. R. 1927 Calcutta 926

CUMING AND PAGE, JJ.

*Sheik Kachu*—Defendant 1—Appellant.

v.

*Mahammad Ali Mahmud*—Plaintiff—Respondent.

Appeal No. 302 of 1925, Decided on 30th March 1926, from the appellate order of the Addl Dist. Judge, Mymensingh, D/- 7th April 1925.

*Evidence Act, S. 70—Document appearing from evidence to be invalid—S. 70 does not validate—Mortgage not properly executed—Mortgagor admitting execution—Document cannot be enforced as mortgage.*

Section 70 cannot, and does not affect to render valid, document which, it is apparent

from the evidence before the Court, is invalid in law : *A. I. R.* 1925 *P. C.*, 203 and *A. I. R.* 1918 *P. C.* 3, *Rel. on.* ; 16 *C. W.* N. 585, *Dist.* [P 928 C 1]

A mortgage was duly executed and attested. but the sub-registrar finding a technical defect had the document re-executed by the mortgagors in his office. This re-execution was duly registered though not re-attested. In a suit upon the mortgage the mortgagor admitted execution.

*Held* : that in spite of the admission the document did not amount to a mortgage and, therefore, was not an instrument creating a mortgage upon which the plaintiff could base his claim. [P 928, C 2]

*Annada Charan Karkoon*—for Appellant.

*Birendra Kumar De*—for Respondent.

**Page, J.**—This is a suit for foreclosure on a mortgage. The plaintiff claims to recover possession of the mortgaged property on the ground that the amount claimed under the mortgage is due. The defendants plead that they had paid off what was due under the mortgage and therefore, the plaintiff was not entitled to recover possession of the mortgaged property. That plea has been found to be bad, and it has been held that if the mortgage is valid in law having regard to S. 59, Transfer of Property Act, the plaintiff is entitled to succeed.

Now, the material facts are : that the mortgagors, the mortgagee and the attesting witnesses are all illiterate persons and on the date upon which the mortgage was executed the parties and the attesting witnesses were all present, and in the presence of the attesting witnesses the names of the mortgagors were duly placed upon the document by a scribe duly authorized by the mortgagors in that behalf. The names of the attesting witnesses were also written on the document with their authority and in their presence. As all those acts were done in the presence of all the necessary parties, the document was validily executed in accordance with law. The mortgagors with the assent of the mortgagee on the following day took the document to the Registry for the purpose of having it registered. Now, the instrument of mortgage was contained in two papers unattached to each other, and the signatures appeared only upon one of the two papers. It may, however, be taken for the purpose of this case that the two papers sufficiently refer to each other to enable the mortgage to be duly executed by the execution of one of them. The registration officer, however, on these two papers being presented to him expressed the view that each of the papers ought to be duly executed and unless both the papers were executed, he stated that he would not accept the document for registration. Accordingly the mortgagors, who were present at the registration office, gave authority to one Hossain Ali to re-execute the mortgage in order to conform with the view expressed by the registration officer. In the presence of the mortgagors and with their knowledge and consent a cross was then placed over the mortgagor's signatures as they then appeared on the document and Hossain Ali wrote their names again on each paper. The result was that the document was re-executed by the mortgagors at the registration office; but unfortunately the witnesses who had duly attested the original execution were not present at the registration office when the original signatures were cancelled and the document was re-executed. In the new form the document was then presented to the registration officer and was accepted by him and duly registered.

Now, the result of what had taken place was that the conditions of S. 59, Transfer of Property Act, upon the fulfilment of which depended the validity of the document as a mortgage were not complied with. The document that was originally executed was duly executed and attested, but was not registered ; whereas the document which was registered did not comply with the provisions of S. 59 for the signatures of the executants were not attested. In their written statement the defendants whose defence was that they had paid off the amount due under the mortgage did not plead that the document sued upon was not a valid mortgage in law, and at the trial it was admitted by or on behalf of the mortgagors that the document was duly executed and attested. Now, if the plaintiff had relied solely upon the admission of the defendants that the document was duly executed and attested, it might well be that he would have been entitled to succeed. But he did not do so. He adduced evidence before the lower Court from which it became apparent that the document was not a valid mortgage according to law. Now, S. 70, Evidence Act enables a plaintiff to dispense with proof of the matters therein mentioned if

they are admitted by the opposite party. S. 70, however, cannot and does not affect to render valid, document which, it is apparent from the evidence before the Court, is invalid in law : See *Ganga Pershad Singh* v. *Ishri Pershad Singh* (1) ; *Hira Bibi* v. *Ram Hari Lal* (2).

Having regard to the facts disclosed in the evidence the learned trial Judge dismissed the plaintiff's suit. The plaintiff preferred an appeal and the learned District Judge before whom the appeal was brought decreed the plaintiff's suit upon the ground that under the circumstances the document that was registered must be taken to be the document as originally executed. In our opinion, there was no evidence before the Court which could justify such a finding, and on that ground the decision of the learned Additional District Judge cannot be supported.

On behalf of the plaintiff, however, it was contended upon the authority of *Gopal Chandra Chakraburtty* v. *Surendra Kumar Roy Choudhury* (3), that the appellants mortgagors were not entitled now to allege that the document was not duly executed, attested or registered. The facts of *Gopal Chandra Chakraburtty's* case (3), however, were very different. In that case the Court held that the alteration that was made in the date upon which the document purported to have been executed by the mortgagor was explained to and accepted by the mortgagee and for the purpose of that case it must be taken that the mortgage was executed upon the date upon which the parties ultimately agreed that it should be taken to have been executed.

In this case in our opinion, there is no ground upon which the doctrine of estoppel can operate. The parties were wholly illiterate persons and the mortgagors made no representation with respect to the registration of the document to the mortgagee with the intention that the mortgagee should rely upon such misrepresentation. The plaintiff paid the money before the document was taken to the registry office. All the parties believed that the document amounted to a mortgage valid in law. It now transpired that the document did not amount to a mortgage and, therefore, was not an instrument creating a mortgage upon which the plaintiff could base his claim. Under the circumstances, we are of opinion that the appeal must be allowed and the suit dismissed. We make no order as to costs.

**Cuming, J.**—I agree. The appeal should be allowed and the suit dismissed.

D.D. *Appeal allowed.*

(1) A. I. R. 1918 P. C. 3=45 Cal. 748=45 I. A. 94 (P. C.).
(2) A. I. R. 1925 P. C. 203=5 Pat. 58=52 I. A. 362 (P. C.).
(3) [1912] 16 C. W. N. 585=15 I. C. 460.

---

## A. I. R. 1927 Calcutta 928

CUMING AND MALLIK, JJ.

*Jotindra Nath Ghosh* and *another*—Petitioners.

v.

*Sourindra Nath Mitra* and *another*—Opposite Party.

Civ. Revn. No. 216 of 1927, Decided on 2nd May 1927, against the order of the Addl. Sub-Judge, Barisal, D/- 2nd December 1926.

(a) *Civil P. C., S.* 115 — *Error of law is no ground for revision.*

An error of law is no ground whatever for the High Court interfering under S. 115 : 41 *Cal.* 323 ; 11 *Cal.* 6 (*P. C.*) ; 39 *Cal.* 473, *Foll.* [P 929 C 1]

(b) *Civil P. C., S.* 115 — "*Jurisdiction*" *means power to decide — Entertaining a petition and deciding wrongly that it is not maintainable is not refusing to exercise jurisdiction.*

Jurisdiction in its ordinary sense when applied to a Court means the power or authority of judging and a Court is said to be of competent jurisdiction with regard to a suit or other proceeding when it has power to hear or determine it or exercise any judicial power therein. Therefore when a Court entertains a petition and deals with it but holds wrongly that it is not maintainable under any provision of the law that does not amount to a refusal to exercise jurisdiction : 39 *Cal.* 473 and 20 *All.* 78 and 11 *Bom.* 488, *Foll.* [P 929 C 2]

*Brajendra Nath Chatterjee* and *Satindra Nath Roy Chaudhury*—for Petitioners.

*Langford James* and *Nando Gopal Banerjee*—for Opposite Party.

**Cuming, J.**—The facts are as follows—The petitioner brought a suit No. 12 of 1926 in the Court of the Additional Judge of Barisal.

The 19th May was fixed for the hearing of the suit. Petitioner did not appear and the suit was then dismissed for default. He then made the usual application under O. 9, R. 9. This application was fixed for hearing on 14th August. He again failed to appear and the appli-

cation was dismissed for default. He then again applied to have the dismissal set aside under S. 151 and O. 9, R. 9.

The learned Judge heard the pleaders. He held that the petition could not be held to be under O. 9, R. 9 because in his opinion O. 9, R. 9 could not be applied with the help of S. 141 to the case of an application under O. 9, R. 9 which had been dismissed for default and he therefore rejected the petition. The petitioner moved this Court and obtained this rule.

Mr. James who appears to oppose the rule contends that S. 115, Civil P. C., has no application to the present case. The Munsif, if he wrongly dismissed the petition holding that it was not maintainable under O. 9, R. 9 or S. 151 when it was maintainable, committed an error of law and that an error of law is not a ground for interfering under S. 115, Civil P. C.

The petitioner's contention would seem to be this : That as the result of the error in law the Subordinate Judge refused to exercise the jurisdiction vested in him by law and deal with the matters under O. 9, R. 9.

I have no hesitation whatever in holding that an error of law is no ground whatever for this Court interfering under S. 115. Looking at the wording of S. 115, Civil P. C., this would seem too obvious to require any decision to support it.

Reference, however, may be made to the case of *Shew Prasad* v. *Ram Chandra Haribux* (1), *Amir Hassan* v. *Sheo Baksh Singh* (2), *Ram Gopal Jhoon Jhoonwalla* v. *Joharmall Khemka* (3), *Sundar Singh* v. *Doru Shankar* (4), *Amritrav Krishna Despande* v. *Balkrishna Ganesh* (5) and *Hari Bhikaji* v. *Naro Vishwanath* (6).

The petitioner's argument would seem to be this : No doubt the Court did wrongly decide the preliminary question of law as to whether the matter did or did not fall within O. 9, R. 9 and having wrongly decided that it did not so fall the Court refused to exercise the jurisdiction which O. 9, R. 9 gave him to decide whether the petitioner had or had not a good reason for being absent when his case was called on. After all it is not O. 9, R. 9 that gives the Court jurisdiction to deal with the matter. It is, on the contrary, S. 9, Civil P. C., which confers on the Courts their jurisdiction or power to try various matters. Jurisdiction in its ordinary sense when applied to a Court means the power or authority of judging and a Court is said to be of competent jurisdiction with regard to a suit or other proceeding when it has power to hear or determine it or exercise any judicial power therein.

In the present case the Court had power to entertain and deal with the petition. It did so entertain it and did not refuse to exercise its jurisdiction. A plea in bar was then raised that the petition was not maintainable because it did not fall within any of the provisions of the Civil P. C.

The Court exercised its jurisdiction for it heard the matter and then decided rightly or wrongly that the application did not fall within O. 9, R. 9 and therefore dismissed it. It certainly did not refuse to exercise its jurisdiction. It exercised its power of judging or its jurisdiction and determined that the application was incompetent because it fell under no section of the Civil Procedure Code. If it were wrong it committed an error of law, but it certainly exercised its jurisdiction or power of judging. The argument of the petitioner would really come to this that if for some reason or other the Judge did not grant the relief asked for on the ground that he could not, that amounts to a refusal to exercise his jurisdiction. For instance where a Judge holds that a suit is barred by limitation and hence refuses to go into the merits, it might be equally well-argued that if he were wrong in holding that the suit was barred by limitation that he had refused to exercise a jurisdiction vested in him by law to decide the suit on the merits ; in fact that whenever the Judge decides a point of law against a party and so does not grant him some relief he has asked for, he has refused to exercise a jurisdiction conferred on him by law. It needs but little examination to see that the doctrine would always give what amounts to an appeal whether it was granted by the Code or not when the Judge by wrongly deciding a question of law refused to grant a suitor the relief he sought for.

For instance, a Court decides wrongly that a certain suit is barred by limitation. If he had not so decided he would have decreed the plaintiff's suit. Hence he re-

(1) [1913] 41 Cal. 823=23 I.C. 977.
(2) [1884] 11 Cal. 6=11 I.A. 237 (P.C.).
(3) [1912] 39 Cal. 473=15 I.C. 517.
(4) [1897] 20 All. 78=(1897) A.W.N. 168.
(5) [1887] 11 Bom. 488.
(6) [1885] 9 Bom. 482.

fused to exercise a jurisdiction vested in him by law to decree the plaintiff's suit, This is, therefore, a case falling within S. 115, Civil P. C. I may, however, say that the Courts have consistently held it does not. *Ram Gopal Jhoon Jhoonwalla* v. *Joharmall Khemka* (3) and *Sundar Singh* v. *Doru Shankar* (4).

As West, J., puts it in the case of *Amritrav Krishna Despande* v. *Balkrishna Ganesh* (5) :

'Where the law speaks of exercise of jurisdiction or failing to exercise jurisdiction it means using or failing to use authority in entering on an enquiry and carrying it to a judicial conclusion. The exercise of jurisdiction is not declined when such a conclusion has been arrived at merely because had the decision on a particular point been different, further questions would have had to be disposed of.

That is exactly what has happened in the present case. The Judge entertained the application, heard it and determined that it did not fall within the scope of O. 9, R. 9. As a result of the decision on this point he did not dispose of the further question, viz., whether petitioner had good ground for not being present when the case was called on.

But by so doing he did not refuse to deal with the matter. He dealt with it and rejected the application. By so doing he did not refuse to exercise his jurisdiction. On the contrary he exercised it. The present case obviously does not fall within the four corners of S. 115.

The rule must be discharged with costs. Hearing-fee 5 gold mohurs.

**Mallik, J.**—I agree.

G.B. *Rule discharged.*

---

## A. I. R. 1927 Calcutta 930

PAGE AND GRAHAM, JJ.

*Rakhal Chandra De*—Judgment-debtor—Appellant.

v.

*Mt. Kumudini Debya*—Creditor—Respondent.

Appeal No. 420 of 1926, Decided on 7th June 1927, from the appellate order of the Sub-Judge, Bakerganj, D/- 17th June 1926.

*Execution sale—Setting aside—Minor properly represented till passing of decree but not so represented in execution proceedings—Execution sale need not be set aside—O. 32 is not strictly applied to the stage of execution—Civil P. C., O. 32.*

**Even if there was no due representation of the minor in the execution proceedings had in furtherance of a decree in a suit in which the minor was properly represented that fact is not a ground upon which the sale can be set aside.**

**The provisions of O. 32, relating to suits by or against minors have no direct application in proceedings in execution after the rights of the parties have merged in a good and valid decree. At any rate the rules in O. 32 are not so strictly applied at that stage : *A. I. R.* 1921 *Cal.* 476 and *A. I. R.* 1924 *Cal.* 847, *Foll.*** [P 930 C 2]

*Surendra Nath Das Gupta*—for Appellant.

*Gunada Charan Sen* and *Prosanta Bhusan Gupta*—for Respondent.

**Judgment.**—In our opinion there is no substance in this appeal. Both the Courts below have rejected an application by the appellant to set aside a sale partly for irregularities to which O. 21, R. 90, Civil P. C. applies, and partly under S. 47 upon the footing that the appellant at the time of the execution proceedings out of which this appeal arises was not properly represented. The only point which is taken on behalf of the appellant by the learned vakil who appears for him is that inasmuch as there was no formal appointment of a guardian ad litem in the execution proceedings the execution proceedings are invalid, and the sale is not a good sale as against the minor. It is conceded that the minor was properly represented in the proceedings up to the passing of the decree by the sheristadar of the Court. It also appears that in the execution proceedings notices were properly served upon the sheristadar of the Court, although some other person than the person who was a guardian ad litem during the trial was then filling that office. In *Fani Bhusan Bhuian* v. *Surendra Nath Das* (1). Sanderson, C. J., and Richardson, J., passed the following observation :

**It is true that Surendra Nath's mother had died and that at the stage of execution he had in fact no guardian on the record. But as I have always understood the matter, the provisions of O. 32, relating to suits by or against minors, have no direct application in proceedings in execution after the rights of the parties have merged in a good and valid decree. At any rate the rules in O. 32 are not so strictly applied at that stage. The 'Lis' in respect of which it is essential that a minor defendant should be represented by a duly appointed guardian is at an end and execution having taken place, in determining whether the minor was sufficiently represented in the execution proceeding, the Courts are at liberty to look at the substance of the transaction.**

Now, looking at the substance of this transaction we have no doubt that the

(1) A. I. R. 1921 Cal. 476.

minor was properly represented in the execution proceedings. Further, *Fani Bhusan Bhuian* v. *Surendra Nath Das* (1) and *Jinnat Ali* v. *Kailas Chandra Chowdhury* (2) are authorities in support of the proposition that even if there was no due representation of the minor in the execution proceedings had in furtherance of a decree in a suit in which the minor was properly represented that fact is not a ground upon which the sale can be set aside.

For these reasons, in our opinion, the appeal fails and must be dismissed with costs ; the hearing-fee being assessed at two gold mohurs.

J.V. *Appeal dismissed.*

(2) A. I. R. 1924 Cal. 847.

---

## A. I. R. 1927 Calcutta 931 (1)

SUHRAWARDY and CAMMIADE, JJ.

*Basirudin* and *others*—*Accused*—Petitioners.

v.

*King-Emperor*—Opposite Party.

Cr. Revn. No. 1137 of 1926 Decided on 21st January 1927, from the judgment of the Ss. J. Mymensing

*Penal Code, Ss.* 71, 147, 325 *and* 149—*Sentences.*

Separate sentences under S. 147 and 325 read with S. 149 are illegal in view of the provisions of S. 71: *A.I.R.* 1924 *Cal.* 771, *Foll.* [P 931 C 1]

*M. A. Quasim*—for Petitioners.

**Judgment.**—In this case the petitioners have been convicted under S. 147, I. P. C., and sentenced to nine months' rigorous imprisonment. They have also been convicted under S. 325 read with S. 149, I. P. C., and sentenced to nine months' rigorous imprisonment each—the sentences to run consecutively. The separate sentences under these two sections are clearly illegal in view of the provisions of S. 71, I. P. C. *Kiamuddi Karikar* v. *Emperor* (1). We accordingly set aside the sentences passed under S. 147, I. P. C. The petitioners will serve out the sentence of nine months' rigorous imprisonment under S. 325 / 149, I. P. C. The order under S. 106., Criminal P. C., upon the accused is maintained.

R.D. *Order accordingly.*

---

(1) A. I. R. 1924 Cal. 771=51 Cal. 79.

## A. I. R. 1927 Calcutta 931 (2)

MUKERJI AND GRAHAM, JJ.

*Sm. Gouribala Debi* and *others*—Defendants—Appellants.

v.

*Probhas Chandra Batabyal* and *others*—Plaintiffs—Respondents.

Appeal No. 2224 of 1924, Decided on 26th November 1926, from the appellate decree of the Addl. Dist. Judge, Midnapore, D/- 19th August 1924.

*Possession—Possession lawfully and peaceably obtained shall be maintained except against preferential title-holder.*

Possession lawfully attained in the sense that it was not procured by force or fraud but peaceably, no one interested opposing, is entitled to be maintained against all comers except such as could plead preferential title. 12 *All.* 51 (*P.C*) *Foll.* [P 932 C 2]

*Amarendra Nath Bose* and *Jati Nath Ghose*—for Appellants.

*Kshitish Chandra Chakravarti* and *Panchanan Ghosal*—for Respondents.

**Mukerji, J.**—The defendants are the appellants in this appeal. The suit out of which it arises was instituted by the plaintiffs for establishment of their title to a tank and its banks which bear Nos. 1621 and 1622 in the settlement map of village Ajabnagar The plaintiffs claimed nishkar right in this property alleging that it is included in the Taidad of Bhagirath Batabyal, and asked for the declaration of title, confirmation of possession or in the alternative for recovery of possession and a declaration to the effect that the record of right is wrong. In the record of rights, it may be stated here, the property is recorded in the names of the defendants. The defendants' case shortly stated was that the property is included in another Taidad called Becharam Batabyal's Taidad and that in the ordinary course of succession they have acquired title to it and are in possession of it.

The Munsif made a decree declaring the plaintiffs' niskar right to an undivided 2/15th share of the property in suit and confirmed their possession in respect of that share.

The defendants preferred an appeal and the plaintiffs a cross-appeal. The result of these was that the Subordinate Judge declared the plaintiff's title to the entire 16 annas of the property as against the defendants, and confirmed their posses-

sion therein and declared the record of rights to be wrong.

Now the position seems to be this. The Munsif found that the genealogy upon which the plaintiffs relied was not complete and contained some false and unfounded statements, that they had not made their co-sharers parties to the suit, and that they had succeeded in establishing their title only to the extent of 2-15th share. The Subordinate Judge held that the record of rights which stands in the defendants' favour has been amply rebutted by the plaintiffs' evidence, that the entry in the record of rights is wrong, that the defendants have no right to the property, and that the plaintiffs have got title to and are in possession of it. As regards the extent of the plaintiffs' title, the Subordinate Judge was not satisfied that the plaintiffs have got no other co-sharer living, and though he found that the plaintiffs' title had been made out only to the extent of 2-15th, he was satisfied that the defendants were not plaintiffs' co-sharers. As he found the plaintiffs' evidence of possession to be satisfactory, he decreed the suit as above stated, making a reservation that the plaintiffs' co-sharer, if any, will not be bound by this judgment.

The decision of the learned Judge has been challenged before us upon several grounds which ultimately resolve themselves into two, the first being that the plaintiffs' title should not have been declared, upon the findings of the learned Judge himself, to any thing beyond the 2-15th share, and the second being that if the first ground succeeds the plaintiffs' possession should be confirmed to the extent of that share only.

The first ground obviously must succeed as there is no point in making a declaration to the extent of 16 annas as against the defendants only which will not be operative as against the plaintiffs' co-sharers. This declaration is wholly unnecessary in view of the fact that the declaration as to the erroneous character of the entry in defendants' favour is being retained, and if this declaration is made it may lead to complications.

As regards the second ground I am of opinion that the decree confirming the plaintiffs' possession in the entire sixteen annas of the tank need not be disturbed as the defendants have been found to be trespassers. The plaint discloses sufficient materials for a cause of action for a prayer for confirmation of possession. The finding of the learned Judge is that the plaintiffs have been all along in possession, and it is the prayer for the confirmation of possession with which we are here concerned. It is unnecessary in the present case to enter upon the discussion of the question whether and under what circumstances a suit for recovery of possession may succeed as against a trespasser merely on the strength of previous possession for any period short of the statutory period of twelve years, a question which has led to considerable diversity of judicial opinion so far as this Court is concerned beginning with the case of *Nisa Chand Gaita* v. *Kanchiram Bagani* (1) and ending with that of *Nala Kishore Talakdas* v. *Paro Bewa* (2). The present case, in my opinion, falls well within the dictum of the Judicial Committee in the case of *Mt. Sundar* v. *Mt. Parbati* (3) in which their Lordships observed that possession lawfully attained in the sense that it was not procured by force or fraud but peaceably, no one interested opposing, is entitled to be maintained against all comers except such as could plead a preferential title. I am accordingly of opinion that the declaration as to confirmation of possession which the plaintiff has succeeded in getting in the Court of appeal below should be allowed to stand.

The result is that this appeal succeeds only to this extent that the declaration as to the plaintiffs' title to be found in the decree of the learned Subordinate Judge will be expunged, and the rest of the said decree will stand. In view of the technical nature of the appellants' success, he will get no costs in this appeal and each party will bear their own costs therein.

**Graham, J.**—I agree.

G.B. *Appeal partly allowed.*

---

(1) [1899] 26 Cal. 579=3 C. W. N. 568.
(2) A. I. R. 1922 Cal. 193=50 Cal. 23.
(3) [1889] 12 All. 51=16 I. A. 186=5 Sar. 448 (P. C.)

## A. I. R. 1927 Calcutta 933

MUKERJI AND GRAHAM, JJ.

*Bepin Behari Dandapat* and *others*—Defendants—Appellants.

v.

*Trailakya Nath Dandapat* and *others*—Plaintiffs—Respondents.

Appeal No. 69 of 1925, Decided on 2nd December 1926, from the decree of the Dist. Judge, Zillah Midnapur, D/- 5th June 1924.

(*a*) *Record of rights — Presumption arising from, is conclusive until rebutted.*

The presumption arising from the entry in the record of rights is a very important piece of evidence and is conclusive until it is rebutted by evidence. [P 934 C 1]

(*b*) *Attestation—Mere attestation does not prove knowledge of contents by attestator.*

Mere attestation is not sufficient for the purpose of imputing to an attesting witness knowledge of the contents of the document attested by him, in the absence of facts and circumstances which would indicate such knowledge. [P 934 C 1]

*Mritunjoy Chattopadhya*—for Appellants.

*Santosh Kumar Pal*—for Respondents.

**Mukerji, J.**—The principal defendants are the appellants in this appeal. The appeal arises out of a suit for declaration of title and confirmation of possession. The suit has been decreed by both the Courts below. Plaintiffs' case shortly stated was that the land in suit had been purchased by them under a kabala, dated 1294, from a person who in his turn had made a purchase in respect of it in 1290. The plaintiffs alleged that after their purchase they were in possession of the land through a tenant named Haru, that thereafter they were in possession thereof through another tenant named Mahipati, and that the latter surrendered in 1317 corresponding to 1910 and that since then they were in khas possession. In 1916 the lands were recorded in the record-of-rights in the names of the defendants and as the plaintiffs' title and posession were thereby jeopardised they instituted the present suit for declaration of title and confirmation of possession.

In support of the plaintiffs' case, amongst other documents, the plaintiffs relied upon the kabala of their purchase, dated 1294, that of their vendors' purchase, dated 1290, a plaint and a decree on suit for rent against their tenant Haru dated 1897, a chitta of the Irrigation department showing Mahipat's possession before and during 1915-16, receipts and copies of registers of the Irrigation department showing payment of water rate for this land as well as other lands, collection papers, some counterfoils of rent receipts and a kabuliat, dated 1922, which the plaintiffs had executed in favour of the irrigation department for payment of Irrigation charges. On a consideration of these documents as well as of the other evidence, oral and documentary that was adduced in the case the Courts below came to the conclusion that the plaintiffs had title to the land in suit and were also in possession of it.

The learned District Judge has held that the boundaries given in the kabalas of 1290 and 1294 may be reconciled on three sides, that the plaint and decree of the rent suit of 1897 give the same boundaries and that none of the other documentary evidence with the exception of the kabuliyat of 1922 gives the boundaries of the land they deal with. He does not appear to have been very much impressed by the oral evidence by which plaintiffs' possession through tenants was sought to be proved. He relied a good deal upon the kabuliyat of 1922, which gives the boundaries of the land as they exist at present, and contains the signature of the defendant 1, as an attesting witness. On the whole he accepted the plaintiffs' case as true and affirmed the decree of the trial Court decreeing the plaintiffs' suit.

The learned vakil appearing on behalf of the appellants in this case has taken several grounds for the purpose of challenging the decree passed by the learned District Judge. Amongst these grounds three may be mentioned as being worthy of consideration.

One of these grounds relates to the kabuliyat of 1922 which is referred to in the judgment of the learned District Judge. The kabuliyat from the list of documents appears to have been marked as Ex. 6 in the case. It is, however, not on the record before us. What may be gathered as to the contents of this kabuliyat seems to be that there are recitals in this document which go to show that the plaintiffs were in possession of the land in suit. If it was merely the recitals in this document which were sought to be used in favour of the plaintiffs and

against the defendants the objection that could legitimately be taken to the use of this document would be that the recitals are not admissible in evidence. The more so because they would amount only to an admission made by a party in his own favour.

Another objection relates to the finding of the learned District Judge as regards knowledge on the part of the defendant 1, because of the fact that his name appears as an attesting witness to this kabuliyat. The learned Judge does not appear to have found any facts or circumstances which would go to indicate that the defendant 1 when he put his name down on the kabuliyat as an attesting witness had knowledge of its contents and in the absence of facts and circumstances which would indicate such knowledge, as has been repeatedly laid down, mere attestation is not sufficient for the purpose of imputing to an attesting witness knowledge of the contents of the document attested by him.

These two objections to our mind seem to be not altogether without substanee. But apart from them there is a more serious one to which I shall presently refer and on a consideration of that objection it seems to me that the case must be sent back for a re-hearing of the appeal. The record-of-rights, as I have stated, shews that the defendants were recorded as being in possession of the lands in the year 1916 or at least that was the year in which the record-of-rights was finally published. In the judgment of the learned District Judge nothing appears from which it can be gathered that he was allowing the defendants the benefit of the presumption which arises from the entry in the record-of-rights. It is true that on a consideration of the documentary evidence in the case coupled with such oral evidence as he considered reliable he came to the conclusion that the plaintiffs' title was proved and that their possession had been established. But this presumption which the law allows and which, in my opinion, is a very important piece of evidence and is conclusive until it is rebutted by evidence adduced on the side of the plaintiffs does not appear to have been properly taken into account by the learned District Judge. It being an admitted feature of the case that excepting the kabuliyat of 1922 there is no documentary evidence posterior to 1897 which shows plaintiffs' possession, the record-of-rights of 1916 is a very important piece of evidence, the exact value of which should be appraised in deciding the case.

I am accordingly of opinion that the decree passed by the learned District Judge must be set aside and the case sent back to his Court so that he may now proceed to re-hear the appeal and deal with it in accordance with the observations made above.

Costs of this appeal will abide the result.

**Graham, J.**—I agree.

G.B. *Case remanded.*

---

## A. I. R. 1927 Calcutta 934

SUHRAWARDY AND CAMMIADE, JJ.

*Rajani Kanta Shaha Banik*—Plaintiff—Appellant.

v.

*Ramani Mohan Goswami* and *others*—Defendants—Respondents.

Appeal No. 1159 of 1924, Decided on 30th November 1926, from the appellate decree of the first Addl. District Judge, Dacca, D/- 25th February 1923.

*Specific Relief Act, S. 42, Proviso—Suit for a mere declaration—Property leased to insolvent-defendant, sold as belonging to latter—Suit barred under S. 42 if it omits to ask for consequential relief.*

Where a plaintiff brought a suit for declaration of title to certain property leased to the insolvent-defendant but wrongly sold by insolvency Court as belonging to the insolvent,

*Held* : that inasmuch as the plaintiff must get not only a declaration of his title but must get rid of the sale of the property by the insolvency Court as belonging to the insolvent, he was bound to sue for consequential relief in addition to the declaration of his title and so his suit was barred under S. 42. [P 935, C 1]

*Hemendra Kumar Das*—for Appellant.

*Rajendra Chandra Guha*—for Respondents.

**Judgment.**—The question raised in this appeal is that the decision of the lower appellate Court is wrong by which that Court has confirmed the decree of the Court of first instance which dismissed the plaintiff's suit on his failure to put in proper Court-fees on the plaint. The property is claimed by the plaintiff under a mortgage-decree and the subsequent purchase by him in execution of

the mortgage-decree against the insolvent who is his father-in-law. His case is that subsequent to his purchase his father-in-law took a lease of the house and has been living in it. The insolvency Court ordered the property to be sold as that of the insolvent. The plaintiff applied to that Court for determination of his title to the property but the insolvency Court upheld the order passed by it for the sale of the property and refused to go minutely into the question of title. Thereupon the plaintiff brought the present suit for a mere declaration of his title to the property. Both the Courts below found that the suit is barred under S. 42, Specific Relief Act, and that the plaintiff is bound to sue for consequential relief and properly to stamp the plaint. We think that this view is correct. The plaintiff must get not only a declaration of his title but must get rid of the sale of the property as belonging to the insolvent by the insolvency Court. There has been a further complication since the institution of the suit, viz., the property has been sold under order of the insolvency Court and purchased by a third party. The suit, in our opinion, even if it be held to be properly stamped, will be fruitless. The learned vakil for the appellant asks for permission to withdraw the suit. We think that we should give him that permission but he must pay the costs of the respondent in all the Courts.

J.V. *Order accordingly.*

---

## A. I. R. 1927 Calcutta 935

DUVAL AND MITTER, JJ.

*Sm. Matangini Devi* and *another*—Appellants.

v.

*Behari Lal Benerjee*—Respondent.

Appeal No. 453 of 1925, Decided on 20th December 1926, from the original order of the District Judge, Burdwan, D/- 22nd August 1925.

***Execution—Objection by judgment-debtor—Decree-holder absent—No adjudication on merits of objection-petition—Order allowing objection is set aside.***

**In objection by the judgment-debtor to the execution of a decree the decree-holder was absent; the judgment-debtor was present by his pleader and the Judge passed the following order: "The petitioner's pleader is present. The execution case is hereby dismissed for default and petitioner's objection is allowed.', The merits of the application of objection were not argued before the Judge ex parte, nor did the Judge really come to any adjudication on the merits of that application:**

*Held*: that the further order "petitioners' objection is allowed," must be set aside.

[P 935 C 2]

*Panchanan Chowdhury* — for Appellants.

*Bankim Chandra Mukerji* and *Durga Das Roy*—for Respondent.

**Duval, J.**—In this case there was an application made for execution of a certain decree passed in a will case which had been finally decided by this Court on the 5th January 1921. In March 1923 an application was made to transfer the case to the Subordinate Judge of Asansol for execution. It was so transferred but was subsequently dismissed for default. Then a fresh application was made before the District Judge for execution of the decree on the 5th May 1924. A notice was issued apparently under O. 21, R. 22 and a petition of objection was filed. The case was adjourned for various reasons mainly because the District Judge engaged himself in the Sessions from August 1924 to August 1925 and came up on the 22nd of that month when the decree-holder was absent. The judgment-debtor was present by his pleader and the Judge passed the following order:

The petitioner's pleader is present. The execution case is hereby dismissed for default and petitioner's objection is allowed.

Now it is perfectly clear that the order dismissing the execution case for default is a good order and that order must stand simply on the ground on which it was given that is, the absence of the decree-holder. But that is no ground for adding "petitioner's objection is allowed." It does not appear on the record that the merits of this application of objection were argued before the Judge ex parte nor does it appear that the Judge really came to any adjudication on the merits of that application. We think, therefore, that the proper order is that while cofirming the order dismissing the execution case for default we set aside the further order "petitioners' objection is allowed." In case any other application is made it will be open to the judgment-debtor again to raise his objection.

In the circumstances, we pass no order as to costs.

R.D. *Order accordingly.*

---

## A. I, R. 1927 Calcutta 936 (1)

C. C. GHOSE, AND CAMMIADE, JJ.

*Tuka Mia*—Accused—Appellant.

v.

*King-Emperor*—Opposite Party.

Cr. A. No. 599 of 1926, Decided on 27th January 1927, from the order of the Ss. J. Noakhali, D/- 17th July 1926.

(a) *Criminal P. C., S. 297—Charge must set out all points of law and fact.*

As the law allows an appeal in cases of trial by jury on the ground of misdirections, the charge should be in such a form as to enable the Court of appeal to say that all points of law and fact were clearly and correctly and with sufficient fullness explained to the jury, having regard to the evidence adduced in the case : 34 *Cal.* 698, *Foll.* [P 936 C 2]

(b) *Criminal trial—Presiding officers should insist upon compliance with procedural law as embodied in statutes and decisions.*

It should be the duty of the presiding officers in criminal trials to see that the requirements of law as laid down in the Criminal Procedure Code and by the High Courts, are complied with fully and satisfactorily. [P 936 C 2]

*Suresh Ch. Taluqdar* and *Hem Kumar Bose*—for Appellant.

*Khondkar*—for the Crown.

**C C. Ghose, J.**—In this case we are of opinion that the only course open to us having regard to what is stated below, is to set aside the verdict of the jury and the sentence passed upon the accused and to order that the accused be retried according to law. The course that has been forced upon us in this case is one which we adopt with very great regret.

On a previous occasion the present appellant's case had come before this Court and it was then ordered that the accused should be retried, the conviction and sentence being set aside. That was sometime early last year. There has been a retrial in accordance with the previous order of this Court and the present accused has been convicted under the second part of S. 304. I. P. C., and sentenced to suffer rigorous imprisonment for ten years.

On the present appeal it has been contended before us that it is impossible to make out from the charge itself—it being so scrappy and insufficient as it appears on the record before us—with any degree of certainty that the charge is not open to the comment of misdirection. The charge as appears from the record consists of heads of what was stated to the jury. No doubt the law requires that the heads of a charge to the jury should be recorded, but it is equally clear that as the law allows an appeal in cases of trial by jury on the ground of misdirections the charge should be in such a form as to enable the Court of appeal to be satisfied that it was delivered with sufficient fullness to the jury and that it is such as to enable the Court of appeal to say that all points of law and fact were clearly and correctly explained to the jury having regard to the evidence adduced in the case. What we have said above is no more than what was laid down by a very eminent and experienced Judge of this Court—Mr. Justice Rampini—in 1907, in the case of *Panchu Das* v. *Emperor* (1). We have been through the heads of the charge as recorded by the learned Sessions Judge and, in our opinion, it is impossible for us to say that the heads of the charge to the jury have been recorded with sufficient fullness and clearness as required under the ruling cited above. It should be the duty of presiding officers in criminal trials to see that the requirements of law as laid down in the Criminal Procedure Code and as insisted upon by this Court from time to time are complied with fully and satisfactorily. That has not been done in this case and we are, therefore, left, there being no other alternative, to adopt the course indicated above.

The result, therefore, is that the present conviction and sentence must be set aside and the accused should be retried. We direct that such re-trial should take place as soon as possible. In the circumstances which have happened in this case we direct that the re-trial should take place before the learned Sessions Judge of Comilla.

Let the record be sent down as soon as possible.

J.V. *Retrial ordered.*

(1) [1907] 34 Cal. 698=11 C. W. N. 666.

---

## A. I. R. 1927 Calcutta 936 (2)

B. B. GHOSE AND GRAHAM, JJ.

*Srish Chandra Dutta* and *others*—Plaintiffs—Appellants.

v.

*Mathura Nath Dutta*—Defendant—Respondent.

Appeal No. 1033 of 1924, Decided on 29th April 1926, from appellate decree of the Second Sub-Judge, Tippera, D/- 4th February 1924.

*Co-sharer — One co-sharer can have joint possession over land abandoned by a tenant and occupied by another co-sharer landlord.*

On the abandonment of a holding by a tenant, a co-sharer landlord is entitled to joint possession without seeking for partition of the joint property as against another co-sharer landlord who takes possession of the holding ; 26 *Cal.* 553, *Foll.* [P 937 C 2]

*Birendra Kumar Das*—for Appellants.

*G. C. Sen* and *Preo Nath Dutta*—for Respondent.

**Judgment**.—This appeal arises out of a suit for joint possession with regard to a four annas share of a piece of land. The plaintiffs and the defendant are co-sharer landlords. The disputed land was in the possession of a tenant named Brindaban Nath. After his death, his widow Anandamoyee was in possession of it. Then Anandamoyee abandoned the holding about 11 years ago and the defendant who is a landlord to the extent of a four annas share took possession of the entire land. The plaintiffs, therefore, seek joint possession with the defendant of their four annas share of the land, to which they say they are entitled on the abandonment of the holding by the tenant. The first Court made a decree in favour of the plaintiffs. On appeal, the lower appellate Court dismissed the suit on what appears to be the principal ground that the defendant had been in actual possession of the land for over 11 years by erecting a tin-shed thereon. He held that there was no ouster of the plaintiffs or any waste of the joint property nor was there any injury caused by the defendant's possession. The Subordinate Judge on these findings dismissed the plaintiffs' suit. The plaintiffs have appealed against that decree.

The first difficulty in understanding the judgment of the Subordinate Judge is why the question of waste and injury has been brought in. It appears, however, that in certain of the reported cases persons in the position of the plaintiffs in this case charged waste and injury against their opponents and those words have been taken from the reports of those cases. But, in the present case, there is no allegation as regards waste and injury. The plaintiffs want to enforce their ordinary right as co-sharers to recover joint possession and what we have to see is whether the plaintiffs have lost their right to joint possession and should not be allowed to exercise that right on the ground of justice, equity and good conscience as laid down by the Judicial Committe in the well-known case of *Watson & Co.* v. *Ramchand Dutt* (1).

In this case, there is nothing which can be said to bring into play the rule of justice, equity and good conscience against the plaintiffs. The only thing upon which the learned advocate for the defendant-respondent relies is the fact that the Subordinate Judge has found that the defendant has been in occupation of the disputed land without any objection by erecting a tin-shed thereon for over 11 years. From this we are asked to infer that the defendant took possession with the consent and acquiescence of the plaintiffs. This question of acquiescence was actually raised in the issues in the trial Court, but it was not pressed by the defendant. It can hardly, therefore, be allowed to be raised in second appeal for the first time. The matter, therefore, stands thus ; The plaintiffs had the right to joint possession with the defendant on the abondonment of the holding by the tenant. They did not proceed to exercise that right at once, why it does not appear from the judgment. But we are informed that several of the plaintiffs were and are still minors and that was the reason why this was not done. But the fact of their not rushing into Court cannot take away their ordinary right which the law allows them and, as there is nothing in the circumstances which can prevent them from exercising their right, they are entited to joint possession of the property to the extent of their four annas share with the defendant. The case of *Watson & Co.* v. *Ramchand Dutt* (1) and *Lachmeswar Singh* v. *Manowar Hossein* (2) were distinguished in the case of *Dilhar Sardar* v. *Hosein Ali Bepari* (3) where it was held that a person in the position of the plaintiffs in the present case was entitled to joint possession without seeking for partition of the joint property. That case applies under the present circumstances.

It is lastly represented to us by the learned advocate for the respondent that the defendant uses the disputed land for

(1) [1890] 18 Cal. 10=17 I. A. 110 5 Sar. 535 (P. C.).
(2) [1892] 19 Cal. 253=19 I. A. 48=6 Sar. 133 (P. C.).
(3) [1899] 26 Cal. 553.

a charitable purpose by erecting a dispensary on it : and the result of giving joint possession to the plaintiff would be to destroy it. As a matter of law, we cannot take that into consideration. But if the land is being used for a charitable purpose, certainly the plaintiffs will see their way to enforce their right in such a manner as not to destroy the charitable work of the defendant. With these observations we decree the appeal, set aside the decree of the Subordinate Judge and restore that of the Munsif with costs in this Court as well as in the Court of appeal below.

D.D. *Decree set aside.*

---

## A. I. R. 1927 Calcutta 938

B. B. GHOSE AND PANTON, JJ.

*Dasarathy Chakravarty*—Appellant.

v.

*Maharaja Khaunish Chandra Ray*—Respondent.

Appeal No. 349 of 1924, Decided on 18th February 1926, from the original order of the Sub-Judge, Nadia, D/- 20th September 1924.

(a) *Civil P. C., O. 43, R. 1 (j)—Order refusing to set aside the dismissal of an application under O. 21, R. 90, for default is non-appealable—Civil P. C., O. 21, R. 90.*

There is no appeal against an order refusing to set aside the dismissal of an application under O. 21, R. 90, for default : 25 *C. L. J.* 163, *Dist* ; 31 *Cal.* 207, *Foll.* [P. 938, C. 2]

(b) *Civil P. C., O. 9, R. 9—Applicability.*

Rule 9 does not apply to proceedings in execution,: 17 *All.* 103 (*P. C.*). and 18 *Cal.* 635 and 41 *Cal.* 1, *Foll.* [P. 939, C. 1]

*Rupendra Kumar Mitter* and *Dharmadas Seth*—for Appellant.

*D. N. Bagchi* and *Mohini Mohan Bhattacharjee*—for Respondent.

**Judgment.**—The appeal raises the question whether O. 9, R 9, Civil P. C., is applicable to an application made for setting aside a sale in execution of a decree under O. 21, R. 90, Civil P. C. The question arises in this way : The appellant before us presented an application for setting aside a sale under O. 21 R. 90. On the date fixed for the hearing of the case the applicant was not ready with his evidence and he asked for time. Time was granted on one occasion but on the next occasion he was still not ready with his evidence. Further time was asked for and the learned Subordinate Judge refused to grant time and thereupon the pleader for the applicant stated that he had no evidence and no further instructions. Upon that the application for setting aside the sale was rejected for default of the applicant. This order of dismissal was passed on the 23rd August 1924. On the 20th September 1924 one of the judgment-debtors put in an application purporting to have been made under O. 9, R. 9, Civil P. C., for restoration of the application for setting aside the sale. The learned Subordinate Judge rejected the application on the ground that that rule did not apply to such an application. The judgment-debtor appeals to this Court and a preliminary objection has been taken to the competency of the appeal on the ground that there was no appeal under the Code against an order made by the Subordinate Judge. In answer to that objection the learned-vakil for the appellant relies on O. 43, R. 1, Cls, (c) and (j), Civil P. C. Cl. (c) only refers to an order rejecting an application for setting aside the dismissal of a suit. That clause, therefore, does not apply in terms.

It is contended that the order falls under Cl. (j), and reliance has also been placed on the case of *Kali Kanta Chuckerbutty* v. *Shyam Lal Das Basu* (1), in support of an appeal. This appeal is not against the order of dismissal for default which might fall within Cl. (j) of that rule. But this appeal is against the order refusing to set aside the dismissal for default. It is contended on behalf of the respondent that on the authority of the case of *Jung Bahadur* v. *Mahadeo Prosad* (2), which was decided under the old Code, no appeal lies against such an order. We think that the contention of the respondent should be accepted that there is no appeal against an order refusing to set aside an order of dismissal for default of an application such as this. Then with regard to the main question whether O. 9, R. 9, applies to such a case as this, we are asked to set aside the order in the exercise of our revisional jurisdiction. We are of opinion that the case of *Thakur Pershad* v. *Sheikh Fakirulla* (3) is really decisive of the question. There, their Lordships in dealing with

(1) [1916] 25 C. L. J. 163=38 I. C. 598.
(2) [1903] 31 Cal. 207=8 C. W. N. 160.
(3) [1894] 17 All. 106=22 I. A. 44=6 Sar. 526 (P. C.).

the contention that by virtue of S. 647 of the Code of 1882, S. 373 of the Code applied to execution proceedings observed as follows :

The suggestion is that it is applied by force of S. 647. But the whole of Chap. 19 of the Code, consisting of 121 sections, is devoted to the procedure in executions, and it would be surprising if the framers of the Code had intended to apply another procedure, mostly unsuitable, by saying in general terms that the procedure for suits should be followed as far as applicable. Their Lordships think that the proceedings spoken of in S. 647 include original matters in the nature of suits such as proceedings in probates, guardianships, and so forth, and do not include executions.

Their Lordships approved of the case of *Bunko Behary Gangopadhya* v. *Nil Madhub Chuttopadhya* (4), where the matter is stated in equally clear terms. The section of the present Code corresponding to the old S. 647, is 141, which runs thus :-

The procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

This section, it may very well be assumed, was enacted in these terms to give proper effect to the decision of their Lordships in the case of *Thakur Pershad* v. *Fakirullah* (3). If it was intended that proceedings relating to suits should be applicable to proceedings under O. 21 of the Code or similar proceedings it might have been stated that the procedure with regard to suits would be applicable to other proceedings under the Code. It seems, therefore, that the clear intention of the section is that the procedure relating to suits would not apply to proceedings relating to execution, the procedure with regard to which is laid down in O. 21 of the Code itself. In the case of *Hari Charan Ghose* v. *Manmatha Nath Sen* (5), Sir Lawrence Jenkins, Chief Justice, held that O. 9, R. 13, Civil P. C., 1908 was not applicable to a proceeding under Rr. 100 and 101 of O. 21 of the Code and, in delivering the judgment of the Court he referred to the case of *Thakur Pershad* v. *Fakirullah* (3), as laying down the rule that the procedure referred to does not apply to execution proceedings. The argument urged on behalf of the appellant by Babu Rupendra Kumar Mitra is that the Privy Council decisions should be confined to an application for execution but the case of *Hari Charan Ghose* v. *Manmatha Nath Sen* (5), is a clear answer to this contention. It is urged on behalf of the appellant that there are conflicting cases on the point and the matter should be referred to a Full Bench for decision. But as we understand the decisions of the Privy Council the matter seems to be clearly laid down and we do not think that any reference to a Full Bench is called for. The appeal, therefore, is dismissed with costs. We assess the hearing fee at three gold mohurs.

J.V. *Appeal dismissed.*

(4) [1891] 18 Cal. 685.
(5) [1915] 41 Cal. 1=19 I. C. 683=18 C.W.N. 848.

---

## A. I. R. 1927 Calcutta 939

MUKERJI AND GRAHAM, JJ.

*Kumarish Ch. Mukhopadhya*—Plaintiff—Petitioner.

v.

*Ram Taran Ghosh* and *others*—Opposite Party.

Civ. Revn. No. 683 of 1926, Decided on 21st December 1926, from the judgment of the Dist. Judge, Burdwan, in Rent Motion No. 10 of 1925.

*Bengal Tenancy Act, S.* 153—*Decision that jama set up formed part of bigger jama does not come within exception to S.* 153.

Where the decision in a rent suit was that the jama set up had no separate existence, but formed part of a bigger jama,

*Held* : that no question has been decided which would bring the case within the exception referred to in S. 153. [P 940 C 1]

*Gopendranath Das*—for Petitioner.

*Biraj Mohan Mujumdar* — for Dy. Registrar.

**Mukerji, J.**—The judgment of the learned District Judge complained of in this rule deals with an application for revision of a decision passed by the learned Munsif in a suit for rent. An appeal was filed by the petitioner before us in the Court of the learned District Judge against the said decision of the Munsif. The learned Judge, being of opinion that no appeal lay, passed an order to the effect that the memorandum of appeal would be treated as a petition of motion. If the learned Judge was dealing with the matter in revision it is clear that his judgment cannot be assailed, for he has observed in his judgment that even if the Court of first instance had

wrongly decided the question of res judicata in favour of the opposite party, that decision could not be challenged in revision, because in revision the learned Judge would be confined to questions of jurisdiction.

It has, however, been urged before us that an appeal lay to the learned District Judge. Now, it appears that the plaintiff's case was that there were two jamas, one bearing a rental of 10 annas and the other of Rs. 2-2 annas and the suit out of which this application arises was one for recovery of rent in respect of the jama bearing the rental of 10 annas. The defence set up on behalf of the defendants was that this jama which is alleged to bear the rental of 10 annas has no separate existence but that this jama together with the other jama formed one bigger holding of which the total rental payable by the defendants to the plaintiff was Rs. 2-12-0. The decision of the Munsif was that so far as the jama alleged on behalf of the plaintiff was concerned, it had no separate existence and there was no relationship of landlord and tenant between the parties in respect of such a jama and generally speaking the findings of the learned Munsif were in favour of the contention put forward on behalf of the defendants, namely, that the defendants held the bigger jama as was alleged by them and in that view of the matter the plaintiff's suit was dismissed by him.

The petitioner's contention before us is that the decision of the learned Munsif as aforesaid amounted to a decision on a question of the amount of rent annually payable by a tenant and that, therefore, the case comes within the exception provided for in S. 153 153, Bengal Tenancy Act. An unreported decision of this Court has been cited as an authority for the position which the petitioner takes up in this rule. With all respe t to the learned Judge who decided that case I am of opinion that that decision, if it purported to lay down any general proposition such as has been contended for on behalf of the petitioner, was not correct and I am unable to follow the same. I am of opinion that in this particular case no question has been decided which will bring the case within the exception referred to in the section and consequently no appeal lay to the learned District Judge. In this view of the matter I am of opinion that the rule should be discharged.

As the costs of the opposite parties who have appeared in this rule appear to have been deposited by the petitioner, there will be no further order as to costs in this rule.

**Graham, J.**—I agree.

R.D. *Rule discharged.*

---

## A. I. R. 1927 Calcutta 940

MUKERJI AND GRAHAM, JJ.

*Abdul Bari* and *others*—Defendants—Appellants.

v.

*Amirjan* and *others*—Plaintiffs—Respondents.

Appeal No. 629 of 1924, Decided on 26th November 1926, from the appellate decree of the Dist. Judge, Chittagong, D/- 24th November 1923.

*Decree—Setting aside—Fraud — Decree obtained by practising gross fraud on Court—Suit to set aside such decree is maintainable.*

Where a suit to set aside a former decree is not founded upon a mere allegation that the decree was wrong or incorrect or obtained by perjured evidence but upon allegations which, if true, would amount to a gross fraud practised in relation to the proceedings in Court:

*Held*: that upon such allegations a decree may always be challenged. [P 941 C 1]

*Norendra Kumar Das* - for Appellants.

*Chandra Sekhar Sen*—for Respondents.

*Biraj Mohan Majumdar*—for Dy. Registrar.

**Mukerji, J.**—The plaintiffs instituted the suit out of which this appeal arises for setting aside a decree passed in a mortgage suit on the ground that it was fraudulently obtained, and for other reliefs.

In 1886, two persons Uzir Ali and Khadim Ali executed a mortgage in respect of lands of Sch. 1 to the plaint. In 1892, Uzir Ali alone executed a document, in respect of the lands of Schs. 1 and 2 to the plaint, the exact character of which is disputed in the present suit. The interest of the mortgagee under the document of 1886 ultimately passed on to one Asgar Ali who in 1890 instituted a suit, being suit No. 25 of that year, on the basis of the said mortgage, obtained a decree and in execution thereof purchased the lands of Sch. 1 and then sold them to the predecessors of the present defendants.

The plaintiffs who are the heirs of Uzir Ali at first instituted suit No. 636 of 1920, practically ignoring the mortgage of 1886 and praying to redeem the lands of Schs. 1 and 2, treating the document of that year as a mortgage. The claim was opposed on the ground that the defendants were in possession under purchase from Asgar Ali who had obtained the decree under the mortgage of 1886 as aforesaid. The plaintiffs then withdrew that suit with liberty to bring a fresh one. Then the present suit was filed.

Shortly stated, the plaintiffs' case is that the mortgage of 1886 had been paid off, suit No. 25 of 1898 was a fraudulent one and all proceedings taken therein were tainted with fraud and the plaintiffs had no knowledge of them and consequently the decree and proceedings subsequently held were void and inoperative.

The main defence of the defendants on the merits was that Uzir Ali himself had appeared in suit No. 25 of 1898 and had filed a written statement pleading that he had tendered the money due on the mortgage of 1886 but it had not been received and that Uzir Ali had thereafter withdrawn from the contest, and that there was no fraud. The other defences of the defendants were that the suit was barred by limitation and the document of 1892 was a kobala and not a mortgage and consequently the plaintiffs had no rights left in them under which they could get any relief in the suit. The Courts below have concurrently decreed the suit. Some of the defendants have then preferred this appeal.

The appellants' first ground is that the suit is not maintainable and that at any rate the findings of the lower appellate Court are not sufficient to sustain the decree. The suit, it must be remembered, is not founded upon a mere allegation that the decree was wrong or incorrect or obtained by perjured evidence but upon allegations which, if true, would amount to a gross fraud practised in relation to the proceedings in Court. It is well settled that upon such allegations a decree may always be challenged. As regards the question of sufficiency of the findings the one that is enough to vitiate the decree is that Uzir Ali never appeared in the suit, but a written statement purporting to have been his, had been fraudulently filed in the suit. This finding has been recorded in so many words in the judgment of the learned Munsif. That the Judge has affirmed this finding is clear from his observation that

> it is difficult to believe that Uzir Ali having fabricated a false receipt would allow the suit to be decreed in this fashion and it is more clearly apparent from his finding on the question of plaintiffs' knowledge of the proceedings which he says dates from 1920, namely, from the time when the written statement in suit No. 636 of 1920 came to the plaintiffs' knowledge.

This ground, therefore, has no substance. The question of limitation, which has been next argued on behalf of the appellants, cannot arise if the finding on the question of plaintiffs' knowledge which is a finding of fact is right.

Lastly, the appellants contended that the document of 1892 was a kabala and not a mortgage. The learned Judge in view of the paucity of the materials on the record has left the question open and the learned vakil for the appellants was eventually convinced about the propriety of this course adopted by the learned Judge. The appeal fails and is accordingly dismissed with costs.

**Graham, J.**—I agree. If it were the case that the former decree which it is sought to set aside, had been obtained by fraud in the ordinary sense of the word, e. g., by means of perjured evidence, false documents, or the like, so as to mislead the Court and obtain an erroneous decision, I should not in that case be prepared to hold that the matter could be reopened, and the decree set aside. There is, however, something more than that. There are, as my learned brother has pointed out, concurrent findings in both the Courts below that the decree in the former suit – No. 25 of 1898—was obtained by practising a gross fraud upon the Court, and, that being so, it is well established by authority that the decree is liable to be set aside.

J.V. *Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 941

RANKIN, C. J., AND C. C. GHOSE, J.

*Kesoram Poddar*—Defendant—Appellant.

v.

*Banamali Dey* and *others*—Plaintiffs—Respondents.

Appeal No. 43 of 1926, Decided on 4th January 1927, from the original decree of Pearson, J., D/- 1st February 1926.

*(a) Evidence Act, S. 116 — Landlord and tenant—Person attorning to lessors as tenant cannot question title of lessors.*

Where a person has attorned to the lessors as a tenant, it does not lie in his mouth to question in any manner whatsoever the title of the lessors. [P 942, C 2]

*(b) Landlord and tenant—Rent paid according to Bengalee months—Tenancy is regulated by Bengalee months.*

Where the rents were paid according to the Bengali months,

*Held* : that the tenancy was one which was regulated by the Bengali months in the absence of any proof to the contrary. [P 943, C 2]

*S. C. Roy* and *B. Rai Chowdhury*—for Appellant.

*H. D. Bose* and *P. N. Sen*—for Respondents.

**C. C. Ghose, J.**—This is an appeal against a judgment of my learned brother Mr. Justice Pearson dated the 1st February 1926, by which he decreed the plaintiffs' claim for rent aggregating to a sum of Rs. 1511-14-0 and for ejectment from premises No. 1, Raja Brojendra Narain Roy Street, against the defendant Kesoram Poddar.

The facts, shortly stated, are as follows : It appears that the property in question is one of several parcels comprised in a lease for 25 years from the 23rd July 1919, granted by the Maharajah Sir Manindra Chandra Nundy on the 29th July, 1919, in favour of three persons who are described as the Kallas. On the 22nd December 1919, there was an assignment of the lease by the then original lessees to the present defendant Kesoram Poddar. The premises in question were busti lands and the defendant Kesoram shortly after the last mentioned date proceeded to divide the said busti lands into two portions, one of which was called the eastern portion and the other the western portion. The eastern portion was let out to two tenants named Kamini Dasi and Benode Behari Ghosh. As regards the western portion to which the present suit relates, it appears that Kesoram retained possession thereof and it is said that he erected thereon a pucca house at considerable expense. On the 7th April, 1923, Kesoram assigned in his turn the said lease dated the 29th July 1919, to one Bhagwandas Kalla. It appears that after the last mentioned assignment of the lease, Kesoram Poddar became a tenant or sub-lessee of the premises comprised in the said original lease. On the 30th September 1923, Bhagwandas Kalla, the last assignee, assigned in his turn, the said lease to the present plaintiffs who became also entitled to the arrears of rents due from the tenants in actual occupation of the lands.

It appears that at no time from the date when the defendant Kesoram became tenant of the said western portion of No. 1 Raja Brojendra Narain Roy Street, did he pay any rent whatsoever for the same and in this suit the present plaintiffs are seeking to recover from the defendant a sum of Rs. 1511-14-0 being the rent due from the 7th April 1923 up to the end of the Bengali month, Magh 1331. The rent is calculated at the rate of Rs. 68 per month. So far as the claim for rent is concerned, there was and is no dispute and at the trial before Mr. Justice Pearson, the defendant did not resist it.

So far as the claim for ejectment is concerned, it appears from the defendant's written statement that he wanted to raise the pleas that the said western portion was excluded from the operation of the assignment of the 7th April 1923, and that the notice to quit which had been given by the plaintiffs' solicitor on the 9th January 1925, was bad in law and that in those circumstances the plaintiffs were not entitled to any decree for ejectment.

At the hearing before us, the question of the invalidity or otherwise of the notice to quit has been urged and two further points have been taken, namely, (1) that the plaintiffs being minors at the time when the assignment of the 30th September 1923, of the lease in their favour was executed by Bhagawandas Kalla, they had acquired no title whatsoever to the property in question and (2) that having regard to the fact that the defendant, Kesoram Poddar, after he had obtained an assignment of the lease from the Kallas on the 22nd December 1919, had erected a pucca house on the said western portion at considerable expense, no decree for ejectment could be awarded against him unless the plaintiffs were prepared to pay compensation to him.

As regards the second of these points, it is one which is clearly unsustainable. The plaintiffs were the lessors of the defendant Kesoram Poddar. He had attorned to them as a tenant and it did not and does not lie in his mouth to question in any manner whatsoever the

title of his lessors. It may also be noticed in passing that it is not a point which was taken at the trial before Mr. Justice Pearson, nor one taken in the memorandum of the appeal.

As regards the third point, namely, whether the defendant was entitled to compensation, it appears that the pucca house in question had been erected on the western portion of the said premises before the defendant became a tenant under Bhagawandas Kalla. It was not a house or a pucca structure which was erected after the defendant had become a tenant of the premises and while the landlord stood by. In these circumstances the assignment of the 7th April 1923, must be taken to have included, among others, the pucca house which had already been erected by the defendant on the western portion of the premises. It is a little difficult, therefore, to understand how any claim by the defendant for compensation can possibly arise. The third point, therefore, must be negatived.

There remains, therefore, for consideration the question of the invalidity or otherwise of the notice to quit. The argument which has been represented to us is this. It is said that Kesoram became a tenant of the western portion of the premises in question from the 7th April 1923 and that, therefore, the notice to quit which had been given by the plaintiffs' solicitors calling upon the defendant to vacate the premises by the end of Magh 1331, B. S., was not a valid notice to quit because the tenancy was not one according to the Bengali calendar but was one from month to month from the 7th April 1923. It is further urged that assuming for the sake of argument that rents were payable according to the Bengali months, it could not be inferred therefrom that the tenancy itself was one which was or could be regulated by the Bengali months.

Now, the defendant did not go into the witness box. It is said that at the time of the hearing before Mr. Justice Pearson he was ill and could not adduce any evidence. Be that as it may, the materials before Mr. Justice Pearson consisted of the various documents referred to above and the notice to quit and of the reply thereto. In the notice to quit a claim was put forward that the plaintiffs were entitled to recover rent up to the end of the Bengali month of Magh 1331. In reply to the notice to quit which is printed at p. 21 of the paper-book, it was stated on behalf of the defendant that he was agreeable to pay the rent claimed. From these two documents it would appear that the defendant at that time, viz., on the 20th January 1925, did not, and was not minded to raise any question whatsoever that the rents were not payable according to the Bengali month. The matter, however, does not rest there. From an examination of the assignment of the arrears of rent dated 5th September 1924, (being a document to which Kesoram was a party) it appears that in respect of various premises included in the original head lease which had vested in the plaintiffs, rents were being paid by the tenants according to the Bengali months (see, in this connexion Schedule, Part II, statement of arrears of rent due to Bhadra 1330 B. S. at p. 77 of the paper-book.) It is true that in respect of one or two tenants mentioned in the said schedule, months according to the English calendar are mentioned. There were originally on the western portion of the premises in question two tenants named Dallu Singh and Gaya Prosad Singh into whose shoes Kesoram had stepped in.

As stated above, rents were due from Kesoram from the date when he attorned as tenant, namely, 7th April 1923. In that list there is also mentioned that the tenants on the eastern portion, namely, Kamini Dasi and Benode Behari Ghose, had to pay certain rents up to the month of Bhadra, 1330. The list itself is a statement of arrears of rent up to the end of Bhadra, 1330 B. S., showing that rents were collected according to the Bengali months. It appears also from the documents printed at pp 37, 46, 61 and 63 of of the paper-book that rents payable to the head lessor were regulated by the Bengali months. In these circumstances it would not be, in my opinion, a violent assumption to hold that rents in respect of the premises comprised in the head lease and in particular in respect of premises No. 1 Raja Brojendra Narain Roy Street, had to be and were paid according to the Bengali months. It is said, however, that although the rents might have been paid according to the Bengali months, it does not follow that the tenancy was one which was regulated by the Bengali months. As stated above,

there is no oral evidence in this case. Whatever evidence there was on the record is documentary and on the evidence it has not, in my opinion, been made out that the tenancy in this case was one which was not regulated by the Bengali months, but one which was regulated by the English months.

On a consideration of all the circumstances of the case, I am driven to the conclusion that the tenancy in this case was one which was regulated by the Bengali months and that the notice to quit calling upon the defendant to vacate the premises by the end of the month of Magh 1331, was a valid and proper notice to quit. That being so, the last point slso must be negatived and in my opinion this appeal fails and must be dismissed with costs.

**Rankin, C. J.**—I agree.

R.D. *Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 944

CHOTZNER AND DUVAL, JJ.

*Nikunja Behari Mullik*

v.

*Sm. Usalati Devi*

Cr. Ref. No. 194 of 1926, Decided on 24th September 1926, made by the Addl. S. J. Hooghly.

(*a*) *Criminal P. C., S.* 145—*Likelihood of breach of peace is necessary.*

Where there is no likelihood of breach of the peace occurring, proceedings under S. 145 are incompetent. [P 944 C 2]

(*b*) *Criminal P. C., S.* 145 (4)—*Person legally taking possession cannot be ousted.*

Taking possession under S. 87, Bengal Tenancy Act is not forcible and the person so taking possession cannot be ousted under Cl. (4). [P 944 C 2]

*Mrityunjoy Chatterjee* and *Bijan Kumar Mukherjee*—for 1st Party.

*Narendra Kumar Basu* and *Debendra Narain Bhattacharjee*—for 2nd Party.

**Duval, J.**—In this case the Additional Sessions Judge of Hooghly has made a Reference in a proceeding under S. 144, Criminal P. C. It appears that a certain holding was held by a Sanyasi who disappeared about two years ago and has not been heard of since. It appears that after that the landlord issued and served in the holding a notice through the collector's office under S. 87, Bengal Tenancy Act, to resume possession of the abandoned holding and that on the 3rd June her officers went to the land and took khas possession of the land and the Asram on it. Thereafter one Nikunja Behari Mullik claiming to be a disciple of the Sanyasi who has disappeared filed a petition before the Sub-Divisional Magistrate the next day stating that there was a fear of the breach of the peace if he went to the Asram again. At first there were certain proceedings forbidding both sides to go near the land under S.144, Criminal P.C., and subsequently on the 17th June a proceeding was drawn up under S. 145 stating that there was a probability of the breach of the peace and calling upon both sides to produce evidence of possession. The case went on and the Magistrate came to a finding that as a matter of fact the landlord had forcibly taken possession within two months of the order and he, therefore, gave possession to the complainant Nikunja, a disciple of the Sanyasi.

Against that order this Reference is made by the Additional Sessions Judge on the ground that there is no expectation of a breach of the peace. At the time of the hearing it is further urged in support of the reference for questioning the order that the lady is in possession and that she did not forcibly take possession but took possession legally and so cannot be ousted under the provisions of Cl. (4) of S. 145. We consider that there is a considerable amount of weight in both these objections. In the first place it appears that Nikunja and his fellow disciples are mainly people of Calcutta and apparently only used to go to the Asram occasionally. It is not very clear what right they had to the Asram as they did not appear to be Sanyasis and the Asram belonged to the Sanyasi who does not appear to have left any Sanyasi chela. The chance of a breach of the peace would only occur if the first party attempts to take forcible possession of the Asram.

It would also appear that the landlord complied with the provisions of S. 87, Bengal Tenancy Act, and, as she has done so, it cannot be said that she has taken forcible possession within the meaning of the clause I have referred to. She appears to have gone on the land by virtue of the provisions of the Bengal Tenancy Act and that would be a legal entry.

For these reasons we consider that the reference should be accepted and the order made under S. 145, Criminal P. C., is discharged.

**Chotzner, J.**—I agree.

G.B. *Reference accepted.*

---

## A. I. R. 1927 Calcutta 945

MUKERJI AND GRAHAM, JJ.

*Dhirendra Nath Roy* and *others* — Plaintiffs—Appellants.

v.

*Rajendra Nath* and *others*—Proforma Defendants—Respondents.

Appeals Nos. 314 and 315 of 1926, Decided on 4th May 1927, from the appellate orders of the Sub-Judge, Bakarganj, D/- 16th April 1926.

(a) *Bengal Tenancy Act, S. 148-A—Co-sharers should sue for rent due to all—Dues to other co-sharers not known—Plaintiff would be entitled to proceed with the suit for his share only.*

In order that plaint may be in accordance with the provisions laid down in S. 148-A, the first requisite is that the co-sharer landlord should sue for recovery of rent due to all the landlords and secondly, if he is unable to find out the dues of the co-sharers, he would be entitled to proceed with the suit for his share only: *A. I. R.* 1925, *Cal.* 105, *Foll.*; *A. I. R.* 1925 *Cal.* 82 and 15 *C. W. N.* 820, *Dist.* [P 945 C 2]

(b) *Bengal Tenancy Act, S. 148-A—Terms should be strictly complied with—Substantial compliance is not enough.*

The terms of S. 148-A should be strictly complied with and a substantial compliance with the requirements of the section would not be enough to give the auction-purchaser a title to annul incumbrances: *A. I. R* 1925 *Cal.* 106, *Foll.* ]P 946 C 1]

*Hemendra Chandra Sen* and *Surendra Nath Bose* (*Sr.*)—for Appellants.

**Graham, J.** — These appeals are against orders of the Subordinate Judge, Backerganj; confirming orders of the Munsif, first Court, Barisal, and arise out of certain execution proceedings. The plaintiffs decree-holders, who are the appellants before us, applied for service of sale-proclamation under S. 165, Bengal Tenancy Act. The co-sharer landlords, who were pro forma defendants in the suit, objected on the ground that the decree was not a rent decree, the plaints in the rent suits not being in compliance with the provisions of S. 148-A, Bengal Tenancy Act. The trial Court gave effect to this contention, and that decision was on appeal affirmed by the learned Subordinate Judge.

The plaintiffs-decree-holders have now appealed to this Court, and it has been urged on their behalf that the Courts below have misconstrued the decree holding erroneouly that it is not a rent decree, that the plaint in the rent suit complied with the provisions of S. 148-A, Bengal Tenancy Act, and that sale-proclamations should have been issued under S. 165 of that Act.

The learned vakil for the appellants has referred to several decided cases in support of his contention, reliance being chiefly placed upon the cases of *Jagabandhu Nandi* v. *Abdul Hamid Mea* (1) and *Nundalal Chowdhury* v. *Kala Chand Chowdhury* (2). The latter of these cases is distinguishable from the present case as the plaintiffs in that case alleged in their plaint that they had reason to believe that the rent due to their co-sharer pro forma defendant had been paid and consequently they were justified in suing for their own share of the rent only.

The case reported in *Jagabandhu Nandi* v. *Abdul Hamid Mea* (1) lends support to the contention on behalf of the appellants. It was there held in circumstances somewhat similar to those in the present case, that there was sufficient compliance with the requirements of S. 148-A, Bengal Tenancy Act, and that the decree in suit was a rent decree. In a more recent case, however, *Gangamani Biswas* v. *Rabja Ali Chaukidar* (3), a contrary view was taken and it was held that in order that a plaint may be in accordance with the provisions laid down in S. 148-A, Bengal Tenancy Act, the first requisite is that the co-sharer landlord should sue for recovery of rent due to all the landlords and secondly, if he is unable to find out the dues of the co-sharers, he would be entitled to proceed with the suit for his share only. In the case in question the plaintiffs sued for their share only of the rent stating that a certain amount might be due to the co-sharer landlords and prayed that under certain conditions stated in the plaint a decree for the total amount might be made. The Court (Newbould and B. B. Ghose, JJ.) held that the plaint was not in accordance with S. 148-A, Bengal Tenancy

(1) A. I. R. 1925 Cal. 82.
(2) [1910] 15 C. W. N. 820=8 I. C. 50.
(3) A. I. R. 1925 Cal. 106=51 Cal. 935.

Act, the terms whereof should be strictly complied with, and that a substantial compliance with the requirements of the section would not be enough to give the auction-purchaser a title to annul incumbrances.

Looking to the terms of S. 148-A and having regard particularly to the words
has instituted a suit to recover the rent due to all the co-sharer landlords
it seems to us to be plain that it is an essential condition that the suit should have been instituted for the recovery of the entire rent due to all the co-sharers, and we have no hesitation in following the more recent decision cited above. We may observe further that in the plaint in the present case while the plaintiffs sued for Rs. 1,999-6-0 alleged to be due as their share they specified the precise sum viz., Rs. 400-13-9 which they said might be due to their co-sharers, and that being so there was nothing to prevent them from suing for the entire amount. This circumstance serves to distinguish the present case from the case in *Jagbandhu Nandi* v. *Abdul Hamid Mea* (1), where the amount due to the co-sharers was apparently not known or ascertainable.

For the above reasons and following the decision of this Court in *Gangamani Biswas* v. *Rabja Ali Chaukidar* (3), we hold that these appeals fail, and they are accordingly dismissed.

**Mukerji, J.**—I agree.

R.D. *Appeals dismissed.*

---

## A. I. R. 1927 Calcutta 946

CHOTZNER AND DUVAL, JJ.

*Krishna Lal Mitra*—Accused — Petitioner.

v.

*King-Emperor*—Opposite Party.

Cr. Revn. No. 758 of 1926, Decided on 29th September 1926, from the order of the Ss.-J., Dinajpur and Darjeeling, D/- 18th June 1926.

*Criminal P. C., S. 234—Misjoinder—Charge in respect of falsifictions of six different documents is bad.*

The accused was charged under S. 477-A, Penal Code, for making false entries in the pay bill and monthly cash accounts. In the charge framed, there were six distinct and separate charges of falsification of six separate and distinct documents, viz., three pay bills and three monthly cash accounts.

*Held*: that the trial was illegal as being a trial of more than three offences together.

[P 946 C 2]

*Narendra Kumar Basu* and *Pashupati Nath Ghose*—for Petitioner.

**Judgment.**—In this case the petitioner was put on his trial before the Sub-Divisional officer of Kalimpong under S. 477-A, I P. C., on the charge of making false entries with a view to defraud in the Range establishment accounts. These entries are set out in the appendix to the charge; that is the pay bill and monthly cash accounts in respect of Sanman Forest Guard for the months of May 1924, June 1924 and March 1925. The case apparently was that this guard who was no longer in service was entered at a rate of pay in the pay bill and in the monthly cash accounts of those months but as a matter of fact another man was employed at a lower rate of pay for those months as a Forest Guard. The Sub-Divisional officer found the accused guilty and sentenced him to six months rigorous imprisonment and a fine of Rs. 100 on each of the three charges relating to the pay bill. This Rule has been obtained on the ground, that the trial has been vitiated by misjoinder of charges, that there is no evidence that he falsified the accounts, that upon the charges as drawn up three separate sentences were not legal, that the sentence was too severe and further that the learned Sessions Judge was wrong in confirming the conviction.

Now before us the point first taken is that as a matter of fact the charge is defective and illegal in view of the provisions of S. 234, Criminal P. C. in that as a matter of fact in the charge as framed by the Magistrate there were six distinct and separate charges of falsification of six separate and distinct documents—that is to say three pay bills and three monthly cash accounts and that, therefore, the whole trial is illegal, as not more than three of such offences committed within the space of 12 months can be tried at one time. Though no doubt, when convicting, the Magistrate has not recorded any finding in respect of the falsification of the monthly cash accounts, it appears to us that this nonfulfilment of the law in trying together more than three separate falsification of different papers makes the whole trial illegal. In our opinion, therefore the conviction and sentence must be set aside and the case sent back to the Sub-Divisional officer for re-trial according to law.

The petitioner will remain on the same bail pending the orders of the Sub-Divisional officer.

G.B. *Retrial ordered.*

---

## A. I. R. 1927 Calcutta 947

BUCKLAND, J.

*Dulichand Samsukh*—Plaintiff.

v.

*Dunbar Mills. Co.* and *another*—Defendants.

Civil Suit No. 1494 of 1923, Decided on 29th June 1926.

*Company—Articles of Association — Article providing for issue of duplicate share certificates—Construction.*

Where one of the Articles of Association provided "if any certificate be lost or destroyed, then upon proof to the satisfaction of the directors, or in default of proof on such indemnity as the directors deem adequate being given, a new certificate in lieu thereof shall be given to the party entitled to such lost or destroyed certificate,"

*Held* : that the clause gave an absolute discretion to the directors as to the indemnity to be furnished with which the Court would not interfere. [P 948 C 2]

*S. C. Chaudhary* and *R. C. Sen*—for Plaintiff.

*W. W. K. Page*, *Ormond* and *K. P. Khaitan*—for Defendants.

**Judgment**.—This suit has arisen out of the alleged loss of 25 shares in the Dunbar Mills, Ltd. The reliefs prayed for cannot be comprehensively stated, and I will proceed to narrate the facts.

The registered holder of the shares in question which were Nos. 2025 to 2049 inclusive, was the defendant Durga Prosad Singhania, whose name still stands on the books of the company as the registered holder to this day. In the month of February 1920, they were sold by him to Messrs. Tezpal Makunlal. This transfer has not been proved with the exactitude with which the later transfers have been proved, but in the circumstances I do not think there can be any doubt that these shares were among those sold at or about that time by Singhania to Tezpal Makunlal according to the evidence of the witness Tezpal Jhoon Jhoonwalla.

Evidence has been called tracing the subsequent dealings in these shares. Tezpal Makunlal sold them to Jwalaprosad Shroff who in his turn sold them to Magniram Bungar. On the 28th May 1920, the same shares came back into the hands of Jwalaprosad Shroff from Narain-das Khendenwalla, and on the same day Jwalaprosad Shroff sold them to Nemai Chand Boral. The witnesses Khasinath Chobey and Jabbermull have traced the subsequent dealings with the particular shares, and eventually on or about the 28th May 1920, they came into the hands of the plaintiff.

This evidence which has hardly been subjected to cross-examination, in my opinion, clearly establishes that the plaintiff bought the shares in question as alleged in the first paragraph of the plaint ; and the question need not, therefore, be further considered, and that disposes of the first issue submitted on behalf of the defendant. Nor has it been challenged that the certificates were accompanied by a duly executed transfer deed, and, in my opinion, that also was the case and I hold accordingly.

The shares having come into the hands of the plaintiff according to his evidence he found that the scrip was slightly damaged, and he gave orders to his man, Hetram, to take them to the sellers to have them changed for other certificates. Hetram proceeded on his way with the scrip, and since then according to the plaintiff, nothing more has been heard or seen of it. Hetram made a report to him but the report which he received from Hetram has not been admitted in evidence because Hetram is in his native village, and has not been called as a witness.

The plaintiff also says that he gave instructions for advertisements to issue as to the loss alleged, but as to this again no evidence of the advertisements has been adduced. I am at a loss to understand why no attempt has been made to produce the evidence of Hetram or the advertisements, but nevertheless such is the case.

The plaintiff thereupon approached Messrs. Kettlewell Bullen & Co., the Mangging Agents of the defendant company, and what he desired and still desires according to the plaint, is to have new certificates issued to him. A long story is stated in the plaint as to how the Managing Agents refused to issue to him new certificates, but this has not been proved.

The position taken up by the company, however, is that they would be prepared to issue new certificates to the registered share-holder in accordance with Art. 16 of the Articles of Association. That could

not be to the plaintiff because he is not the registered holder but it may be that the plaintiff would be entitled to have his name placed upon the register, in which case it would be for him to satisfy the defendant company as regards the indemnity required for the purpose of obtaining new certificates.

No evidence of any facts has been given beyond the point where the shares are said to have been lost, but I am prepared to hold, on the evidence adduced, that the shares having been handed to a man in the employment of the plaintiff, and he having gone away with the shares, and the shares never having since been seen or heard of by the plaintiff, as regards the plaintiff the certificates have been lost.

This disposes of the third issue submitted on behalf of the defendant company, in the terms in which it is stated though having regard to the terms of Art. 16 to which I shall further refer I am not sure that it arises.

But in so holding I must not be taken to imply that the shares are irretrievably lost so that in all human probability there is no possibility whatever of any person coming forward with them and making a claim against the company. It is necessary that I should say this as it might be contended upon Art. 16 of the company's Articles of Association that my finding debarred the directors from requiring the indemnity which that Article entitles them to demand in default of proof of loss to their satisfaction, and that by virtue of this judgment the plaintiff, once his name is registered, is entitled to new certificates without giving an indemnity. That would not be fair to the company and my finding is not intended to go to that length.

It is not disputed on behalf of the company that the plaintiff would be entitled to have his name placed upon the register once he has proved his title, and this brings me to the stage when the real matters in controversy, which have given rise to all the trouble, arise. They are embodied in the following issues submitted on behalf of the defendant company :

1. Was the defendant company entitled to require from the registered holder the indemnity required in para. 8 of the witten statement?

2. Is the plaintiff, upon adducing proof of loss entitled to the issue to him of a duplicate certificate ?

The last issue submitted is the usual one as to the relief to which the plaintiff is entitled.

So far as the plaintiff claims to have new certificates issued to him, he clearly, in my opinion, has no locus standi until he has had his name registered as the holder and, however much he might satisfy the company as to the loss the answer to the second of the above issues must be in the negative.

The question really is as to the right of the registered holder, be it the plaintiff or be it Singhania, for the trouble has arisen as to the indemnity. What the requirements were and what the plaintiff was prepared to do has not been proved but I have been informed that the defendant company required, among other guarantors, a European Bank, which the plaintiff could not or did not offer to furnish. Be that as it may, there is no need to discuss what actually was required for the whole question turns upon the point whether the Court will interfere with the discretion allowed to the directors by Art. 16. This Article is as follows :

16. If any certificate be worn out or defaced then, upon production thereof to the directors they may order the same to be cancelled and may issue a new certificate in lieu thereof, and if any certificate be lost or destroyed, then upon proof to the satisfaction of the directors or in de ault of proof on such indemnity as the directors deem adequate being given, a new certificate in lieu thereof shall be given to the party entitled to such lost or destroyed certificate.

The clause, in my opinion, gives an absolute discretion to the directors as to the indemnity to be furnished with which the Court will not interfere, there being, as here, no question of mala fides. Various observations have been made to me as to the risk which the company would incur on the one hand, and as to the need for a substantial guarantee on the other hand. In the view which I take I have nothing to do with such considerations. It is entirely a matter for the directors who are given a discretion and may exact such indemnity as they deem adequate.

In this view there is no need to consider the ground upon which the various attempts to claim new certificates fell through, and indeed evidence of that would not have been relevant. In my judgment the defendant company is entitled to require from the registered holder such indemnity as the directors may deem adequate.

In these circumstances it only remains to consider to what relief the plaintiff is

entitled. I have already expressed my opinion on the questions of fact, and I declare that the plaintiff is the owner of ordinary shares Nos. 2025-2049 in the Dunbar Mills, Ltd., and solely and beneficially entitled thereto and to all the advantages and benefits thereof, and all dividends, privileges, bonuses, etc., declared since the day of purchase.

As regards dividends it appears that dividends which have accrued amount to Rs. 6,800 but by some arrangement or other which is not disputed this money was paid to Durga Prosad Singhania The plaintiff by his counsel does not ask for any order against the company as regards the sum already paid to Singhania. I also hold that the plaintiff is entitled to have his name registered in the books of the company as the holder of the said ordinary shares, and I direct rectification of the register of the company accordingly.

The plaintiff is not entitled to an order that certificates be issued to him. Once his name has been placed on the register it will be for him to apply to the company for new certificates which I have no doubt will be supplied if he furnishes an indemnity which the directors deem adequate.

The question of costs required a certain amount of consideration for it would appear as though the plaintiff had obtained some measure of success in these proceedings, but I think upon analysis it is clear that he has entirely failed in regard to his real object in bringing the suit. If one takes the first three issues as to purchase of the shares, delivery of the certificates with the deed of transfer and the loss, they are merely preliminary to the next point which is the rectification of the register.

The need for that has, as far as I am aware, been entirely ignored by the plaintiff throughout. His one object has been to get the new certificates. Assuming, however, that he was the proper person to apply for the new certificates, he has not, according to the evidence, and there is nothing to show that he has, made any effort to prove to the directors the loss of the shares and to satisfy them. It may be that even so, had a sufficiently substantial indemnity been forthcoming the directors would not have been too stringent in this respect. The new certificates and the indemnity, undoubtedly, have been the real question at issue throughy out. As to that the plaintiff has entirelfailed in this suit.

The questions of fact to which I have referred and the rectification of the register have been put in issue as the company could hardly have been expected to admit them but at the same time it cannot be said that they have strenuously contested. It was,, however, necessary for the plaintiff to establish his case in regard to these matters before the question of the indemnity and the new certificates could be reached.

In the circumstances, though he may, as I said just now, appear to have obtained some measure of success in these proceedings, nevertheless as to the real objects for which the suit was brought, he has entirely failed. In my judgment he should pay the costs of the defendant company.

Before I conclude I wish to refer to the brief of correspondence. A brief of correspondence, was tendered in evidence, filed and marked. No letters have been referred to by either side. Learned counsel for the defendant company was willing that the brief of correspondence should be returned. Learned counsel for the plaintiff was anxious that it should remain on the record. To this course no objection was taken on behalf of the defendant.

As I have directed the plaintiff to pay the costs of the defendant, there is no need to give any special directions as to this brief of correspondence, but had I ordered otherwise I should have directed that the costs of the brief of correspondence be borne by the plaintiff in any event.

G.B. *Order accordingly.*

---

## A. I. R. 1927 Calcutta 949

CUMING AND GREGORY, JJ.

*Kasem Ali*—Appellant.

v.

*King-Emperor*—Opposite Party.

Cri. A. No. 588 of 1926, Decided on 3rd December 1926, from the order of the Ss. J., Backergunge, D/- 30th June 1926.

*Penal Code, S. 120-B—Charge of conspiracy between two persons only—One acquitted—Other must also be acquitted.*

Where two persons are charged under S. 120-B of conspiracy and the charge does not show

that any other person was concerned in the conspiracy, then if one of the accused is acquitted the other also should be acquitted.

[P 951, C 1]

*Subodh Ranjan Das Gupta* and *Khitish Chandra Ghattak*—for Appellant.

*Khundkar*—for the Crown.

**Gregory, J.**—This is an appeal by one Kasem Ali who was tried before a jury in the Court of the Sessions Judge of Bakerganj and convicted and sentenced under S. 120-B, I. P. C,

The facts of the case may be stated briefly in view of the circumstances under which we consider it necessary to interfere with the conviction and sentence of the accused. The facts are shortly these : It would appear according to the prosecution that there was ill-feeling on the part of the accused Kasem towards Kagal Sardar his uncle the deceased on account of Kagal wishing to sell his properties and so deprive the accused Kasem of them, by reason of a misunderstanding that had arisen between them. The accused Kasem was living in the same bari as his uncle and the case is that on the 10th February 1926 the deceased Kagal Sardar whose murder is the subject of one of the charges, was sleeping in the eastern hut while his wife Sherjan Bibi slept in the western hut. One Jamila the wife of the accused Kasem Ali slept in the southern hut. The case for the prosecution was that the accused Kasem Ali himself was not in the house that night but he had gone to Barisal. On the following morning it was discovered by Jamila, otherwise called Kuti, that both Kagal Sardar and his wife Sherjan Bibi were lying dead in their huts. The evidence shows that the death of both was due to strangulation.

The two accused namely one Elemaddi and the present appellant Kasem Ali were put on their trial in the Sessions Court on the following charges the character of which will be referred to hereafter. The charge against Elemaddi was one of a criminal conspiracy under S. 120-B, to commit the murder of Kagal Sardar and his wife Sherjan Bibi another charge against the same accused was under S. 302, I. P. C. in respect of the murder of Kagal Sardar. The charge against Kasem Ali the present appellant was only under S. 120-B, I. P. C. The verdict of the jury as against Elemaddi was one of guilty, by a majority of 3 to 4, of the charge under S. 120-B, I. P. C. and of not guilty on the charge under S. 302, I. P. C. As against Kasem Ali the present appellant the verdict was one of guilty of the charge under S. 120-B, I. P. C., by a majority of 8 to 1. In consequence of the verdict of guilty against Elemaddi of the charge under S. 120-B the Sessions Judge was not satisfied with the propriety of it and he made a reference under S. 307, Criminal P. C., to this Court and the ground of the reference was that there was no proper corroboration of the evidence of one Menajuddi who was called as a witness for the Crown and that therefore the conviction under S. 120-B, I. P. C. was not proper in his case. Apparently his view was upheld and Elemaddi on that reference was acquitted in respect of the charge under S. 120-B, I. P. C. The effect of this is this—that the present appellant was left convicted of an offence under S. 120-B, I. P. C. and it is against this conviction that he has preferred the present appeal.

The charge under S. 120-B, I. P. C. against the two persons Elemaddi and the present appellant appears to us to be a charge of a conspiracy between themselves to murder Kagal Sardar and his wife Sherjan Bibi. It does not appear to us that it is a charge of conspiracy between themselves and other persons. It is not stated that there were other parties known or unknown to the conspiracy, and it would appear from the grounds of commitment that the committing Magistrate regarded the conspiracy as one between Kasem Ali and the other accused Elemaddi. In this view of the matter the objection taken by the appellant is that taking the charge against the two accused persons on trial to be one of conspiracy between themselves when one of them namely, Elemaddi was acquitted of that charge, the other accused Kasim Ali the appellant cannot be convicted of that conspiracy. Mr. Khundkar for the Crown agrees that the charge as drawn up is capable of being read as we construe it ; but he contends that it was the case for the prosecution supported by evidence that the conspiracy was one not confined to the two accused on trial only but extended to other parties also. We do not think,

having regard to the charge as drawn that effect can be given to that argument. Neither can it be said fairly that the accused would not be prejudiced if, as contended by the Crown, an extended reading were given to the charge.

On our construction of the charge the appellant was not called upon to meet any case other than the one we have indicated.

On these considerations it appears to us that the objection raised by the appellant is fatal to the conviction, and it is unnecessary to consider any of the other objections which have been raised by the learned pleader who has appeared for the appellant.

This being so, the conviction of and the sentence passed on the present appellant must be set aside and the appellant acquitted.

**Cuming, J.**—I agree.

G.B. *Conviction set aside.*

---

## A. I. R. 1927 Calcutta 951

DUVAL AND MITTER, JJ.

*Ebad Ali* and *others*— Defendants—Appellants.

v.

*Mt. Fatema Bibi* and *others*—Plaintiffs—Respondents.

Appeal No. 1801 of 1924, Decided on 30th November 1926, from a decree of the Addl. Sub-Judge, Noakhali, D/- 28th May 1924.

*Landlord and tenant—Suspension of rent—Tenant put in possession of only a part of land leased—Doctrine of suspension applies only where rent is a lump sum.*

**The doctrine of suspension of the payment of rent, where the tenant has not been put in possession of part of the subject leased, applies where the rent is a lump sum for the whole land leased treated as an indivisible subject. It has no application to the case where the stipulated rent is so much per acre or bigha : *A. I. R.* 1925 *P. C.* 97, *Foll.*** [P. 952, C. 1]

*D. L. Kastgir* and *Shamadas Bhattacharjee*—for Appellants.

*Bijan Kumar Mukherjee* and *Raj Kumar Chakravarty*—for Respondents.

**Judgment.**—In this case the plaintiff sued for rent for the years 1323 to 1326 for three kanis of land at the rate of Rs 13 per kani and also prayed for additional rent for additional area according to the terms of a lease. The defendants put up various defences alleging that they held all the lands within certain boundaries ; that there was no excess land ; that they had been dispossessed of some of their lands and that they had paid rent for 1323 and part of 1324. The Munsif dismissed the suit holding that there had been partial dispossession and holding too that the rent for 1323 and part of 1324 had been paid. In appeal the Subordinate Judge has given the plaintiff a decree to this extent that he has remanded the case to the lower Court to ascertain by actual measurement the exact extent of land held by the respondents within the boundaries given in the kabuliyat and to assess the excess land at Rs. 13 per kani. He does not appear to have disturbed the finding that the rent for 1323 and part of 1324 had been paid though in the ordinary portion of his judgment he does not refer to it. Now it appears that the lands were described as being within certain boundaries excepting a tank and its bank and being of about three kanis let out to the defendants' predecessor in 1310. In the following year another one kani and 13 gandas was let out to one Aminulla. There appears to have been no litigation in the matter. Both defendants and Aminulla lived in the same bari. Now the defendants put up a claim that they had been wrongfully dispossessed after having lived amicably with their dispossessor for 20 years.

The difficulty, however, in our way in dealing with this case has been avoided owing to the fact that since the order of remand for an enquiry by a civil Court commissioner was made, that enquiry has been held and we are informed that in that enquiry it has transpired that the present defendants were in actual exclusive possession of a little over three kanis and that 16 gandas of land are held jointly by Aminulla and the defendants, that certain area is held by the plaintiff and that a certain area is held exclusively by Aminulla. So far as the rent is concerned the kabuliyat stated that any excess area had to be paid for at Rs. 13 per kani and that for any decrease of area there should be reduction of rent. The defendants are, therefore, clearly liable for rent for three kanis and in future for a little more, as found by the commissioner. The further discussion as to whether the lease of the defendants included all the lands within the boundaries or not, specially in view of the terms of the

commissioner's report, appears to us to be purely academic.

As to suspension of rent for loss of land whether there should be a permanent or proportionate suspension in such a case as this has now been set at rest by the decision of their Lordships of the Judicial Committee in *Katyayani Debi* v. *Udoy Kumar Das* (1). The doctrine of suspension of the payment of rent where the tenant has not been put in possession of part of the subject leased, has been applied where the rent was a lump sum for the whole land leased treated as an indivisible subject. It has no application to the case where the stipulated rent is so much per acre or bigha.

We would add, however, that the Additional Subordinate Judge appears to have overlooked the fact that the rent for 1323 and the rent of Rs. 10-8-0 for 1324 have been paid.

The order, therefore, we propose to pass in this case is that the appeal succeeds to this extent, namely, that the plaintiff will get a decree for rent at Rs. 39 a year for the years 1324 to 1326 less Rs. 10-8-0 already paid for 1326, and the plaintiff will also be entitled to a decree for any small additional area found exclusively in the possession of the present defendants. We do not propose to pass any order as to the land held jointly, and as to the land held exclusively by Aminulla no order is necessary as the defendants have still more than three kanis left in their exclusive possession.

The order of costs in the lower Courts will stand. Each party will bear its own costs in this Court.

G.B. *Appeal partly allowed.*

(1) A. I. R. 1925 P. C. 97=52 Cal. 417=52 I. A 160 (P. C.).

---

## A. I. R. 1927 Calcutta 952

PAGE ANE GRAHAM, JJ.

*Sm. Jugal Kishore Debi*—Judgment-debtor—Appellant.

v.

*Baidya Nath Roy* and *another*—Decree-holders—Respondents.

Appeal No. 361 of 1925, Decided on 25th July 1927, from the original order of the Sub-Judge, Asansole, D/- 7th August 1925.

*Limitation Act, S. 7—Joint decree in favour of one adult and two minors—Persons not proved to be members of joint Hindu family—Adult not acting as karta—He cannot give discharge on minor's behalf.*

A joint decree was passed in favour of three persons, two of whom were minors. It was not proved that the decree-holders were members of a joint undivided Hindu family, nor whether they were living under the Mitakshara or Dayabhaga School of Hindu Law, nor whether the major member was acting as karta of a joint Hindu family of which the decree-holders were members.

*Held*: that the adult member was not able to give a discharge to the judgment-debtors within S. 7, Limitation Act: 25 *Mad.* 26; 7 *All.* 313 (*F. B.*); 27 *Bom.* 292; 28 *Mad.* 487; 28 *Cal.* 465; 25 *Mad.* 431 (*F.B.*); *A. I. R.* 1916 *P.C.* 148; 36 *Mad.* 295 (*P. C.*); *A. I. R.* 1925 *Mad.* 78 and 31 *All.* 156, *Ref.* [P 954 C 1]

*Ram Chandra Majumdar*, *Narendra Krishna Bose* and *Gopendra Nath Das*—for Appellant.

*Girija Prosanna Sanyal*, *Indu Bhusan Roy*, *Brojo Lal Chakravarti* and *Nripendra Chandra Das*—for Respondents.

**Page, J.**—This is an appeal from an order of the learned Subordinate Judge of Asansole of the 7th August 1925, dismissing an objection by a judgment-debtor to the execution of a decree passed by the High Court of Patna on the 6th December 1920. The present execution proceedings were commenced on the 23rd March 1925, and, therefore, prima facie were time-barred. The decree-holders contended that the present application for execution was not barred by limitation, because (1) on two previous occasions, 15th April 1921, and the 11th January 1924, applications had been made "in accordance with law" to execute the said decree in "the proper Court," namely, the Court of the Subordinate Judge of Dhanbad and, therefore, under Art. 182 (5), Statute of Limitation (Act 9 of 1908), the present application was presented within the time limited by the Statute; (2) on the 6th December 1920, when the decree which it is now sought to execute was passed, two of the three decree-holders were, and still are, minors, and the three decree-holders being jointly entitled to make an application for execution of the decree, and the adult decree-holders not being able to give a discharge to the judgment-debtors without the concurrence of the minor decree-holders the present application was saved from the bar of limitation by the provisions of Ss. 6 and 7, Limitation Act. The first contention raised by the decree-holders cannot be supported, for it has

not been proved that either of the two previous applications was made (a) in accordance with law; (b) to the proper Court. Under S. 37, Civil P. C., "the Court which passed the decree" of the 6th December 1920, is deemed to be the Court of the Subordinate Judge of Purulia and that Court did not send the decree to the Court of Subordinate Judge of Dhanbad for execution as required by Ss. 38 and 39 and O. 21, R 6, Civil P. C. As the decree-holders have failed also to prove that the Court of the Subordinate Judge of Purulia had

ceased to exist or to have judisdiction to execute the decree

the two previous applications to the Dhanbad Court for execution were not made "in accordance with law" or to "the proper Court," and are not to be regarded as steps-in-aid of execution within Art. 182 (5), Limitation Act. It was established, however, that the decree was duly sent to the Court of the Subordinate Judge at Asansole for execution by the Court at Purulia, and that the present application for execution presented in compliance with the provisions of the Civil Procedure Code.

With respect to the second contention that has been raised before us by the decree holders it is necessary to refer to certain material facts that are not in dispute in order that the nature of the proceedings may be appreciated. It is to be observed that the judgment-debtors' objection to the execution of this decree is utterly devoid of merit, and is based solely upon technical grounds. It appears that the defendants in the suit were officials employed in the management of the estate of one Prosanna Kumar Roy, a trader of Keshalpur, and that, after the death of Prosanna the present suit No. 198 of 1911 was brought in the Court of the Subordidate Judge of Purulia inter alia to compel the defendants to render an account of the moneys that they had received in the course of stewardship. The plaintiffs were two of the sons of Prosanna; (1) Bireswar Roy an adult, (2) Butto Kristo Roy, then a minor, by his next friend and brother Bireswar. The third son of Prosanna, Bhola Nath Roy also a minor was made defendant 7 and appears through his mother Sarojini Debya as next friend and guardian ad litem. The suit was decreed on 16th September 1916, in favour of the plaintiffs and defendant 7 against the judgment-debtor or his predecessors-in-title. The decree-holders, regarding the sum decreed as inadequate, appealed to the High Court at Patna. Meanwhile Butto Kristo had attained his majority and Bireswar had died, and on the 6th December 1920, when the decree of the High Court was passed, the appellants were (1) Baidyanath Roy, a minor son of Bireswar Roy by his mother Satyabala Debya as his next friend and guardian ad litem, (2) Butto Kristo Roy and (3) Bhola Nath Roy, the other minor son, by his mother Sarojini Debya as his next friend and guardian ad litem. The decree provided inter alia:

Accordingly it is ordered and decreed that the appellants do realise from

Respondent 1, Rs. 18,328-10-9 and costs Rs. 1,948-3-9.

Respondents 2 to 5, Rs. 592-12-6 and costs Rs. 76 13-4.

Respondent 6, Rs 278-3-0 and costs Rs 22.

Respondent 7, Rs. 1,777-14-6 and costs Rs. 140-8-4.

Respondent 8, Rs. 27,678-12-9 and costs Rs. 2,187-0-9

Respondents 2, 3 4, 5 and 8 Rs. 1,977 and costs Rs. 166-3-6

and the respondents to bear their own costs in the lower Courts

And it is further ordered and decreed that the respondents do pay to the appellants the sum of rupees four hundred and sixty-five annas eleven and pies ten only as per details at foot being the amount of proportionate costs incurred by the latter in this Court.

It is not, I think, open to doubt or controversy that this decree quoad the principal defendant was a joint decree which the decree-holders were jointly entitled to execute. In *Ahinsa Bibi* v. *Abdul Kader Saheb* (1) which was a suit brought by the heirs of a deceased partner for an account, and to recover from the other partners their father's share of the profits in the partnership, Bhashyam Ayyangar, J., observed:

The claim which was possessed by one individual is now possessed jointly by a number of individuals, who are his legal representatives and all must, therefore, join in a suit to enforce that claim. If one or more of such joint claimants do not join as plaintiffs, the course to be pursued in India, according to long established course of decisions, is for the claimants bringing the suit to join, as party defendants, those who do not join as plaintiffs. The cause of action for taking an account...was one and indivisible, as against the surviving partnars, and it necessarily follows that the suit cannot be barred in respect of some of his heirs and not barred in respect of the others. It must be either wholly barred or not barred at all. This

(1) [1902] 25 Mad. 26.

is the principle underlying Ss. 7 and 8, Indian Limitation Act. (now S. 6 and 7 of the present Act).

I respectfully agree with those observations, and hold that the decree in the present suit was one that the three heirs of Prosanna Kumar Roy were jointly entitled to execute within S. 6, Limitation Act. See *Ahinsa Bibi* v. *Abdul Kader Sahib* (1), *Kandhiya Lal* v. *Chandar* (2), *Sitaram* v. *Shridhar* (3), *Ranchode Doss* v. *Rukmany Bhoy* (4), *Surja Kumar Dutt* v. *Arun Chunder Roy* (5) and *Periasami* v. *Krishna Ayyan* (6) per Bhashyam Ayyangar, J , at page 437. A further question still remains to be considered, namely, whether Butto Kristo was able to give a discharge to the judgment-debtors. "without the concurrence of" the minor decree-holders. I have examined a number of cases upon this subject. It is not easy to disentangle them, and to reconcile them is impossible. But on the facts of this case I am clearly of opinion that Butto Kristo Roy was not able to give such a discharge to the judgment-debtors within S. 7, Limitation Act. It is not proved that the decree-holders were members of a joint undivided Hindu family, nor whether they were living under the Mitakshara or Dayabhaga School of Hindu Law, nor whether Butto Kristo was acting as karta of a joint Hindu family of which the decree-holders were members. On the contrary, it is apparent that in these proceedings he did not act or purport to act, as the manager of the family or on behalf of the decree-holders as a whole. Much less has he acted in these proceedings on behalf of Bhola Nath. In my opinion, he has acted solely in his own interest. Butto Kristo was not a party to the Execution Case 35 of 1924 which was brought by Bhola Nath, through his mother as his next friend; and in this suit he did not join Bhola Nath as a co-plaintiff but impleaded him as defendant 7. Moreover, after the decree of the High Court of Patna had been passed on 6th December 1920, Butto Kristo Roy appears to have been substituted in the place of Satyabala Debi as the guardian and next friend of the minor, Baidya Nath Roy, and in that capacity he filed Execution Case No. 101 of 1921. It is in that capacity as well as on his own behalf that Butto Kristo is a party to the present application for execution. On the other hand throughout the suit and the proceedings incidental thereto in execution of the decree Bhola Nath has appeared through his mother as his guardian and next friend I am of opinion that according to law, now clearly established, under such circumstances Butto Kristo cannot be held to have been capable of giving a discharge to the judgment-debtors without the concurrence of the minors within S. 7, Limitation Act. See *Nobin Chandra Barua* v. *Chandra Madhab Barua* (7), *Ganesha Row* v. *Tulja Ram Row* (8), *Lakshmanan Chetty* v. *Subbiah Chetty* (9), *Ganga Dayal* v. *Mani Ram* (10) and *Jawahir Singh* v. *Udai Parkash* (11).

For these reasons I am of opinion that the appeal fails, and must be dismissed with costs—the hearing-fee being assessed at ten gold mohurs. Let the record be sent down without delay.

**Graham, J.**—I agree.

D.D. *Appeal dismissed.*

(2) [1885] 7 All. 313=(1885) A. W. N. 34 (F. B.).
(3) [1903] 27 Bom. 292=5 Bom. L. R. 91.
(4) [1905] 28 Mad. 487.
(5) [1901] 28 Cal. 465=5 C. W. N. 767.
(6) [1902] 25 Mad. 431=12 M. L. J. 966 (F. B.).
(7) A. I. R. 1916 P. C. 148=44 Cal. 1 (P. C.).
(8) [1913] 36 Mad. 295=19 I. C. 515=40 I. A. 132 (P. C.).
(9) A I. R. 1925 Mad. 78=47 Mad. 920.
(10) [1909] 31 All. 153=1 I. C. 824=3 A. L. J. 62
(11) A. I. R. 1926 P. C. 16=48 All. 152=53 I. A. 36 (P. C.).

---

## A. I. R. 1927 Calcutta 954

B. B. GHOSE AND ROY, JJ.

*Mahim Chandra Saha* and *others*—Plaintiffs—Appellants.

v.

*Esahak Sikdar* and *others*—Defendants—Respondents.

Appeal No. 434 of 1925, Decided on 21st July 1927, from appellate decree of the Sub-Judge, 1st Court, Barisal, D/- 13th December 1924.

*Transfer of Property Act, S. 54—Part performance—Right of defendant to claim specific performance barred—Doctrine of part performance is not applicable.*

The principle is well settled that in order to give equitable relief to the plaintiff on the ground that the contract has been partly performed the defendant must be in a position to get equitable relief by way of specific performance of contract. If that plea does not come

to the aid of the defendant on account of the right to sue for specific performance becoming time barred he cannot resist the plaintiffs' title by reason of that plea : *A. I.R.* 1927 *Cal.* 365, *Foll.* [P 956 C 1]

*Sarat Chandra Roy Chaudhury*, *Sant Kumar Roy Choudhury* and *Sisir Kumar Banerji*—for Appellants.

*Gopal Chandra Das* and *Bhuban Mohan Saha*—for Respondents.

**B. B. Ghose, J.**—This is an appeal by the plaintiffs which arises out of a suit for recovery of possession of a certain land. The defendants admitted the title of the plaintiffs but pleaded that an agreement in favour of them was executed by the plaintiffs dated 16th May 1919, to sell the property to them and they received Rs. 50 as the earnest money. Afterwards the plaintiffs put the defendants in possession of the property and, therefore, the plaintiffs are incompetent to sue for recovery of possession. The suit was instituted on the 12th January 1923. The trial Court disbelieved the story of the execution of the bainapatra, and also held that the defendants had entered into forcible possession. Upon that finding it decreed the suit and directed the defendants to remove their huts and other belongings from the suit lands within 15 days from the date of the decree and also allowed the plaintiffs mesne profits. From that decree defendant 2 appealed, and in that appeal the Subordinate Judge has reversed the decision of the Munsif and dismissed the suit altogether. From that decree the plaintiffs have appealed to this Court.

The points taken before us on behalf of the appellants are : Firstly, that all the plaintiffs did not enter into any agreement or sign the alleged deed of agreement and they alleged that only plaintiffs 4 and 5 executed it ; secondly, that the plaintiffs did not deliver possession of the land to the defendants in pursuance of any contract but, on the other hand, the defendants took forcible possession and that the plaintiffs had recourse to the criminal Court and complained against defendants' high handed acts ; thirdly : that the plaintiff 4 who is alleged to have signed the bainapatra was not an agent of the other plaintiffs and the fourth point urged is the doctrine of part performance of the contract on which the Subordinate Judge has based his judgment is not applicable to the case as the defendants' suit for specific performance of the contract is barred by limitation.

It is unnecessary for us to discuss other points except the last. If the defendants' right to enforce specific performance was barred at the time of the suit, in our opinion, he could not in resisting the plaintiffs' suit raise the plea of the doctrine of part performance of a contract. It is, however, contended on behalf of the respondents that the claim of the defendants for part performance was not barred at the date of the suit and that no time being fixed for the performance of the contract, time would run from the date of refusal of the contract and that as the date of refusal is not within 3 years of the date of the suit, the doctrine can be invoked. He also relies upon the case of *Mehr Ali Khan* v. *Aroatannessa Bibi* (1) decided by a single Judge of this Court for the proposition that the doctrine of part performance can be invoked in aid of the defendants even if the suit for specific performance is barred by limitation. As regards the question whether the suit for specific performance brought by the defendants would be barred by limitation or not, the finding of the trial Court is relevant. The learned Munsif in dealing with the evidence on behalf of the defendants makes this observation that the defendant 2 said that the plaintiffs promised to execute and register the kobala in 3 or 4 days from the date when the agreement was entered into. Then again disbelieving the evidence of the defendants as to the date of execution of the kobala the learned Munsif observes that there was no reason why the plaintiffs would surreptitiously go away from Parerhat after having agreed do execute the kobala on that date without informing the defendants about it. That clearly shows, as the defendants stated, that the kobala was to be executed within 3 or 4 days of the agreement. Before the Subordinate Judge this matter appears to have been raised and the Subordinate Judge brushes it aside by this observation :

It is contended on behalf of the plaintiffs that as the defendants' remedy for getting kobola is time barred they should not be allowed to stand upon the doctrine of part performance of contract. It is an equitable relief. In my opinion limitation should not be allowed to stand in the way of giving equitable relief.

(1) [1919] 25 C. W. N. 905.

Then he recites certain cases and comes to the conclusion that it was held that limitation could not stand in the way when equitable relief is given to a party. The question, therefore, resolves itself into this : whether this plea can be taken by the defendants if the right to sue for specific performance is lost by the expiry of time. It is unnecessary for me to discuss the cases in detail which lay down that in order to invoke the aid of this doctrine, defendant must show that he has the right to claim specific performance of contract. The cases have been collected and dealt with elaborately by my learned brother Mr. Justice Mukerji in the case of *Kalipada Basu* v. *Fort Glostar Jute Manufacturing Co., Ltd.* (2). The principle is well settled except for a slight deviation in one or two cases that in order to give equitable relief to the plaintiff on the ground that the contract has been partly performed the defendant must be in a position to get equitable relief by way of specific performance of contract. If that plea does not come to the aid of the defendants, they cannot resist the plaintiffs' title by reason of that plea.

This appeal, therefore, must succeed upon that sole ground and decreed with costs. The result, therefore, is that the judgment and the decree of the Subordinate Judge are reversed and those of the Munsif restored with costs of both the appellate Courts.

**Roy, J.**—I agree.

N.D. *Appeal allowed.*

(2) A. I. R. 1927 Cal. 365.

---

## A. I. R. 1927 Calcutta 956

B. B. GHOSE AND G. N. ROY, JJ.

*Rajeswar Prosad Bhakat* and *others*—Defendants—Appellants.

v.

*Bhupendra Narayan Sinha Bahadur* and *others*—Plaintiffs—Respondents.

Appeals Nos. 70 and 123 of 1924, Decided on 28th February 1927.

(*a*) *Words—"Durbust hakuk" means all zamindari rights.*

The term "durbust hakuk" includes everything which might be considered as belonging to the zamindari right: *A I. R.* 1925 *P C* 42 and 16 *C. L. J.* 7, *Foll.* [P 958 C 2]

(*b*) *Bengal Patni Regulation* (8 *of* 1819), *S.* 3 (1)—*Difference between mokarari and patni explained.*

Although there are various points of similarity between a mokarari and a patni, there are many points of difference. A patni, although in form a lease, is not a mere leasehold property. A patnidar may let lands in any manner that may be conducive to his interest By the patni deed every right that the zamindar has passes to the patnidar, and unless there is some limitation expressly mentioned, the patnidar can without let and hindrance exercise those rights: 22 *Marsh* 28; 10 *M. I. A.* 16; *A. I. R.* 1917 *P. C.* 8; 12 *W. R.* 413 and *A. I. R.* 1925 *Cal.* 962, *Foll.* [P 959 C 2, P 960 C 1]

(*c*) *Limitation Act, Arts.* 144 *and* 120—*Where defendants worked quarries without objection, the period of adverse possession is not to be counted from the time when different sorts of earth were found.*

Where defendants worked the quarries in all parts of the land openly and not underground without objection or opposition,

*Held*: the period of adverse possession was not to be counted from the time when different sorts of earth were found at different depths of the quarry, but from the time defendants began to make quarries: *A. I. R.* 1925 *P. C.* 42, *Foll.* [P 960 C 2]

(*d*) *Transfer—Mere agreement does not create a conveyance.*

The law requires a conveyance for the purpose of transfer of title and this cannot be made by a mere agreement: 33 *Cal.* 867, *Foll.* [P 963 C 1]

(*e*) *Words—Sayer.*

"Sayer" means all sorts of imports in addition to land revenue and does not include minerals. [P 958 C 2]

*S. C. Bose, Brojo Lal Chakravarti, Panna Lal Chatterji* and *Santimoy Mojumdar*—for Appellants.

*Sarat Chandra Basak, Sitaram Banerji* and *Sures Chandra Das*—for Respondents.

**B. B. Ghose, J.**—These two appeals arise out of one suit brought by the plaintiff Raja Bhupendra Narain Sinha Bahadur for declaration of his right to a certain hillock within his estate as shebait of idol Parbati Mata, and in the alternative for a declaration, by virtue of his right as zemindar of the estate, that the principal defendants have no right to take away earth and stones and minerals from the hillock in the exercise of the right that the defendants have as darpatnidars under the patnis within his estate. The plaintiff is one of the four sons of Maharaja Ranajit Sinha. The other sons and grandsons by those sons are defendants 16 to 20 in the case. The patni was created of three mehals within the estate No. 1152/1 by a predecessor in interest of the plaintiff's father. The patni was granted to two persons in equal shares by deeds dated the 30th May 1861. The three mauzahs of which the patni was granted were called Tarof Nalhati, Hat Nalhati and Kalindipur.

Out of these three mauzahs the patnidars granted darpatni of Taraf Nalhati and Hat Nalhati by separate leases to Ganga Prosad Saha in 1862; the defendants 1 to 9 came into the possession of the darpatni interest through various mesne purchases by their deed dated 11th October 1898. Defendant 9 died during the pendency of the suit and is represented by his sons defendants 9ka, 9kha, 9ga. 9gha and grandson 11ka. Defendants 10 and 11 were lessees under the darpatnidars of the portion of the property now in suit. The plaintiffs' claim with regard to ownership on the ground that the hillock is the property of the idol Parbati Mata has been found against him in the Court below, and no question has been raised before us about that right of the plaintiff; so we have to consider only the question as regards the plaintiffs' right as zemindar.

The plaintiff claims the zemindari right in himself on the ground that by custom of primogeniture prevailing in his family he is entitled to the entire estate to the exclusion of his brothers and their descendants. He also relies upon an ekrar said to have been executed in his favour by his adult brothers and his mother acting as guardian for his infant brother with regard to his sole right to succeed to the estate left by his father. The defendants disputed the title of the plaintiff on the ground of primogeniture to the entire property. They further alleged that they were entitled to take away stones and earth and minerals within their darpatni by virtue of the right granted to the patnidars under the patni settlement, and they also pleaded limitation. The Subordinate Judge found in favour of the plaintiff with regard to the question of title to the minerals and gave a decree to this effect that the plaintiff's title to the minerals lying in the hill by virtue of his being the zemindar be declared, and a perpetual injunction be issued restraining the principal defendants from raising the said minerals by digging and from appropriating the same, but it is ordered that the defendants will be competent to dig and take such stones and gravel as are found on the surface of the hill. The Subordinate Judge found against the plaintiff on the question of primogeniture and he held that the plaintiff was entitled to only ¼th of the property and gave him a decree for a fourth of the sum which he found the defendants are liable to pay on account of damages for the quantity of earth or minerals taken away by them. The principal defendants 1 to 11 appeal to this Court with regard to that portion of the decree which is against them, namely, the injunction granted against the defendants from raising minerals and the amount of damages allowed to the plaintiff. Their appeal is No. 70 of 1924. The plaintiff appeals against that part of the decree which dismissed a portion of his claim. His appeal is No. 123 of 1924.

Appeal No. 70 is the principal appeal and it should be taken up first. The first ground that was taken in the appeal was as to the question of the title of the plaintiff. This question was raised clearly under a misapprehension. It was urged that the zemindari under which the patnis were created belonged to the idol Ram Chandra Jiu and it was Touzi 1152/2. This argument, as was pointed out by the learned advocate for the respondent, was based upon a misconception of the evidence of plaintiffs' am-mukhtear and pleader printed at p. 63, part 1 of the paper-book. At line about 25 the figure 1152 2 ought to have been 1152/1, and this is also clear from the fact that the kabala by which the defendants acquired the darpatni mentioned the patni to be within estate 1152/1. Further it appears that in the lower Court the title of the plaintiff as zemindar was not disputed as will be found from the observation of the Subordinate Judge on issue 17. In reply, however, on behalf of the appellants a futile attempt was made to sustain the plea that it was debatter property, but such a plea could not be allowed to be heard in the circumstances stated above.

The principal points raised are really three that under the terms of the patni lease the patnidars were expressly granted all minerals and underground rights; secondly, even if there was no express grant of underground rights in the absence of any reservation the grant of patni conveys all rights including underground rights which belonged to the zemindar; and thirdly, the plaintiffs' right is barred by limitation. The fourth ground is that the amount of damages is excessive. Another ground was taken but was not elaborated that the substance taken out by the defendants was not mineral but mere earth.

It was further argued that the defendants had not worked underground but their working had not gone below the level ground and as patnidars they are entitled to remove any maunds of earth within the patni and they cannot be charged with having worked any mines.

I propose to take up the question with reference to the construction of the grant of patni first. There are three documents on the record relating to the patni grant, one patta and two kabuliats executed by the two patnidars. They are all in the same terms and one of them was taken by both sides for the purpose of their argument. This was the document which is marked Ex. 42, the kabuliat executed by one of the patnidars Uma Sundari Dasya in favour of Rani Lachmi Kumari Saheba the ancestress of the plaintiff. The official translation of the document with regard to certain parts was questioned by both sides and I have taken the translation which has been agreed to by both sides except with regard to one expression which I shall put down in original. This document Ex. 42 after stating under what right the lessee wanted to take the property, on payment of a premium of Rs. 3,655, and after stating that the zemindar was willing to grant a patni of the mehals in question excluding establishment charges and expenses in connexion with deities, bund, Pulbundi and wages and so forth, and after mentioning other things excluded proceeds thus:

> I shall enjoy down to my sons and grandsons etc., in succession in great bliss the mehals within the four boundaries without any deduction, the Chhaya Hrad (shades and lakes), land and water, whatever has been produced and all seeds of production, mal and sayers, barring those sayers prohibited by Government, all sorts of land held without payment of rent but which are liable to be assessed, hasil and patit, nalkar, bankar, falkar and jalkar and Bils, Jhils and all tanks, gardens, trees whether fruit bearing or non-fruit bearing and with the exception of debatter and Brahmatter and Mahatran Piran etc., . . . . . which have been confirmed under the orders of Government and except the aforesaid gifted Brahmatters etc. all rights and interests (darbast hakuk) I shall possess in patni taluk in the mofussil . . . . . I shall never make any application to any Government Official for kharij (mutation of my name).

Towards the end of the patta after making certain other recitals there is the provision that the grantee will not be entitled to cut down those trees the cutting of which will cause damage to the mehal or loss to the jama. There is a further provision that the zemindar would get the money which will be due from the Government on account of Land Acquisision for cart roads and railways and cacha roads, as well as any kind of road that may be made in future.

The first contention on behalf of the appellants is that the expression Chhaya Hrad means sky and underground. Chhaya literally means shadow but in the dictionary it is found that it may also mean sun from which it is contended that it is sky. Hrad means a deep piece of water naturally formed, or in other words, a lake. But nowhere it can be found that it means something underground. This expression Chhaya Hrad in the patta or kabuliat is unmeaning, and I confess it is new to me. In the course of my experience I have seen a large number of these pattas and kabuliats but I have never met with this expression ; I cannot hold that the expression distinctly means any right to underground minerals.

The next contention is that the word "sayer" includes the minerals because it is stated that sayer means all income which is not derived from land revenue. I am unable to accept that contention, because my impression is that sayer means all sorts of imports in addition to land revenue.

Lastly it is contended that all the expressions taking together along with the expression Darabast Hakuk conveys the entire interest of the zemindar in the mehals in question to the patnidar and nothing was reserved. In my judgment that is the proper construction which may be given to those words used. The only doubt that has been cast upon this construction is on account of the observations made in the judgment of Lord Shaw in the case of *Giridhari Singh* v. *Megh Lal Pandey*, (1) where it has been observed that the words mai hak hakuk only refers to the rights that were granted previouly and not to all the rights of the grantor. However that may be the contention of the learned advocate is that when mehals are granted in patni taluk without any deduction, of everything that can be mentioned within the four boundaries, all rights of the zemindar have been

(1) A. I. R. 1917 P. C. 163=45 Cal. 87=44 I. A. 246 (P. C.).

conveyed, and in my opinion there is considerable force in this contention. It is argued on behalf of the respondent on this question that when there are reservations as regards the cutting of trees and compensation money that would be obtained for land acquisition for public purposes, it should be held that all rights of the zemindar were not conveyed by the grant. In my opinion that argument is of very little substance. It seems to me that after giving all the right to the patnidar there was a small reservation about cutting down trees which would cause damage to the mehal or loss to the jama so as to affect the right of the patnidar to the rent reserved. With regard to the compensation money the same observation may be made. In the absence of the stipulation about compensation money it would have been divided between the zemindar and the patnidar under the law. By special contract the zemindar provides that the entire amount should be taken by himself. That does not take away from the rights of the patnidar anything more than what was reserved under the grant. It seems to me that the special mention of these reservations shows that nothing else was reserved. I need only add that minerals were not reserved.

The next question is whether by the grant of a patni taluk underground rights have been conveyed. I will rest content by referring to the observations of their Lordships of the Judicial Committee in the case of *Satya Niranjan Chakravarti* v. *Ram Lal Kaviraj* (2). Their Lordships did not agree with the dictum of the Patna High Court that the judgment of Prinsep and Hill, JJ. in *Ali Quader Hossein* v. *Jogendra Narain Roy*, (3) has been overruled by the decisions of the Privy Council cited in the judgment. It follows, therefore, that that case decided by the learned Judges of this Court is still good law. So far as we are concerned unless we are prepared to differ from it and refer the question decided there to a Full Bench, we are bound to follow it. We are not prepared to differ from what was laid down in that case. So we are bound to follow the law laid down in it. The learned advocate for the respondent endeavoured to distinguish that case from the present on the ground that the words there used in the patni patta were 'Darabast Zemindari Hakuk', while the words in the present grant are only 'Darabast Hakuk'. I do not think that there is any difference in substance, because the word 'Darabast' means "all", "entire" and "Hakuk" is the plural of "Hak" which means "right" and when the zemindar grants "Darabast Hakuk" he grants "Darabast Hakuk" of his zemindari right. It was next contended that the terms "Darabast Hakuk" were intended to refer only to those rights which had been previously described, rights generally known as ejusdem generis. This argument was advanced in the case of *Ali Quader Hossein* v. *Jogendra Narain* (3), cited above, and the learned Judges observed that this expression was intended, to use a familar expression, to throw a net so as to include everything which might be considered as belonging to the zemindari right. With these observations, I respetfully agree.

It was next contended by the learned advocate for the respondent that there is really no essential difference between a mokarari and a patni taluk and he referred to the case of *Sonet Kooer* v. *Himmut Bahadoor* (4) and his contention was that it is open to us to decide notwithstanding the observation of Lord Dunedin in the case of *Satya Niranjan Chakravarti* v. *Ram Lal Kaviraj* (2) cited above that a mokarari and patni are similar in all respects. It is unnecessary for me to hazard the opinion that a mokararidar should have the same interest as a patnidar. Although there are various points of similarity between a mokarari and a patni there are evidently many points of difference, and I think it is necessary for me to point out the essential characteristics of a patni which may not belong to a mokarari. First, I would refer to S. 3, Regn. 1819. In Cl. (1) of that section it is mentioned that the interest of the patnidar was capable of being transferred by sale etc., in the same manner as other 'real property'. It is contended by the learned advocate for the appellants that in 1819 this Regulation being drafted by English lawyers the expression real pro-

(2) A. I. R. 1925 P. C. 42=4 Pat. 244=52 I. A. 109 (P. C.).
(3) [1912] 16 C. L. J. 7=16 I. C. 441.
(4) [1876] 1 Cal. 391=3 I. A. 92=25 W. R. 289=3 Sar. 608 (P. C.).

perty has a particular significance, because a leasehold was not considered real property in English law. So a patni although in form a lease was not a mere leasehold property. There appears to be some substance in that contention. In the second clause power is given to the patnidar of letting out the lands composing their taluks in any manner that may be deemed conducive to their interest. That also in a matter which should be borne in mind. In S. 11 Cl. (1) the defaulting patnidar is described as the 'defaulting proprietor,' and in the second paragraph of the first clause it is stated that the rent receivable by the zemindar is in fact his reserved property in the tenure. In the second clause of S. 11 again the defaulting patnidar is described as the late proprietor. I may refer also to field's Introduction to the Regulations which is a well known authority with regard to land tenures. The learned author observes with reference to such taluks and subordinate taluks in S. 36 of his introduction:

> Considerable sums are paid by way of fine on the creation of both the parent and subordinate taluks. Men who do not like to part with the status of zemindar by an absolute sale of the zemindari will readily enough raise money by allowing the proprietary right to be carved up into estates of minor value, the whole substance going into the hands of others, while the name alone remains to them.

Again in the case of *Gyaram Mandal* v. *Gyaram Naik* (5) it was held by the patni deed every right that the zemindar had passed to the patnidar and that unless there is some limitation expressly mentioned the patnidar can, without let and hindrance, exercise those rights. The observations of the Privy Council in the case of *Joykishen Mookerjee* v. *Collector of East Burdwan* (6) as well as in *Raja Ranajit Sinha* v. *Kali Dasi Debi* (7) are to the same effect. In *Tarinee Churn Gangooly* v. *Watson & Co.* (8), Mr. Justice Markby in delivering the judgment of the Court observed with reference to a patni interest.

> Though of course, we do not mean to deny that it is a tenure, yet the relation between the zemindar and talookdar has scarcely any analogy to the ordinary one of landlord and tenant. The zemindar parts with all control over his property, and all interest in it except to an annual rent which has been likened to what in England is called a quit-rent.

Lastly I may cite the observations of Mr. Justice Chakravarti, who has considerable experience with reference to land tenures, in the case of *Surendra Narayan Sinha* v. *Bijoya Singh Dudhuria* (9), to the effect that patni taluks were really transfer of the zemindari interest, the consideration being payable not in a lump sum but by annual payment in the shape of rent, and lower down, he observes these patni taluks are really grants of the zemindar's interest without restrictions unless specially mentioned in the pattah. I need hardly add that I quite agree with the observations made above as regards the nature of a patni taluk.

On these grounds in my opinion the patnidar and the defendants as darpatnidars being grantees from the patnidars are entitled to all the minerals included within the patni grant.

The next question of importance is the question of limitation. This hillock as it appears from the plaintiff's evidence is about half a mile in length and a quarter of a mile wide. The height is about 40 feet and the diggings are from 10 to 30 feet and the quarries were down to the level ground. It also appears from the evidence that there are about 300 to 400 pits in all parts of the hillock. The Subordinate Judge has found that the defendants have been working the quarries for stones and earth for about 60 years, and it also appears that a railway siding was taken to the hillock for the purpose of carrying stones and gravel. There is no question that the defendants have been making quarries quite openly and there is no question of surreptitious possession. The Subordinate Judge, however, decides in favour of the plaintiff on the ground that the yellow earth or ochre which is now being taken and found to be of some value was found in large quantities only about six years before suit, and, therefore, the plaintiff's right is not barred by limitation. I do not think the period of adverse possession of the quarries on the hillock may be counted from the time when different sorts of earth were found at different depths of the quarry. In my opinion adverse possession should be considered to have commenced when the defendants began to make quarries on the

(5) [1862] 22 Marsh 28.
(6) [1864] 10 M. I A. 16=1 W. R. P. C. 26 =1 Suther 542=2 Sar. 54 (P. C.).
(7) A. I. R. 1917 P. C. 8=14 Cal. 841=44 I. A. 117 (P. C.).
(8) [1869] 3 B. L. R. Ac. 437=12 W. R. 41 3.
(9) A. I. R. 1925 Cal. 962=52 Cal. 655.

side of the hillock. I am aware that it has been held that a stranger cannot ordinarily acquire title to the whole of a mine by working a part of it and he only acquires possession of the minerals which he actually digs. But the question may be different where a stranger works a mine in such a manner as to prove possession to the whole of it. See the observations of Hall, V.C. in *Ashlon* v. *Stock* (10). As I have already said, here the defendants worked the quarries in all parts of the hillock openly and not underground. It is hardly necessary to say anything further than to rely upon the observations of the Privy Council in the case of *Satya Niranjan Chakravarti* v *Ram Lal Kaviraj* (2). Their Lordships say:

> Working by the defendants was working not under a lease but by a mere trespasser. If therefore the suit is possessory then it is barred under Art. 144 for more than 12 years have elapsed as soon as possession became adverse. If on the other hand the suit is declaratory it is barred under Art. 120 for more than six years have elapsed since the right to sue for the declaration emerged.

The question of limitation, therefore, must also be decided against the plaintiff.

There is the question whether the article taken out is mineral or not. The appellants rely upon the contradictions in the evidence of the two expert witnesses examined by the plaintiff. One is Monmotha Kumar Roy who says that the earth that is mineral contains Sodi Carbonate and Sodium Sulphate, and his witness G. N. Frattini gives in his evidence an analysis of the thing taken away but does not mention that there is either sodi carbonate or sodium sulphate. I do not think much depends on this question. It may be a mineral or some valuable earth underground. If nothing underground was given to the defendants by the patni the plaintiff would be entitled to it. If everything passed to the patnidar then the plaintiff would not be entitled to it.

It is unnecessary to discuss another small point which was urged by the appellants and it is this, that the earth itself has no commercial value but is used for the purpose of adulteration of real yellow ochre. There is evidence on the part of the plaintiff that the earth that is taken from there can be sold in the market and there is evidence on the plaintiffs' side about its sale in the locality. If it had really no market value nobody would ever endeavour to raise a quarrel about it.

Lastly with regard to the question of damages it was argued on behalf of the appellants that damages have been calculated at a very excessive rate. The defendants, however, have not given any evidence on the basis of which the amount can be reduced. From the evidence on the record the Subordinate Judge has made a calculation and I do not think there is any reason to differ from it.

As, however, the plaintiff's case fails on the other grounds I have already stated this appeal must be allowed and the suit dismissed with costs in both Courts.

It was pointed out on behalf of defendant 11 (ka) that he obtained the interest of defendant 9 in the property in question by a deed of gift dated 19th November 1919. So if the defendants are liable for any damages this defendant would be liable along with the other heirs of defendant 9 for damages up to 18th November 1919, and defendant 11 (ka) would only be liable for damages payable by defendant 9 from 19th November 1919. This circumstance should be noted.

The appeal of the plaintiff, that is appeal 123, relates to the matter of damages and incidentally the question of primogeniture arises. It is urged on behalf of the plaintiff that the Subordinate Judge has refused to give the plaintiff the entire amount of the damages on insufficient grounds. The plaintiff, however, has not been able to show that there was any custom of primogeniture in his family. On the other hand, there is evidence of a plaint in a suit brought by the plaintiffs' father in 1895, Ex. U, where it was stated by him that his father Raji Kirti Chandra Bahadur got the entire interest in the property under the will executed by his brother Kumar Udoy Chand. This statement strikes at the foundation of the claim of right on the basis of primogeniture by custom. The learned advocate then refers to the agreement, I have already stated, (Ex. 43 dated 18th June 1918) entered into between the plaintiff and his brothers Nripendra Narain, Rajendra Narain and Kumar Birendra Narain, minor represented by his mother and next friend Moharani Kamal Kumari Saheba in which the right of primogeniture was acknowledged and the other three brothers gave up their rights to the property. Assuming that the minor's interest can be legally given up by such an agreement

(10) [1877] 6 Ch. D. 719=25 W. R. 862.

the right of these persons to the property could not be taken to have been transferred by an agreement like this. The law requires a conveyance for the purpose of transfer of title and this cannot be made by a mere agreement : see *Jadu Nath Poddar* v. *Rup Lal Poddar* (11).

This is the only ground that was urged in this appeal. This appeal must be dismissed with costs apart from the questions which have been found against the plaintiff's contention in the other appeal.

The costs are to be recovered in both the appeals by the defendants-appellants in appeal 70, one set in each appeal.

**Roy, J.**—These appeals arise out of a suit brought by the plaintiff zemindar to establish his right to minerals in a small hill within Mouzah Nalhati. The Subordinate Judge decreed the suit in part. The darpatnidars who resisted the suit are appellants here. The plaintiff has field a separate appeal in respect of his title. It appears that the darpatnidars have quarried stones on the surface of the hill without objection or opposition for many years. Recently ochre has been found below the surface and it has turned out to be of value in the market. A question was raised that the substance was not mineral and that the defendants were not really going below the surface. It has been found by experts that the substance found is a mineral and since pits have been dug up to a depth of 30 feet it may be taken that the dispute is in respect of the sub-soil i. e. of mineral rights in the sub-soil.

The substantial question in dispute is whether or not a patni lease, as such, conveys minerals to the patnidar. Our task in this discussion is easy. The question was decided in favour of the patnidar by Prinsep and Hill JJ. in the case *Ali Quader* v. *Jogendra Narayan Roy* (3). It was held here and in the Behar High Court that the authority in favour of the patnidar has been overruled by the decisions of the Judicial Committee in a series of cases. Their Lordships of the Judicial Committee have now in the case of *Satya Niranjan Chakravarti* v. *Ram Lal Kaviraj* (2), pronounced that the judgment of Prinsep and Hill, JJ. has not been overruled, and that the question whether a patni lease, as such, conveys the minerals to the patnidar is, so far as the Judicial Committee is concerned, still open. Their Lordships go on to say that the question turns on what is, the true nature of a patni tenure.

So far as we are concerned, therefore, the judgment of Prinsep and Hill, JJ., still rules the field. We are bound by that decision.

It would appear, therefore, that the principle that minerals will not be held to have formed part of a grant unless there was an express grant, apply to the cases of mokrari lease, maintenance grant, talabi brahmatter and grants of that kind. Dr. Basak contended that the nature of a patni tenure is in no way different from the mokrari grant discussed in the case of *Giridhari Singh* v. *Meghlal Pandey* (1), and he invites us to refer this case to a Full Bench. We are unable to do this for the reason that we do not think that a patni tenure is different in many respects from a leasehold interest.

The difference will be apparent from a brief historical survey of taluks in Bengal.

The word 'taluk' is derived from the Arabic word alak which signifies 'to hang from', 'to depend upon': alak also means a leech which hangs from the body to which it has attached itself and another quality said to have belonged to the talukdar and means connexion and dependence. In Upper India the taluk was dependent upon and subordinate to the Sovereign. In Bengal the taluk was subordinate to the zemindar but not always. The larger talukdars were huzuri, i. e. they were immediately under the supreme Government to which they paid their revenue direct ; while the smaller ones were mazkuri or specified i. e. in the sanad of the zemindar through whom they paid their revenue. Doubtless all were originally huzuri but when the revenue came to be collected through the zemindars, the smaller talukdars were directed to pay their revenue through this channel in order to avoid the inconvenience of a multiplicity of small payments into the Khalsa or treasury. (Field's Introduction to the Regulations, page 30 notes).

I mention this to show that the talukdar was in status equal to the zemindar. Regulation 8 of 1793, S. 51 recognized the dependent taluks created by the zemindars before the Permanent Settlement and protection was given to them subject to the payment of the fixed rent. A number of the talukdars was given the option of getting separated and holding directly under the Government as owners of separate estates. At the same time Government declared by Regulation 44 of 1793 that no zemindar shall grant pattas to raiyat or other persons for cultivation of lands for a term exceeding 10 years. The zemindars, however, continued to grant

(11) [1906] 33 Cal. 967=4 C. L. J. 22=10 C.W. N. 650.

leases in violation of the prohibition. Regulation 5 of 1812 removed the restriction of 10 years but no provision was made for validating the leases granted in violation of the prohibition. Regulation 8 of 1819 i. e. the Patni Regulation remedied the omission. The preamble to the Regulation recites the circumstances and S. 2 validates these leases.

What happened was that the zemindar of Burdwan was threatened with ruin on account of the high land revenue assessed on the estates settled with him at the Permanent Settlement, and large tracts were let out by him in perpetuity and at fixed rent. Thus were created permanent tenures known as patni taluks and the object was easy and punctual realization of rent to enable the zemindar to pay the revenue to the Government. By 1819 it was found that permanent alienations of this kind had been extensively effected in other zemindaries in the neighbouring districts and these alienations were formally legalized by Regulation 8 of 1819. By the Permanent Settlement, Government gave up its position as the exclusive owner of the soil and contented itself with a permanent rent charge on the land, thus escaping the labour, risk and odium attendant upon detailed mofussil management. The zemindars followed suit and they made the talukdars proprietors in the same way as the Government had made the zemindars proprietors. The Patni Regulation was designed to provide a way to the zemindar to recover arrears of rent from the patnidars, almost identical with that by which the demands of Government revenue were enforced against themselves. Henceforth the zemindar had to be content with his rent reserved and the patnidar was the proprietor to the raiyats. Hence has grown up the popular idea that the patnidar is also a proprietor. It is well known that many of the mining leases are derived from patnidars and it is an astonishing fact that the zemindars have not challenged the patnidar's right except as far as I know, in this case in which Prinsep and Hill, JJ. gave their decision.

The patnidar has been able to maintain his position that unless there was anything expressly reserved in the patni contract everything passed to him. One class of cases is that of choukidari chakran lands. The last case in the subject is that of *Ranjit* v. *Kali Dasi* (7), and it was the patnidar who got the lands. Recently there was the case of *Surendra Narayan Sinha* v. *Raja Bejoy Singh Dudhuria* (9) before this High Court. The zemindar sought to restrain the patnidar from making bricks and it was held that the zemindar could not complain when his property was not jeopardised nor his rent threatened. Chakravarti, J. discussed the nature of patni taluks and observed that

**these patni taluks were really grants of the zemindars entered without restrictions unless specially mentioned in the patta.**

Minerals were not thought of when these patnis were created. They were no more thought of when the Permanent Settlement was made with the zemindar. The position as between the zemindar and the patnidar is that the latter gets everything except what was expressly reserved. This follows from his position that he is a proprietor. The Regulation itself calls the tenure a taluk and the tenure-holder the talukdar and it is not unreasonable to hold that the old significance of the word taluk was retained. In S. 3 it is stated that the patnidar's property may be dealt with as other "real property." Mr. Field in his Digest of the Law of Landlord and Tenant puts a note of interrogation against the words. I take it the framers of the Patni Regulation had the same idea in their minds as the framers of the settlement of 1793 whereby they recognized and proceeded upon the footing that the zemindars are the actual proprietors of the land. In S. 11 again the patnidar is called the defaulting proprietor and attention was drawn by the Court in *Ali Quader* v. *Jogendra Narayan Roy* (3) to para. 2, S. 11 wherein it is mentioned that " the rent is in fact his reserved property in the tennre. "

The zemindar, therefore, has no grievance if his rent is not jeopardised. If there is no reservation therefore the minerals will pass to the patnidar.

Turning to the actual terms of the patni grant it is contended that there are no such terms as adhah and urdhah as in the case of *Satya Niranjan Chakravarti* v. *Ram Lal Kaviraj* (2) and that the words 'darbust hakuk' in it are not enough since 'mai hak hakuk' were not considered sufficient in *Meghlal Pandey's* case (1). My learned brother has dealt with the matter in detail on this point. I agree with him and all I need say is that all the exclusions and reservations were

catalogued and there is a long category of things conveyed giving rise to the inference that everything else was granted by the instrument.

I agree, therefore, with my learned brother in the conclusions he has arrived at in the case.

N.D. *Appeal No.* 70 *decreed* :
*Appeal No.* 123 *dismissed.*

---

## A. I. R. 1927 Calcutta 964

B. B. GHOSE AND ROY, JJ.

*Nadiar Chand Guin*—Plaintiff—Appellant.

v,

*Satish Chandra Sukal* and *another*—Defendants—Respondents.

Appeal No. 305 of 1925, decided on 19th July 1927, from the Appellate Decree of the Dist. Judge, Midnapur, D/- 20th November 1924.

*Contract Act, S. 73—Sale of goods—Defaulting purchaser is not entitled to recover earnest money.*

A person, who has entered into a contract for the purchase of goods and has made a deposit by way of earnest money and then refused to purchase, is not entitled to recover the earnest money: *A. I. R.* 1922 *Cal.* 104, *Foll.*

[P 964 C 2, P 965 C 1]

*Sarat Chandra Basak* and *Santimoy Majumdar*—for Appellant.

*Tarakeswar Pal Choudhuri*, *Jnan Chandra Roy* and *Anil Chandra Dutt*—for Respondents.

**B. B. Ghose, J.**—In this case the plaintiff is the appellant. The appeal arises out of a suit for the refund of the money deposited by the plaintiff with the defendants for the purpose of purchasing bricks which the defendants undertook to make for the plaintiff and to sell him at a certain rate. The agreement was that the plaintiff was to take delivery of the bricks at the brick-field of the defendants. It was stipulated that the bricks would be supplied within a certain date. The plaintiff complained in his plaint that the defendants had failed to perform their part of the contract and asked for the refund of the money deposited and for interest. The defendants pleaded that it was the plaintiff who was guilty of the breach of the contract as they had actually prepared the bricks and were always ready to give delivery to the plaintiff. They also pleaded that they called upon the plaintiff to accept the delivery but that the plaintiff failed to do so, because the price of bricks had gone down. The defendants stated that they had suffered loss on account of the plaintiff's breach of contract for which they were entitled to get damages in excess of what the plaintiff claimed to the extent of Rs. 585 after setting off the claim of the plaintiff to the extent of Rs. 761. The trial Court held that the plaintiff was entitled to get his money with interest to the extent of Rs 761 and the defendants' claim by way of set off was dismissed with costs. The defendants' appealed against that decision and the learned Judge accepted the story of the defendants and held that it was the plaintiff who was guilty of breach of contract and not the defendants. The learned Judge also held that neither party produced any independent testimony as to the fluctuation of the price of the bricks and, therefore, he was unable to find that the fall in the price of bricks was the cause of the plaintiff's backing out of the contract. He gave certain other reasons for which the plaintiff might have committed the breach. In the end he dismissed the plaintiff's suit on the finding that it was the plaintiff who broke the contract and he observed that as the suit was one for damages for breach of contract by the defendants, the suit failed.

From this judgment the plaintiff appeals and on his behalf the learned advocate has urged that the learned Judge below was wrong in holding that the suit was for damages for breach of contract. His argument is that the suit was not for damages for breach of contract but for the recovery of the deposit or the advance made by the plaintiff to the defendants for the performance of the contract. Although it has been found that the plaintiff broke the contract, the defendants were only entitled to damages under S. 73, Contract Act, and as the learned Judge has found that there was no evidence to assess the actual damages suffered by the defendants, the plaintiff's suit for the refund of money ought not to have been dismissed. The question then resolves itself into this: whether a plaintiff, who has entered into a contract for the purchase of goods and has made a deposit by way of earnest money, and then refuses to purchase is entitled to recover the earnest money. There have been several casss in various High Courts on this question and ap-

parently the decisions have been to the effect that the plaintiff is not so entitled. This has been held following the principle laid down in the cases relating to specific performance of contract both in England as well as in this country. All these cases have been discussed and followed in *Mangobinda* v. *Baisogmaff* (1) where the learned Judges held that the plaintiff under such circumstances must forfeit the deposit, although the defendant has not been able to establish that he has suffered any loss. With this decision we agree. The appeal must, therefore, be dismissed with costs.

**Roy, J**—I agree.

N.D. *Appeal dismissed.*

(1) A. I. R. 1922 Cal. 104.

---

## A. I. R. 1927 Calcutta 965

RANKIN, C. J., AND D. N. MITTER, J.

*Nawab Bahadur of Murshidabad*—Defendant—Appellant.

v.

*Bhupendra Narayan Sinha Bahadur*—Plaintiff—Respondent.

Appeals Nos. 1805 of 1925 and 42 of 1926, Decided on 24th August 1927, from the appellate decrees of the Sub-Judge, Murshidabad, D/- 21st April 1925, and Dist. Judge, Murshidabad, D/- 10th September 1925, respectively.

*Civil P. C., S. 115—Wrong application of law is no point for revision.*

Section 115 applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved and therefore the High Court cannot interfere in such a case: *A. I. R.* 1917 *P. C.* 71, *Foll.*; 33 *Cal.* 487 and *A I. R.* 1924 *Cal.* 487, *Dist.* [P 966 C 1, 2]

*Amarendra Nath Bose, Suresh Chandra Mukherjee* and *Amulya Charan Sen*—for Appellant.

*Sitaram Banerjee* and *Bijoy Prosad Singha Roy*—for Respondent.

**Mitter, J.**—This appeal arises out of a suit by the respondent for recovery of the balance of Road and Public Works Cesses from the appellant payable for four years viz., 1326 to 1329 B. S., with damages at 25 per cent.

The defendant in this suit, now appellant, is the patnidar under the plaintiff, now respondent, who is the zomindar of the mahal in suit and the terms of the patni are to be found in a kabuliat to some of the terms of which reference will be made later.

The plaintiff alleges that out of the cesses payable by the defendant only a smaller sum has been realized and the plaintiff consequently sues for the excess cesses.

The defence of the defendant substantially was (i) that the plaintiff was realizing cesses at the legal rate without adverting to a clause in the kabuliat which runs to the following effect:

If there be any demand from the state on the zemindari for any new amount on account of rent or revenue payable to the king or if any order is passed, I shall abide by it and pay my rent along with it without any objection,

(ii) that the plaintiff's claim for recovery of cesses for the year 1926 was barred by limitation.

The Munsif granted a decree to the plaintiff for the excess cess. An appeal was taken by the defendant to the Court of the Subordinate Judge of Murshidabad who affirmed the decision of the Munsif.

A second appeal has been taken to this Court by the defendant and three points have been raised before us by the learned advocate for the appellant. It is argued in the first place that the covenant in the kabuliat that the defendant would pay "Rajaswa" would not include the excess cess claimed i. e., the cess in excess of the legal rate. It is contended in the second place that the excess cess claimed does not fall within the definition of rent as given in the Bengal Tenancy Act for under S. 3, Cl. 5 of the Act

rent includes also money recoverable under any enactment for the time being in force as if it was rent

and as the excess cess was recoverable not under the Cess Act but under the covenant in the kabuliat the excess cess could not be regarded as rent within the meaning of the Bengal Tenancy Act and that the suit for excess cess was not a suit to which the provisions of Art. 2, Sch. 3, Cl. (iii) (b), Bengal Tenancy Act, would apply and consequently the claim for 1326 B. S. is barred by limitation. It is contended in the third place that in any view the plaintiff is not entitled to damage at 25 per cent on the excess cess having regard to the provision of S. 68, Cl. 2, Bengal Tenancy Act, which applies only to a suit for rent.

Basing his argument on the ground taken by the appellant that the sum claimed in the suit cannot be regarded as

rent, the learned vakil or the respondent has taken a preliminary objection to the hearing of this appeal. He contends that according to the appellant's argument the present suit would be a suit not for rent but for money and as the suit is valued at less than Rs. 500 there would be no second appeal to this Court by reason of S. 102, Civil P. C. The appellant is in the horns of a dilemma for if his argument is accepted that the present suit is not a suit for rent then he has no right of second appeal. If on the other hand his argument is not accepted and the suit is regarded as a suit for rent then there is no substance in any of the three grounds taken. The learned advocate for the appellant is prepared to accept the position that this is a suit for money and not for rent; consequently he is met by the preliminary objection which must prevail and the appeal is dismissed with costs.

It is next argued in reply that this petition of appeal should be treated as a petition for revision and this Court should interfere under S. 115, Civil P. C. With reference to the second and third grounds raised on behalf of the appellant it is said that the lower appellate Court has applied the law to a case to which it does not apply and has thus exercised his jurisdiction with material irregularity. Reliance has been placed in this connexion on the decisions of this Court in *Brajabala* v. *Gurudas* (1) and *Mohini Mohan* v. *Ram Das* (2). All that these cases lay down is that in a proper case where there has been an error of jurisdiction the High Court may treat a petition of appeal as a petition for revision and interfere under S. 115 of the Code. But we do not think that S. 115 applies in the present case for in deciding the three points raised by the appellant against him the lower appellate Court has merely arrived at conclusions of law contrary to the contention of the appellant. It has been observed by the Judicial Committee of the Privy Council in the recent case of *Bala Krishna* v. *Vasudeva* (3), that S. 115 applies to jurisdiction alone, the

irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved.

I think, therefore, that this is not a case which calls for our interference under S. 115.

*S. A. No.* 42 *of* 1926.

With regard to this appeal which arises out of a suit between the same parties as in appeal No. 1805 of 1925 which I have just dealt with, it has been frankly admitted by the learned advocate for the appellant that the case is governed by a previous decision of the High Court dated 1st June 1922 which has been marked as Ex. 3 in the suit and that that decision is against him.

I think that the decision of this Court referred to concludes this second appeal which must be dismissed with costs.

**Rankin, C. J.**—I agree.

N.D. *Appeals dismissed.*

(1) [1906] 33 Cal. 487=3 C. L. J. 293.
(2) A. I. R 1924 Cal. 487.
(3) A. I. R. 1917 P. C. 71=40 Mad. 793=44 I. A. 261.

---

## A. I. R. 1927 Calcutta 966

MUKERJI AND MALLIK, JJ.

*Basiruddin Sarkar* — Plaintiff—Appellant.

v.

*Sahebulla Pramanik* and *others*—Defendants—Respondents.

Appeal No. 378 of 1925, Decided on 2nd August 1927, from the appellate decree of the Sub-Judge, Bogra, D/- 22nd December 1924.

*Bengal Tenancy Act, S.* 49—*Suit for ejectment — Plaintiff alleging that defendant is under-ryot must prove that — Evidence Act, S.* 101.

Where the plaintiff, alleging that he is a ryot and the defendant is under-ryot, sues to eject the defendant on service of notice to quit in compliance with the provision of S. 49, Cl. (b), Bengal Tenancy Act, the burden of proving that he is a ryot and the defendant is under-ryot is on him ; 57 *I. C.* 833, *Foll*; *A. I. R.* 1920 *P. C.* 67; *A. I. R.* 1924 *P. C.* 65, *Dist.* [P 967 C 1]

*Atul Chandra Gupta* and *Satis Chandra Singha*—for Appellant.

*Hemendra Chandra Sen* and *Nirmal Kumar Sen*—for Respondents.

**Judgment**.—The plaintiff who had been unsuccessful in an action in ejectment in both the Courts below has preferred this second appeal. The plaintiff's case was that he was a ryot and the defendants are under-ryots, and he sued to eject the defendants on service of notices to quit in compliance with the provision of S. 49, Cl. (b), Bengal Tenancy Act.

Two questions have been raised on behalf of the appellant, of which the first relates to the onus of proof. The Subordinate Judge has held that it was for the plaintiff to prove that the defendants were under-ryots and that the plaintiff has failed to discharge this burden. It is said that it was for the defendants to prove that their status was higher than what the plaintiff alleged.

In support of the contention aforesaid reliance has been placed upon the principles underlying the decisions of the Judicial Committee in the cases of *Sethuratnam Iyar* v. *Venkatachala Goundan* (1) and *Nainapillai Marakayar* v. *Ramanathan Chettiar* (2) and the line of cases in which it has been held that where a defendant alleges that he has a permanent right to remain on the plaintiff's land it is for him to prove it, the case of *Nubo Coomar Ghose* v. *Oozir Shikdar* (3) and also the decision of this Court in the case of *Paran Chandra Karmokar* v. *Khazez Mandal* (4) which is directly in point and in appellant's favour.

The respondents, on the other hand, have relied upon the decision of this Court in the case of *Abbey Charan Dutta* v. *Futtari Dasi* (5) which is in their favour, and have urged that the decisions on which the appellant has relied are distinguishable.

In my opinion the question may be looked at from several points of view and the result that follows is exactly the same.

Apart from authorities and from any other considerations the elementary rule contained in S. 101, Evidence Act, is a rule that is inflexible and must apply to all cases. The plaintiff came to Court with the case that he is a ryot and the defendants are under-ryots and he asked for ejectment of the latter on the ground of his legal right as accruing on the footing of the respective status aforesaid and on the service of the notices. He asserted those facts and desired the Court to give judgment in his favour on the basis of those facts. He must, therefore, prove them.

Then again in an action in ejectment one of the things that the plaintiff must prove is his title to immediate possession. This is a proposition as old as the hills. In a case where the defendant's tenancy is admitted—an admission that involves the admission of the defendant's right to be in possession—the plaintiff must necessarily establish as to how he is entitled to possession; in other words how the tenancy has come to an end. He has in this particular case asserted a particular set of facts to exist which entitles him to immediate possession. Must he not prove these facts?

Section 102, Evidence Act, makes it clear that the initial onus is always on the plaintiff. If he discharges that onus and makes out a case which entitles him to relief the onus shifts on to the defendant to prove these circumstances, if any, which would disentitle the plaintiff to the same. It may be said that it is not always easy to determine at what particular point it shifts from the plaintiff to the defendant and then again from the defendant to the plaintiff, and then once again from the latter to the former and so on; the more so in contested proceedings as evidence gradually continues to be adduced, but at the conclusion of the trial when the issues come to be judged, it has to be seen whether the initial onus which S. 101 casts upon the plaintiff has been discharged or not.

Taking S. 109, Evidence Act, next, the tenancy being admitted, the burden of proving that the parties no longer stand in the relationship of landlord and tenant—a position which must be found before a decree in ejectment can be passed—is on the plaintiff. He undertook to prove it in this case in a particular way, namely, by proving the respective status as alleged by him and also by proving the service of the notice. If he fails to prove the same, S. 101, Evidence Act, will stand in the way of his obtaining any relief from the Court.

In my opinion, the decisions of the Judicial Committee do not indicate that their Lordships ever intended to depart from these elementary rules. In both the cases the plaintiffs' title to the lands was conceded, and notices by which the defendants' tenancies were terminated were not disputed. In neither case had any grant been alleged, asserted or admitted on behalf of the plaintiffs, but inasmuch as the defendants had been in

(1) A. I. R. 1920 P. C. 67=43 Mad. 567=47 I. A. 76 (P. C.).
(2) A. I. R. 1924 P. C. 65=47 Mad. 337=51 I. A. 83 (P. C.).
(3) 23 W. R. 238.
(4) [1917] 42 I. C. 262.
(5) [1920] 57 I. C. 833.

occupation on payment of rent, a tenancy from year to year terminable on notice was all that was conceded. In both the cases the actions were resisted on behalf of the defendants on the ground of a permanent tenancy or occupancy right. As their Lordships have pointed out in the later of these cases:

A permanent right of occupancy in land in India is a right, subject to certain conditions, of a tenant to hold the land permanently which he occupies. It is a heritable right, and in some places it possibly may be transferable by the tenant to a stranger. That permanent right of occupancy can only be gathered by a tenancy by custom or by a grant from an owner of the land who happens to have power to grant such a right or under an Act of the Legislature.

All the facts which the plaintiffs in those cases asserted as entitling them to a decree in ejectment had been established by them; indeed most, if not all, of them were admitted on behalf of the defence and the initial onus that lay on the plaintiffs had thus been discharged. From these facts they asked the Court to infer that the defendants had nothing more than the right of a yearly tenant and as the said tenancy had terminated by notice to quit they were entitled to the decree they asked for. It was then for the defendants to prove those facts on which they relied as establishing a permanent or occupancy right in their favour as a shield against eviction. In the present case an under-ryoti interest in defendants' favour is admitted on behalf of the plaintiff. In other words, the plaintiff asserted that what was parted within the defendants' favour was the interest which created an under-ryoti in favour of the latter, and what was left in him as a ryot would entitle him to a decree for possession. These facts he must prove. In my opinion the onus has been rightly placed on him.

In this view it is unnecessary to deal with the appellant's second contention which relates to the view that the Subordinate Judge has taken of the applicability of S. 182, Bengal Tenancy Act, to the present case.

The appeal fails and is dismissed with costs. The cross-objections have not been pressed and are also dismissed, but without costs.

N.D. *Appeal dismissed.*

---

## A. I. R. 1927 Calcutta 968

B. B. Ghose AND ROY, JJ.

*Radha Binode Mandal*—Claimant No. 3—Appellant.

v.

*Surendra Nath Ghosal* and *others*—Respondents.

Appeal No. 228 of 1925, Decided on 21st June 1927, from the original decree of the President, Calcutta Improvement Tribunal, D/- 15th September 1925.

*Land Acquisition Act, S. 21—Landlord is entitled to compensation given for the land acquired according to terms of the lease.*

Where under a contract in a maurasi mokarari lease, the lessor was to get half of the compensation as malgani right, if the land was acquired for the purpose of the Government and the land was subsequently acquired for the public purpose, viz., for the construction of a sewer road in a municipal area,

*Held*: that the land must be held to have been acquired for the purpose of the Government and the lessor was, therefore, entitled to half of the compensation under the special provisions contained in the lease: *A. I. R. 1921 Cal. 406, Dist.* [P 970 C 1]

*Atul Chandra Gupta* and *Radhika Ranjan Guha*—for Appellant.

*Sarat Chandra Bose, Hira Lal Ganguly, Nirmal Chandra Das Gupta* and *Saraj Kumar Maiti*—for Respondents.

**B. B. Ghose, J.**—The question for decision in this appeal depends upon the effect to be given to a contract contained in a maurasi mokarari lease, dated 8th April 1889. Two persons, the appellant before us and his brother granted a maurasi mokarari lease in favour of the predecessor-in-interest of the respondent at a rent of Rs. 21 per year. A provision was contained in the lease which may be translated in these words:

In future, if only for the purpose of the Government, the land is acquired, then out of the compensation awarded we shall get 8 annas as the malikani right, and you shall get 8 annas of the compensation in your maurasi right.

The land had been acquired for a public propose by a declaration, dated 16th November 1920. It was for the purpose of constructing what is called the new main sewer road from Chetla to the Ballygunge railway station. The brother of the appellant, Gopi Kristo, sold his eight annas interest of the malikani right to the lessee in the year 1901. The appellant is, therefore, only entitled to the remaining eight annas share of the malikani interest. The total amount of compensation awarded by the Collector was Rs, 46,000 odd.

The Collector apportioned the compensation and, in his view, the appellant was entitled to one-half of the lessor's dues under the agreement in the lease which I have already recited. In accordance with that view, he made an award in favour of the appellant for Rs. 11,565-6-1 The lesses asked for a reference to the Court under S. 18, Land Acquisition Act read with the Calcutta Improvement Act. The matter came for consideration before the learned President of the Calcutta Improvement Tribunal. That learned Judge held that the provisions contained in the lease do not apply to the present acquisition. He held that the land had not been acquired for the purpose of Government and, therefore, the compensation money should be apportioned between the parties as if the clause referred to in the lease had not existed. In that view, he held that the appellant before us was only entitled to 20 years' purchase of the maurasi rent due to his share, or, in other words, Rs. 210 only and the whole of the balance of the compensation for the land was awarded to the lessees. The lessor-claimant appeals against that judgment and order of the President.

The ground on which the learned President bases his judgment was that it has been held by this Court in the case of *Bejoy Kumar Addy* v. *Secretary of State* (1), that a requirement for the Calcutta Corporation was not a requirement for the Government and so a requirement for the Board of Trustees for the improvement of Calcutta cannot be considered as a requirement for Government. With great respect to the learned President, it seems to me to be quite clear that the law was not laid down, as the learned President considers it to have been in the case referred to decided by this Court. There, the Government was the lessor of the land in question and the stipulation in the lease was to this effect:

> If any portion or the whole of this land be required for the Government. we shall give up the same without any compensation.

The land was acquired for a public purpose, namely for the purposes of Corporation of Calcutta under the Land Acquisition Act; and it was held by the Collector that by reason of the stipulation contained in the lease, the lessee was not entitled to anything and this opinion of his was confirmed by the District Judge on reference. What the High Court held was this, that possession was not taken by the Government which was in the position of the lessor in terms of the lease; and when that was not done it could not be said that the lessee had no interest in the land which was incapable of valuation. The position was the same as if in a lease by a landlord it is stipulated that if the land is required for the landlord's own purposes, the tenant would give it up without any compensation. If afterwards the land is acquired for any public purpose, the landlord certainly could not have said that the tenants' interest was of no value and the tenant was not entitled to any compensation. It was distinctly observed in the judgment of Mr. Justice Woodroffe that the land was not taken in that case by enforcing the terms of the lease but it was acquired under the provisions of the Land Acquisition Act. That makes a world of difference. If the Government had enforced the terms of the lease, the condition of ejectment would have been quite different from the conditions under which the land was acquired for a public purpose under the Land Acquisition Act. The argument, therefore, on which the judgment of the learned President is based does not appear to me to be of any substance.

The learned advocate appearing for the respondents admits that he cannot rely upon the case of *Bejoy Kumar Addy* v. *Secretary of State for India* (1) in support of the judgment of the learned President. He contends that the stipulation contained in that part of the lease should be strictly construed as derogating from the ordinary rights of a grantee under a maurasi mukarari title. His contention is that under the ordinary law the landlord is only entitled to the capitalised value of his own interest in the land after the grant of the permanent lease. The stipulation expressly provides that if the land is acquired only for the purpose of Government, then the compensation should be divided half and half; and his contention is that this land had not been acquired for the purpose of Government. It seems to me to be difficult to give effect to his contention. Under the Land Acquisition Act, lands can be acquired either for a company or for a public purpose. The learned advocate

(1) A. I. R. 1921 Cal. 406.

for the appellant concedes that if this land had been acquired for a company, he would not be entitled to rely on the stipulation contained in the lease. But when the land is not acquired for a company but for public purposes, it must be considered to have been acquired for the requirement of the Government. It seems to me that this contention is of considerable weight. The Government of the country is carried on by different bodies and anything which is for a public purpose must be considered to be a purpose for the Government of the country; e. g., Local self-Government.

In my judgment, therefore, the lessor is entitled to rely on the special provisions contained in the lease and under the terms of those provisions, he is entitled to the half share of the lessor's interest reserved under the conditions set forth above, that is to say, he is, entitled to Rs. 11,565-6-1 as awarded by the Collector. The judgment and order of the President of the tribunal is, therefore, varied in the manner as aforesaid and the appellant is entitled to his costs of this appeal as well as the costs of the lower Court.

**Roy, J.**—I agree.

N.K. *Order varied.*

---

## A. I. R. 1927 Calcutta 970

B. B. GHOSE AND ROY, JJ.

*Sm. Dintarini Devi* and *others*—Plaintiffs—Appellants.

v.

*Ambicaprosad Sanyal* and *others*—Defendants—Respondents.

Appeal No. 263 of 1925, D/- 6th July 1927, from appellate decree of the Sub-Judge, Fourth Court, Alipur, 24 Parganahs, D/- 9th September 1925.

*Hindu law—Succession—Dayabhaga School—Daughter's daughter's son is not an heir.*

A daughter's daughter's son cannot be an heir under the Dayabhaga School of Hindu law and cannot as such be a reversionary heir of an agnatic relation of his mother's mother's father. *A. I. R.* 1926 *Cal.* 460, *Foll.* [P 970 C 2]

*Prokas Chandra Majumdar* and *Satindra Nath Choudhuri*—for Appellant.

*Tarakeswar Pal Choudhuri* and *Hemendra Chandra Sen*—for Respondents.

**Judgment.**—A preliminary objection has been taken that the original appellant being dead, the persons who have been substituted in the place of the deceased appellant have no right to carry on the appeal as her heirs. The plaintiff-appellant was a lady named Dintarini Debi. She died during the pendency of the appeal in this Court on 11th February 1926. The persons who got themselves substituted in her place are related to her as her husband's paternal uncle's daughter's daughter's sons. The objection taken on behalf of the respondents is that these persons cannot be the reversionary heirs, under the Hindu law, of the husband of the original appellant and so have no right to carry on the appeal. This matter has been long settled that a daughter's daughter's son cannot be an heir under the Dayabhaga School of Hindu law. If these substituted persons could not be the heirs of their mother's mother's father, surely they cannot be the reversionary heirs of an agnatic relation of their mother's mother's father. The last case to which our attention has been drawn in which this point was decided is that of *Nepaldas Mukherjee* v. *Probhas Chandra Mukherjee* (1). The question being concluded by long established authority of cases which have been cited in that recent judgment, we must hold that the substituted appellants cannot continue the appeal. The appeal therefore, has abated and must be dismissed with costs. As the matter has been disposed of on the preliminary point, we assess the hearing-fee at ten gold mohurs.

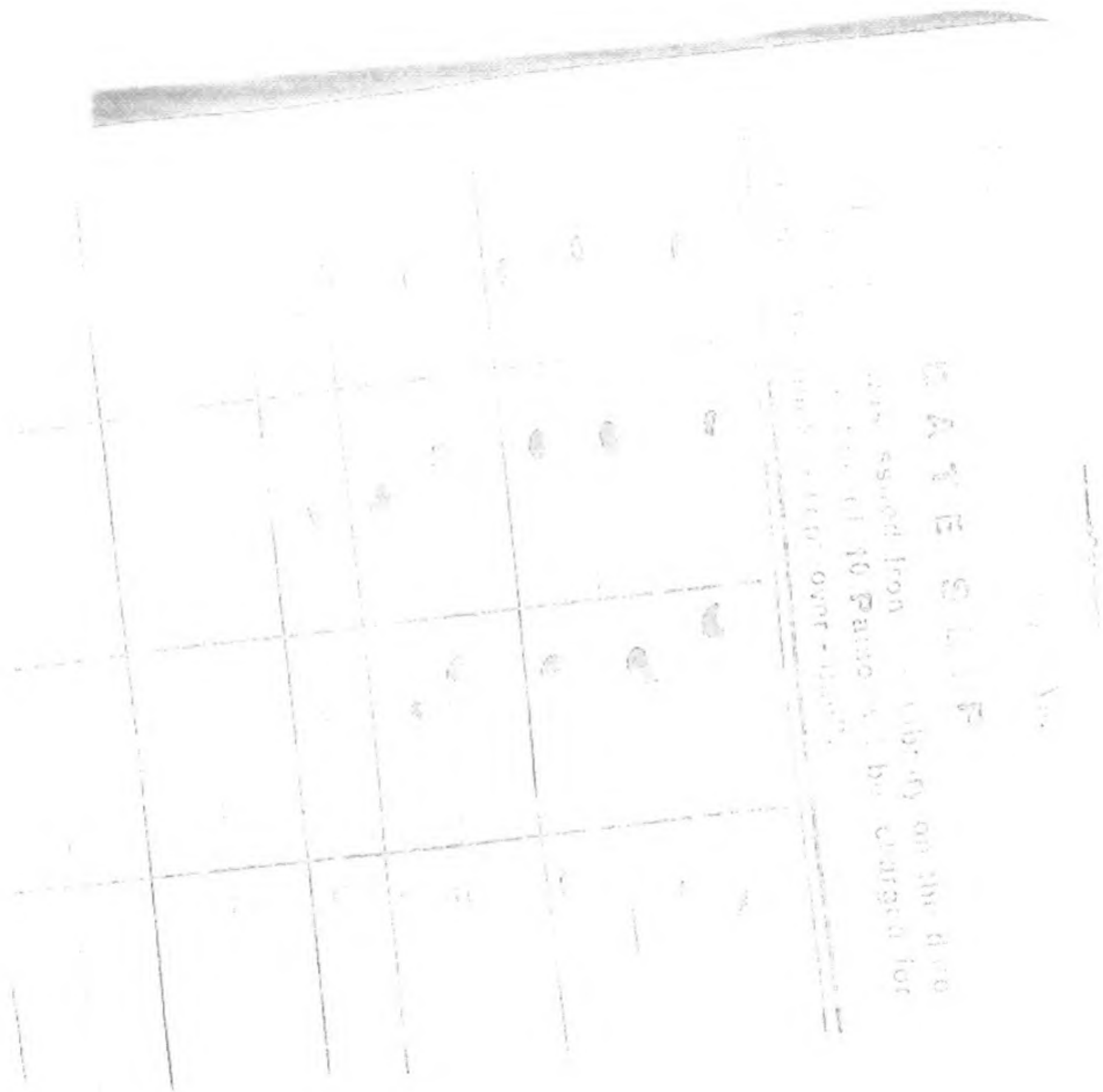
S.J. *Appeal dismissed.*

(1) A. I. R. 1926 Cal. 460.

DEPARTMENT OF LAW
LIBRARY
UNIVERSITY OF KASHMIR
NO 239 DATE 1-3-2021

Call No.

# D A T E  S L I P

This book was issued from the Library on the date last stamped below. A fine of 10 Paise will be charged for each day the book is kept over-due.

| | | | |
|---|---|---|---|
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |